

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-B

Appearances:

Cullen, Weston, Pines & Bach, by **Attorney Linda L. Harfst**, 122 West Washington Avenue, Suite 900, Madison, Wisconsin, appearing on behalf of Madison Teachers, Inc.

Attorney Anne L. Weiland, Law Offices, W182 N9052 Amy Lane, Menomonee Falls, appearing on behalf of the Madison Metropolitan School District

**ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND
AFFIRMING EXAMINER'S CONCLUSION OF LAW AND ORDER**

On June 23, 1997, Examiner David E. Shaw issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that Respondent had not committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 and 4, Stats., by refusing to provide Complainant with "Probationary and Experienced Employees Who Need To Improve" forms or the names of those employees identified on said forms. He therefore dismissed the complaint.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed briefs in support of and in opposition to the petition, the last of which was received September 2, 1997.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

No. 28832-B

ORDER

A. Examiner Findings of Fact 1-6 are affirmed.

B. Examiner Finding of Fact 7 is modified to read as follows:

7. Complainant has requested completed "Probationary and Experienced Employees Who Need to Improve Performance" forms. In the alternative, Complainant has requested the names of the individual employees as to whom forms have been completed so that Complainant can seek the employees' authorization to have Complainant review the forms.

The requested forms/names are relevant and reasonably necessary to the Complainant's ability to administer the parties' existing collective bargaining agreement. However, when the relevance and need for the forms/names is confidential to protect its ability to effectively monitor the performance of its supervisors and to protect the supervisors' ability to effectively improve employee performance, Respondent's confidentiality interests predominate.

C. Examiner Conclusion of Law is affirmed.

D. Examiner Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of September, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Madison Metropolitan School District

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND
AFFIRMING EXAMINER'S CONCLUSION OF LAW AND ORDER

THE PLEADINGS

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.

THE EXAMINER'S DECISION

The Examiner concluded that the forms and names requested by Complainant were neither relevant to nor reasonably necessary for Complainant to meet its duty to represent employes. He reasoned:

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 "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 employees. The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees. 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 employees 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 employee 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 employees and "deficiencies" identified. It is not necessary to have a completed form with actual employees and deficiencies noted in order to make that determination. With regard to receiving notice of an individual employee's performance deficiencies, the testimony of Respondent's witnesses indicated that Complainant would receive notice of an employee 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.

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.

POSITIONS OF THE PARTIES

Complainant

Complainant asks that the Examiner be reversed.

Complainant contends the Examiner erred when finding that Complainant already has access to the information in dispute. Complainant asserts this finding is contrary to logic and the record. It argues that the information on the form will inