STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant, vs. MADISON METROPOLITAN SCHOOL DISTRICT, Respondent.	Case 254 No. 53135 MP-3075 Decision No. 28832-A

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin, by Mr. Richard Thal, appearing on behalf of Madison Teachers, Inc.
Ms. Anne L. Weiland, Attorney at Law, W182 N9052 Amy Lane, Menomonee Falls, Wisconsin, appearing on behalf of the Madison Metropolitan School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On October 2, 1995, Madison Teachers, Inc., filed the instant complaint alleging that the Madison Metropolitan School District had committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 4, Stats., by refusing to provide information it had requested and which it needs to administer the parties' collective bargaining agreement. Thereafter, the parties attempted to resolve the dispute, but were unsuccessful. The Commission then appointed David E. Shaw, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order in the matter. A hearing was held before the Examiner on October 14, 1996 in Madison, Wisconsin. A stenographic transcript was made of the hearing and was received on October 28, 1996. By November 13, 1996, both parties advised the Examiner that further hearing was not necessary and by January 9, 1997, completed filing of post-hearing briefs. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Madison Teachers, Inc., hereinafter the Complainant, is a labor organization with its offices located at 821 Williamson Street, Madison, Wisconsin. At all times material herein, John A. Matthews has been Complainant's Executive Director, and Edward Sadlowski its Executive Assistant for Labor Relations. At all times material herein, Complainant has been the exclusive collective bargaining representative of all regular full-time and regular part-time certificated teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by Madison Metropolitan School District including psychologists, psychometrists, social workers, school nurses, attendants and visitation workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, guidance counselor, project assistant, principal investigators, researchers, photographer technician, teachers on leave of absence, and teachers under temporary contract, but excluding supervisor - cataloging and processing, on-call substitute teachers, interns and all other employees, principals, supervisors and administrators.

2. Madison Metropolitan School District, hereinafter the Respondent, is a municipal employer having its main offices at 545 West Dayton Street, Madison, Wisconsin. At all times material herein, Timothy Jeffrey has held the position of Director of Human Resources, Susan Hawley held the position of Labor Contract Manager, Shirley Baum and Lee Gruenewald have held the position of Assistant Superintendent, and Cheryl Wilhoyte has held the position of District Administrator for Respondent.

3. Complainant and Respondent were parties to a 1993-1995 Collective Bargaining Agreement which contained, in relevant part, the following provisions:

> IV-Individual Contract
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> . . .
>
> G. PROBATIONARY PERIOD
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> . . .
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> 4. A probationary teacher, who has been identified by his/her administrator as having a performance problem(s), may be denied requests for voluntary transfer during probation. A description of any performance problem will be reduced to writing by the administration and furnished, on a timely basis, to the teacher and the Executive Director of MTI.

H. TEACHER EVALUATION

1. A staff member's effectiveness as a professional employee shall be evaluated by a District administrator.

2. Any written response by the teacher shall be made a part of the original evaluation report and shall remain in the teacher's evaluation file in the Department of Human Resources. Staff members will be requested to sign the evaluation as completed by the administrator and they may retain a copy for their records. The teacher's signature does not indicate approval, but merely that it has been reviewed as set forth above. The administrator and the staff member shall jointly review the evaluation.

3. Evaluation Timetable:

    a. Probationary teachers shall be evaluated each contract year at least twice; on or before November 15 and on or before February 1. During the school year in which an issue of a probationary teacher's continuing employment status is raised by the consideration of the commencement of nonrenewal proceedings pursuant to Section IV-I an additional final evaluation shall be completed between February 20 and February 28.

    b. Nonprobationary Teachers shall be evaluated by May 15 for the year the evaluation is applicable. During a school year in which an issue of an employee's continuing employment status is raised by the commencement of nonrenewal proceedings pursuant to Section IV-J, the evaluation shall be completed no later than the end of the first semester of the then current school year.

    c. The evaluator(s) may file, and the teacher may request, a special evaluation at a time other than the specified times for evaluations.

4. All assessments and evaluations become part of the staff

member's permanent file in the Department of Human Resources.

5. In completing the evaluations referenced above, the evaluator shall make:

   a. An analysis of points of strength and weakness, with specific examples.

   b. Definite suggestions for ways in which improvements may be made, if such be necessary; and

   c. A statement of what has been done by the teacher and the evaluator to strengthen classroom instructions.

6. The criteria which are to be used in measuring a teacher's performance are:

   a. All teacher collective bargaining unit members except those referenced in Section IV-H-6-b & c: professional knowledge, professional interest, assignments to pupils, instructional preparation, rapport with and control of pupils, techniques of teaching.

   b. Social Workers, Nurses, Guidance Counselors, Occupational Therapists, Program Support Teachers, and Physical Therapists, Psychologists: professional knowledge/development; assessment/evaluation effectiveness; intervention/consultation effectiveness; organization and management; and communication skills.

   c. Speech and Language Clinicians: professional knowledge and development; assessment and evaluation effectiveness; consultation effectiveness; scheduling/time management; effectiveness of program therapy; and communication skills.

   d. Library Media Personnel: Professional Knowledge/Growth/Interest; Assistance to; Rapport

with, and Control of Students; Assistance to and Rapport with Staff; Techniques/Strategies for Teaching; Library Media Materials Collection, Development and Management; Library Media Technology Development and Management; Library Media Staff Management; Educational Assistants, Volunteers and Student Assistants; and Effective Management of Total Library Media Program. In schools with Department Chairpersons, only the Department Chair shall be evaluated on Effective Management of the Total Library Media Program.

e. Braillist, Hearing Impaired Interpreter, Therapy Assistant: Job Competence; Motivation; Reliability; and Interpersonal Skills.

7. If any changes are to be made to the evaluation form(s), such shall be provided on a timely basis, to the Executive Director of MTI.

8. Should there be an evaluation of teachers holding temporary contract, the time designation in Section IV-H-3 does not apply.

. . .

J. NONRENEWAL OF PROBATIONARY TEACHER

1. No teacher holding a regular annual contract may be nonrenewed except for just cause.

2. It is the duty of the District to counsel teachers concerning the proper performance of the assigned duties of the teacher.

3. Prior to the recommendation for nonrenewal of a nonprobationary teacher, and no later than the end of the first semester of the then current school year, the District shall provide said teacher and the Executive Director of Madison Teachers with a written explanation of the specific alleged deficiencies of the teacher. Said explanation shall include an analysis of points of weakness with specific examples,

recommendations for overcoming the alleged deficiencies, specification of the available assistance, and a reasonable period of time for correction.

4. On or before March 1, the Board of Education or its designee shall inform the teacher in writing if the Board of Education is considering nonrenewal of the teacher's contract. The notice shall outline the rationale upon which the consideration is based and indicate that the teacher may have a private conference with the Board of Education if a written request is filed with the Board within five (5) days of receiving the notice of consideration for nonrenewal. A copy of the notice shall be forwarded to the Executive Director of Madison Teachers unless the teacher requests, in writing, that such action not be taken. Should the teacher request that Madison Teachers not be notified, a copy of this request will be sent to the Executive Director of Madison Teachers by an agent of the Board of Education.

. . .

L. SUSPENSION WITH PAY

1. The Superintendent of Schools may suspend a teacher with pay, if and when, in the judgment of the Superintendent, a grave condition or situation warrants such emergency action. Notice of the suspension and the alleged reasons therefore, shall be delivered in writing by the District to the teacher at the time of the suspension. A copy shall be sent, by the District, to the Executive Director of MTI immediately thereafter.

. . .

M. SUSPENSION WITHOUT PAY

1. The Superintendent may suspend a staff member for up to five (5) days without pay for just cause. The Superintendent shall forward by certified mail to the suspended staff member a notice setting forth the reasons for the suspension. A copy of these charges shall be sent to the Executive Director of Madison Teachers, unless the teacher requests in writing that

such action not be taken. Should the teacher choose not to notify Madison Teachers, a copy of his/her request will be sent to the Executive Director of Madison Teachers by the Superintendent.

. . .

N. DISMISSAL OF TEACHER DURING CONTRACT YEAR

1. No teacher holding a regular annual contract may be dismissed, except for just cause.

2. If a teacher is recommended, by his/her principal and/or supervisor, for discharge or dismissal prior to the end of the contract year, the teacher shall immediately be notified, in writing, of this action. A copy of the notice shall be forwarded to the Executive Director of Madison Teachers, unless the teacher requests, in writing, that such action not be taken. Should the teacher request that Madison Teachers not be notified, a copy of this request will be sent, on a timely basis, to the Executive Director of Madison Teachers by an agent of the Board of Education.

. . .

V. PERSONNEL FILES

1. Teachers shall have the right to see all information in their personnel folder relating to their performance during employment in the Madison Metropolitan School District upon appropriate request.

    a. Pre-employment recommendations, credentials, practice teaching or intern evaluations and medical reports are confidential and not subject to review by the teacher or his/her representative.

    b. No official reports or derogatory statements about a teacher's conduct, service, character or personality shall be filed by an administrator or supervisor unless the teacher is sent a copy at the same time. The teacher shall have the right to submit a response to

the report or statement. The response shall be attached and filed with the report or statement in the teacher's official personnel file.

2. An individual or group representing a teacher shall be accorded the same opportunity to review all information in the teacher's file relating to the teacher's performance during employment in the Madison Metropolitan School District if the teacher consents in writing to the review.

. . .

In addition, the parties' 1993-1995 Agreement also contained Addendum F, which provides for a mentoring program.

4. In October of 1993, a "Supervision Committee" consisting of a number of Respondent's administrators issued a report entitled "A Framework For Supervising Staff and Curriculum and Instruction", which in part dealt with methods and procedures for the supervision and monitoring of instructional staff by principals and administrators. As a result, the following form was developed:

PROBATIONARY AND EXPERIENCED EMPLOYEES
WHO NEED TO IMPROVE PERFORMANCE

* Please identify employees with a need to improve performance who you are coaching.

P/E	Employee	Desired Results (Performance Deficiencies)	Coaching/Support Strategies	Results

_____ _____
Name of Administrator Completing Form Date

Beginning in the 1993-1994 school year, Respondent's principals have been required to complete said form as to instructional staff. The "Results" column on the form is completed by the principal at the end of a school year.

5. Respondent's administrators are supervised and evaluated on the basis of two components - their general skills in the areas of planning, leadership, supervising, etc., and whether they have met specific performance agreements known as "Management Performance Agreements" (MPA's) which are developed on an individual basis. The form in question is utilized for the purposes of developing the specific MPA for an individual administrator, to determine the extent of the administrator's supervisory workload and the type and amount of support needed. Once the form is completed, it is used to determine the extent to which the individual administrator has met the goals in his/her MPA as part of that administrator's annual review. The completed form is then attached to the administrator's MPA and is retained only by the administrator's supervisor. Said form is not used as an evaluation of the individual employes identified on the form, is not provided to Respondent's Department of Human Resources, is not utilized in the non-renewal or discipline of bargaining unit employes, and is not placed in the personnel file of an employe who is listed on the form, but is instead used as a part of the evaluation of an administrator's performance as to the supervision of his/her subordinates.

6. Complainant's Executive Assistant for Labor Relations, Edward Sadlowski, sent the following letter of July 28, 1995 to Hawley:

> Re: Teacher Evaluation
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> Dear Susan:
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> We write to request that, (sic) pursuant to Section 111.70 of Wisconsin Statutes, all copies of the document entitled "Probationary and Experience Employees Who Need to Improve Performance", which have been completed by District Administrators at the conclusion of the 1994-95 school year. Please forward all copies of the above-requested documents, to my attention, so we may investigate a possible grievance related to Section IV-H of MTI's Teachers Collective Bargaining Agreement.
>
> We await your response.
>
> Sincerely,

Edward A. Sadlowski /s/
Executive Asst. for Labor Relations

Respondent did not respond to Sadlowski's request and he renewed that request by letter of August 16, 1995. Hawley responded to that request by the following letter of September 6, 1995:

RE: Teacher Evaluation

Dear Ed:

As I indicated to you in our telephone conversation, I do not believe that you have a right to copies of the documents requested without a specific written authorization to release the information from each employee referenced.

Furthermore, even if such written authorization was provided, these documents are provided as part of an administrator's Management Performance Agreement between the administrator and his/her supervisor and as such are confidential records relating to each administrator.

Finally, there is no grievance pending and no issue has been raised for which MTI would need this information.

Very truly yours,

Susan Hawley /s/
Susan Hawley
Labor Contract Manager

7. Complainant has also requested the names of the employes identified on said form in order to seek their authorization to review those forms pertaining to them and Respondent has also denied that request. To the date of hearing in this matter, the Respondent has refused to provide the completed "Probationary and Experienced Employees Who Need to Improve Performance" forms Complainant has requested. Said forms do not contain information that is relevant and reasonably necessary to Complainant's policing the administration of its collective bargaining agreement with Respondent covering the employes involved. The blank form is sufficient to permit Complainant to determine whether use of the form would constitute a violation of the evaluation procedures and personnel files provisions in the parties' Agreement, and pursuant to Article IV, Sections G, H, J, L, M and N, and Article VI-V of said Agreement, Complainant has access to information regarding teacher performance and problems that could result in nonrenewal or discipline.

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

CONCLUSION OF LAW

The Respondent Madison Metropolitan School District, its officers and agents, by refusing to provide Complainant Madison Teachers, Inc., with completed "Probationary and Experienced Employees Who Need To Improve Performance" forms or the names of employes who are identified on said forms, have not refused to bargain in good faith in violation of Secs. 111.70(3)(a)1 and 4, Stats.

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

ORDER 1/

The complaint filed in this case is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 23rd of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

(Footnote 1/ appears on the next page.)

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).

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant has alleged in its complaint that Respondent has committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats. by refusing to provide Complainant with the completed "Probationary and Experienced Employees Who Need to Improve Performance" forms. The Respondent denies that it has committed any prohibited practice in that regard and asserts that the information sought is neither relevant nor reasonably necessary to Complainant's administration of the parties' Agreement, or collective bargaining, and that said forms contain confidential information, the disclosure of which would violate bona fide privacy interests of employes both within and outside the bargaining unit Complainant represents. Respondent further asserts that Sec. 103.13, Stats., exempts such information from disclosure, and that Complainant has contractually waived the right to obtain said information.

POSITIONS OF THE PARTIES

Complainant

Complainant takes the position that the District breached its duty to furnish Complainant with information that was properly requested and relevant and thereby committed prohibited practices. It is well-established that the statutory duty to bargain in good faith requires a municipal employer to furnish information which is relevant and reasonably necessary to facilitate a union's administration of a collective bargaining agreement. Citing, Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88), aff'd, Dec. No. 24729-B (WERC, 9/88). The examiner in that case explained that the duty to provide information applies to information that is relevant to a union's policing of an existing agreement, and need not relate to a pending dispute with the employer. In determining whether information is relevant to contract administration, the Commission applies a "discovery type" standard, rather than a "trial type" standard. Citing, Milwaukee Board of School Directors, Dec. No. 27807-A (Crowley, 1/94), aff'd by operation of law, Dec. No. 21807-B (WERC, 2/94). Under a similar standard, the National Labor Relations Board (NLRB) held that potential or probable relevance is sufficient to give rise to an employer's obligation to provide the information. Citing, Shopper's Food Warehouse, 315 NLRB 35, 147 LRRM 1179, 1181 (1994). This allows unions to gather a broad range of potentially useful information. Citing, Union Builders, Inc. v. NLRB, 68 F3d 520, 523 (1st Cir., 1995). In that case, the court cited the following from NLRB v. Acme Industrial Company, 385 U.S. 432, 438 (1967):

> "Requiring employers to divulge information of even merely potential relevance improves the efficiency of the arbitration system as a whole, since otherwise, unions might be 'forced' to take grievances all the way through to arbitration without the opportunity

to evaluate the merits of the claim."

Complainant asserts that the information requested in this case is necessary for it to administer contractual provisions concerning teacher evaluations and potential employe disciplinary matters. Section IV-H of the Agreement governs teacher evaluations. Section IV-H(2) provides that the Respondent must allow teachers to review evaluations and that teachers may submit written responses that should be made part of the original evaluation report and shall remain in the teacher's evaluation file in the Respondent's Department of Human Resources. Section IV-H(4) provides that: "All assessments and evaluations become part of the staff member's permanent file in the Department of Human Resources." Sections IV-H(5) and (6) set forth the guidelines and criteria to be used in completing evaluations and measuring teacher performance, including analyzing strengths and weaknesses of teachers using specific examples, specifically suggesting ways to improve, and if such improvements are necessary, a statement of what has been done by the teacher and evaluator to strengthen classroom instruction must be included. When Complainant made its initial request for copies of the form, it stated it needed the copies of the completed forms so that it could investigate a possible grievance related to Section IV-H. Even if Respondent did not believe there was a basis for such a grievance, it is obligated to provide the requested information. As the court reasoned in ACME Industrial, supra, a union must be given the opportunity to make its own evaluation of the merits of a potential grievance. Section VI-V(1) of the Agreement provides that teachers have the right to see all information in their personnel file relating to their performance and states that no official reports or derogatory statements regarding a teacher's conduct or service shall be filed unless a teacher is sent a copy at the same time. Subsection (2) of that provision permits Complainant access to teacher evaluations, and with an employe's written consent, Complainant may "review all information in the teacher's file relating to the teacher's performance during employment. . ." with Respondent. Depending on what is included on the forms, Respondent could be violating those contractual provisions, however, Complainant cannot evaluate the merits of such a potential grievance until it is provided with the requested information.

Under Sections IV-J and L of the Agreement, teachers have just cause protection for nonrenewal, suspension or termination and Respondent must apply progressive discipline. Complainant asserts that it may reasonably seek information so that it can be informed of any alleged need for correction of a teacher's performance in order to participate in efforts to correct those deficiencies. Complainant frequently helps teachers overcome such problems or deficiencies, e.g., through the mentor assistance program set forth in Addendum F to the Agreement. Complainant needs the information on teacher deficiencies in order to administer that mentoring agreement. Respondent's witnesses acknowledged that the requested information concerns performance deficiencies that could result in nonrenewal or disciplinary action being taken against a teacher; information that is therefore relevant to the administration of the just cause and mentoring provisions.

Complainant asserts that when an employer raises a confidentiality defense to a union's information request, the employer has the burden of demonstrating that the relevant information is

non-disclosable. Milwaukee Board of School Directors, Dec. No. 24729-A, at page 11; Resorts International v. NLRB, 996 F2d. 1553, 143 LRRM 2697 (3rd Cir., 1993). To meet its burden, an employer must first show that it has legitimate and substantial confidentiality concerns about the requested information. If that burden is satisfied, the employer must then show that its confidentiality concern outweighs the union's need for the requested information. Here, Respondent cannot show that it has a legitimate and substantial confidentiality claim, but even if it could do so, Respondent has failed to demonstrate that its confidentiality claim outweighs Complainant's need for the information. Respondent cannot rely on teachers' privacy interests to justify non-disclosure of the requested information. Citing, City of Janesville, Dec. No. 22943-A (Gallagher, 3/86). While bargaining unit members themselves may assert their privacy interests by requesting that their evaluations not be disclosed to the union, the point is moot in this case as Respondent does not inform employes that they have been identified as employes needing to improve performance. Moreover, Respondent indicated it would still not disclose the information even if Complainant obtained the employe's authorization. While the Respondent may raise the privacy interests of the principals and their supervisors, doing so does not automatically make those interests substantial. Respondent apparently is asserting that the claim is substantial because the deficiencies identified in the information relate primarily to the supervision and evaluation of administrators. In that regard, Baum testified that if teachers were informed that their name was on the list, principals might be reluctant to identify teacher deficiencies and that it was her opinion that the coaching strategy may be most effective when the teacher is unaware that he/she is being coached, and that she believes that the strategies should be confidential because the approach avoids the "negative context" that is associated with formal evaluations. However, the Respondent's own "Framework For Supervising Staff" indicates it is not appropriate for a principal to develop training or coaching strategies without involving the subject teacher, stating: "Development programs are established through formal needs assessments which involve the staff." It being Respondent's policy that teachers and their representatives should be formally involved in the process of helping those teachers with identified deficiencies, Respondent cannot reasonably claim that it has a substantial interest in keeping such informal evaluations confidential.

Complainant also asserts that an employer claiming that portions of requested information are confidential must raise those concerns with the union and bargain to resolve them. Silver Brothers, 312 NLRB 156, 146 LRRM 1010 (1993). If it is possible for the employer to alleviate those concerns, the employer must explain the reason the information must be kept confidential and possible methods of alleviating those concerns with the union. Providence Hospital, 320 NLRB 60 at page 6 (1996). In this case, the Respondent refused to provide the information and never suggested ways of alleviating its concerns to Complainant. While Respondent has a right to supervise and evaluate its principals, Complainant has not requested documents concerning the supervision and evaluation of administrators and the information on the form does not relate to the legitimate and substantial privacy interests of the principals. While the Respondent claims that the information is mixed with comments or notations that should not be disclosed, if that is so, Respondent should raise those concerns and request bargaining to alleviate them, but it has not done so.

Even if the Respondent is able to establish that its confidentiality claim is legitimate and substantial, it must further prevail in a balancing test in which its claims are compared to the reasons the Complainant needs the information that has been requested. Complainant should prevail in such a balancing test because helping teachers overcome performance deficiencies is at the heart of its duty to represent teachers. Further, Complainant, and the teachers it represents, needs the information in order to evaluate the merits of a potential grievance regarding the Respondent's right to supplement contractual teacher evaluation provisions with the non-contractual evaluations included on the form. While Respondent claims the information requested is non-disclosable because it is confidential information concerning the supervision and evaluation of management personnel, its policy decision in that regard is not sufficient to shield the information from disclosure. Holiday Inn On The Bay, 317 NLRB 479 (1995). Respondent's confidentiality claim is not based on a claim that the requested forms include any private information about the conduct of non-bargaining unit staff; rather, the information concerns the performance deficiencies of bargaining unit members. Therefore, Complainant's need for that information clearly outweighs the Respondent's claim that the information is confidential.

In its reply brief, Complainant asserts that Respondent's claim that the information is confidential because its sole use by Respondent is to evaluate principals, is not persuasive since the employer's intended use does not determine whether the information is relevant to contract administration. Information is relevant and must be provided if it helps a union represent bargaining unit members. Complainant has met its burden of proving that the information requested is relevant to its representation of bargaining unit members, and has clearly established a sufficient relationship between the information requested and the need to police the contractual teacher evaluation provisions, demonstrating the relevance and necessity of the requested information. Further, all documentation of teacher deficiencies is relevant to Complainant's duty to represent employes even if Respondent insists the information will not be used in any disciplinary actions. Both Baum and Gruenewald testified that the information on the form could appear on other forms if the deficiencies were such that the principal was considering nonrenewal of the teacher. Complainant needs all information that might help a teacher to avoid being disciplined and needs it as soon as it is available. Respondent's argument that under contractual and statutory provisions Complainant can receive teacher evaluations only with the consent of the teacher is illogical, as the need to seek the employe's consent does not affect the relevance of the requested information. It merely means that once Respondent provides Complainant with the identity of the teachers, Complainant would need to seek authorization from those individuals to review these forms. It cannot be expected to obtain such authorization until it learns who those teachers are. Moreover, Respondent has indicated that it would still refuse to release the requested information even if Complainant obtained the employe's authorization because it regards the information as confidential.

Complainant also asserts that Respondent's reliance on Detroit Edison v. NLRB 2/ and LaCrosse School District 3/ is misplaced. The instant case does not involve employment aptitude tests and Respondent's confidentiality defense is not based on any need for test secrecy. Instead, the Respondent claims the information should be confidential because of the privacy interests of the teachers identified and the privacy interests of the principals who prefer the teachers not be informed that administrators have identified them as having deficiencies. While Respondent's obligation to disclose the information can be conditioned upon teacher consent, it has no legitimate basis for raising potential confidentiality claims of teachers. Respondent's argument that disclosure of the information could adversely affect the principal's ability to help a teacher improve performance does not establish a substantial and legitimate confidentiality interest and is contrary to Respondent's own policies and the contractual teacher evaluation provisions in the parties' Agreement. Further, testimony indicated that the deficiencies listed ranged from a need for computer training to a teacher's perceived need to lose weight. Given the nature of the information on the forms requested, there is no factual basis for Respondent's claim that it has a substantial confidentiality concern supporting non-disclosure.

Respondent also cannot lump the privacy rights of individual teachers together with the confidentiality concerns of administrators. Under the decision in City of Janesville, supra, an employer may not assert the privacy interests of its employes. Respondent's argument that it also has confidentiality concerns regarding the release of information that directly reflected upon the level of competence of principals and other administrators and that related to its business needs, misses the point. Complainant did not request information that directly evaluates principals or administrators, nor did it request any business information based on the data on the forms. Respondent's use of the requested information for the purpose of evaluating principals also does not free it from its obligation to provide the requested information. Regardless of its intended use by Respondent, Complainant needs the requested information in order to represent the teachers identified on the form and to evaluate a potential grievance regarding the contractual evaluation provisions.

Lastly, Complainant disputes Respondent's claim that Complainant waived its right to disclosure of the requested information. Waiver of a known right must be an intentional or voluntary relinquishment of that right. Citing, Black's Law Dictionary, at page 1417 (5th Edition, 1979). Complainant never bargained with Respondent regarding disclosure of the information and never intentionally or voluntarily relinquished its right to receive that information. To the contrary, as soon as it learned of the existence of the forms, Complainant requested the information concerning the teachers identified as needing to improve their performance. Complainant could not have waived its right to receive the information when it negotiated the contractual provisions Respondent cites, since it had no knowledge of the existence of the forms at that time. Further,

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2/ 440 U.S. 301, 100 LRRM 2728 (1979).

3/ Dec. No. 26541-A (Crowley, 3/91).

disclosure of the requested information is easily harmonized with the contractual provisions which permit the release of teacher evaluations or other personnel records only with teacher authorization. Complainant has indicated that it will seek the consent of the teachers identified before seeking the requested information from Respondent.

Respondent

Respondent takes the position that Complainant has not met its burden of establishing the relevance and necessity of the information it seeks in this matter. That information is clearly not related to wages or fringe benefits and, therefore, Complainant has the burden of demonstrating that the information sought is relevant and necessary to its representation duties.

Complainant referenced the following three provisions of the parties' Agreement in support of its assertion that the Respondent is legally obligated to provide the requested information: Article IV-H (evaluations); Article VI-V (personnel files); and Addendum F (mentoring program). Respondent asserts that the information sought in this case is not used in the teacher evaluation process, is not placed in a teacher's personnel file, and has no bearing on the administration or application of those contract provisions. Complainant's Executive Director acknowledged he had not seen the form in question used or referenced in any of the past disputes involving teacher evaluation, discipline, nonrenewal or personnel files. Respondent's witnesses all confirmed that the form is used solely for administrator evaluation, and that it is not distributed and is only attached to the building principal's MPA, which is contained in the supervisor's files. There is no evidence that the document is considered an "evaluation form" within the meaning of Article IV-H and no evidence of any grievance claiming that use of the form violated that provision. Instead, the evidence demonstrates that the forms and contractual process used for teacher evaluations have been well-established, and that the use of inappropriate documentation in that process has been, and is, the subject of litigation between the parties. Since the disputed form is not used in the contractual evaluation process, and is not placed in the teacher's personnel file, it cannot logically be considered relevant or necessary to the administration of those provisions. While its Executive Director suggested that Complainant needed the names of the teachers identified on the form to carry out its responsibility to assist teachers in overcoming deficiencies, he later acknowledged that Complainant has no contractual responsibility, nor does it want such responsibility, to identify teachers with problems. That acknowledgement clearly undercuts the argument that the information sought is relevant or necessary for contract administration or collective bargaining. Since the evidence demonstrates that the purpose, intent and use of the information on the form is confined to administrator evaluation, Complainant has failed to meet its burden of demonstrating the relevance and necessity of the information sought.

Next, Respondent asserts that it is well-established that an employer is not required to disclose even relevant and necessary information where it can demonstrate reasonable, good faith confidentiality concerns or privacy interests of employes. In Detroit Edison Company v. NLRB, supra, the Supreme Court used a balancing test to determine whether the interest in protecting confidentiality of employe records outweighed the necessity for the information and any impairment upon the union in processing grievances without the information, and determined that the confidentiality interests of the employer and individual employes in that case outweighed the union's interest. Similarly, in LaCrosse School District, supra, the Commission determined that the legitimate interests of employe privacy outweighed the interests of the bargaining representative, where the latter sought the test questions and the individual test scores used to select the person to

be promoted to a position within the bargaining unit. The same strong privacy and confidentiality interests apply in this case. First, the information on the form is used to evaluate the administrator completing the form and directly reflects on the level of competence of that administrator as to the supervision of employes. The main purpose of the form is to collect data in support of an evaluative assessment of the administrator. Principals not only have a strong interest in protecting the confidentiality of their own evaluations, but also in preserving the privacy of the "sensitive information", the disclosure of which could adversely affect their ability to achieve the desired improvements in employe performance. Second, the teachers identified on the form also have legitimate interests in protecting information from disclosure to the Complainant. Appearance of a teacher's name on the form is evidence that he/she needs to improve performance and could easily be misconstrued by that teacher and others and could be devastating to that individual and detrimental to his/her professional reputation. Moreover, some of the information identified on the form is "intensely private", relating to personal problems, mental health concerns, professional relationship concerns, and self-esteem concerns. Respondent has a legitimate right to protect such information from disclosure to others absent the employe's consent. While there is a legitimate business need for the supervisor to be apprised of the nature and extent of the principal's supervisory efforts, there is no need to provide such information to Complainant. Even Complainant's Executive Director agreed that employes have a contractual right to non-disclosure of such information.

Non-disclosure of the information has a minimal impact on Complainant's legitimate representation interests, since the information is not used for any teacher evaluation, non-renewal or disciplinary action, and the parties' Agreement contains provisions for the employe and Complainant, with the employe's consent, to obtain and review all documents used in support of those processes. Further, the grievance and arbitration procedure permits an employe to object to any documentation used, to an evaluation not based upon the criteria contained in Article IV (H)(6) of the Agreement, or to the absence of appropriate documentation. Complainant has been able to assure that contractual requirements have been met in the past without the information it now seeks. As far as the mentoring provision of Addendum F, Complainant has acknowledged that it has no responsibility under that provision to identify teaching deficiencies and in fact has negotiated strict confidentiality of information exchanged between the teacher and his/her mentor. It would be illogical to suggest that the same confidentiality interest between a teacher and his/her supervisor should be trammeled in the interest of assuring the administration of a mentoring program. Respondent concludes that the privacy interests of the administrators whose evaluations are at issue and of the teachers who are identified on the disputed form are far greater than the interests of the Complainant, and that non-disclosure would place little or no burden upon the Complainant as far as its ability to carry out its responsibilities.

Respondent also asserts that Complainant has clearly and unmistakably waived any statutory right to disclosure of the requested information. Complainant has acknowledged that a teacher has a contractual right to non-disclosure of the information it has requested. If Complainant is contending that the contents of the form, by its "evaluative" nature, places that information within

the purview of Article IV-H, including subsection (4) of that provision, then Complainant has clearly negotiated a waiver of any unilateral right to that information, even if it is determined that Respondent is otherwise obligated under MERA to disclose it. The language of the above provision clearly precludes Complainant from obtaining information on a teacher evaluation or in the teacher's personnel file without the consent of that teacher. Subsection (2) of that provision specifically grants the teacher the right to review the contents of the evaluation, while subsection (7) only provides Complainant the right to receive copies of any changes in the form. Complainant has the express right to receive information under Article IV-I(4),(J)(2), (L)(1), and (M)(1) and (2), while under Article VI-V(2), Complainant is expressly not entitled to disclosure of contents of the teacher's personnel file unless the teacher consents in writing. Complainant's Executive Director testified that former contract language requiring that the Complainant receive copies of "anything that was negative" was deleted from the Agreement in bargaining. Therefore, even if it is found that the statute requires disclosure to Complainant, that right was expressly waived by Complainant in the parties' collective bargaining agreement.

In its reply brief, Respondent asserts that a great deal of Complainant's argument is based upon the misleading notion that the information contained in the disputed form is the only source of information regarding teacher performance deficiencies. The record establishes that the contractual evaluation process affords both the employe and the Complainant (with employe consent) information regarding employe strengths and weaknesses. The evaluation form referred to in Article IV-H of the Agreement, rather than the form in dispute, is the appropriate and mutually negotiated vehicle for the exchange of such information. If any action against an employe is intended as a result of performance problems, the contractual evaluation procedure, as well as the just cause and nonrenewal procedures, require disclosure of information regarding those problems to both the employe and Complainant. If the employe and Complainant already have access to information regarding performance problems via those mutually negotiated documents, MERA does not require that Respondent provide the same information from another source. Citing, LaCrosse School District, supra, Respondent asserts that an employer is not required to furnish information in the exact form requested by the union.

Respondent also distinguishes the facts in this case from those in the City of Janesville, supra, cited by Complainant. In that case there was a presumption of disclosure because the information requested directly involved the wages of bargaining unit employes in that it was found the performance evaluations had a direct relationship to the amount of merit pay employes would receive, while the information sought in this case has no bearing whatsoever on the wages, hours and conditions of employment, nor is it used in any bargaining unit member's evaluation or contained in their personnel files. Further, in City of Janesville, the evaluations concerned bargaining unit members, unlike this case where the information sought is contained in the evaluation of non-unit members. Further, the examiner in that case expressly noted that the employer had taken no steps to ensure the confidentiality of the evaluations, while the evidence here establishes that the principals had expressly requested that the information on the form be confidential and that promises were made to the principals in that regard. The only individual who

reviews the forms is the supervising administrator who evaluates the principals. These factual differences make City of Janesville inapplicable.

Respondent also disputes the assertion that it had a duty to bargain the confidentiality concerns involved. Complainant made it clear that the information sought was the very identity of the teachers identified on the form and all of the information respecting those teachers. There is no way to remove the personally identifiable information and accommodate Complainant's request, since that is the very information it seeks. Further, reviewing the names of the teachers automatically identifies the administrator who completed the form, thereby abridging the legitimate and substantial confidentiality interests of the administrator. Thus, to require Respondent to bargain the means to protect its confidentiality concerns would be both futile and illogical.

Respondent also disputes the ability of Complainant to rely upon Holiday Inn On The Bay, supra, to support its position. The NLRB noted in that case that there had been no showing that employes or supervisors expected their disciplinary records to remain confidential, nor that the employer had made a commitment to maintain confidentiality of such records. In contrast, the evidence in this case shows the Respondent made a commitment to maintain the confidentiality of the information on the principal's MPA's. The NLRB also suggested that there would have been a different result in that case had not the information requested been necessary and relevant to a pending grievance. In this case, there is no pending grievance and Complainant has alternative sources of information to assess whether the contract has been violated. Respondent concludes that Complainant has therefore not demonstrated a substantial need for the information requested, and that, more importantly, both the teachers and the principals have a right to maintain the privacy of that information.

DISCUSSION

The law in Wisconsin regarding a municipal employer's duty to provide information upon the request of its employes' exclusive collective bargaining representative is well-settled and has been cogently summarized by Examiner Crowley in his decision in Milwaukee Board of School Directors: 4/

> 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. Whether information is relevant is determined under a "discovery type" standard and not a

4/ Dec. No. 27807-A, supra.

> "trial type standard." 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. 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. 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. 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. 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. (At pp. 10-11) (Citations omitted)

It is first important to note that the evidence establishes that the purpose of the "Probationary and Experience Employees Who Need to Improve Performance" forms is to evaluate the supervisory skills of principals and other administrators, and that it is not utilized to evaluate the employes identified on the form. Complainant asserts, however, that the completed forms are "relevant and reasonably necessary" to its responsibility to police the administration of the parties' Agreement and to its responsibility to help teachers with performance problems. Specifically, Complainant asserts that it needs to be able to review the completed forms in order to determine whether they constitute improper evaluations in violation of the contractual evaluation provisions and to make determinations in situations where the "just cause" standard is to be applied. It is also noted that while Complainant alleges it was contemplating filing a grievance, there is no evidence that a grievance was pending at the time of the request or that one was filed subsequently. Therefore, the request was made in the context of Complainant's general policing of the Agreement.

Regarding the evaluation procedures and the provisions regarding employe personnel files, a review of the form reveals that the blank form itself is sufficient to permit the Complainant to determine whether it could constitute a violation of the contractual evaluation and/or personnel file provisions if it were to be completed with the employes and "deficiencies" identified. It is not necessary to have a completed form with actual employes and deficiencies noted in order to make that determination. With regard to receiving notice of an individual employe's performance deficiencies, the testimony of Respondent's witnesses indicated that Complainant would receive notice of an employe with a serious performance deficiency, such that it could lead to a recommendation for nonrenewal, through the contractual evaluation and nonrenewal procedures. Article IV, Section G, 4, of the parties' Agreement, provides that where a probationary teacher has

been identified as having a performance problem, Complainant's Executive Director will be furnished with a description of such performance problems. Article 4, Section H, sets forth the evaluation procedures and criteria to be followed. Those procedures call for a joint review of the evaluation by the administrator and the employe and require that all assessments and evaluations be placed in the employe's permanent file. It would seem likely that if the employe felt it was necessary, or that it would be helpful, he/she would notify Complainant that he/she had been identified as having a performance problem. Article IV, J, 3 expressly provides that Complainant's Executive Director will be furnished with a written explanation of specific alleged deficiencies of a non-probationary teacher who has been recommended for nonrenewal. It is only in the instances where the teacher is notified that Respondent's Board of Education is considering nonrenewal of his/her contract or notified of charges/reasons leading to the teacher's suspension or dismissal, that the individual employe may request that Complainant not be notified in that regard, in which case, Complainant is to be notified of the employe's request.

As to the relevance of the completed form to those situations involving a just cause determination, the evidence indicates that the form has not been utilized by Respondent in nonrenewal or discipline situations involving employes identified on the form. Given that evidence and Respondent's declarations that the form is not, and will not, be used for such purposes, it is difficult to see how Respondent could even attempt to utilize the forms in those regards. Further, there is no evidence there was an actual situation of that nature pending at the time of Complainant's request and upon which it based its request. Therefore, even the potential relevance of the completed forms in those situations would be purely speculative at this time.

In summary, the evidence demonstrates that the completed forms are not used to evaluate unit employes and that Complainant already has access to the information it seeks in this proceeding for its alleged purposes via the contractual provisions of the parties' Agreement. Therefore, it is concluded that the information Complainant ultimately seeks to have disclosed - the completed forms, is neither relevant, nor reasonably necessary to its duty to represent the employes in this bargaining unit, and that Respondent was not obligated under MERA to disclose that information. 5/ For that reason, the instant complaint has been dismissed.

Dated at Madison, Wisconsin, this 23rd day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

5/ Having reached that conclusion, it is not necessary to determine whether Respondent established good faith confidentiality concerns and no finding has been made in that regard.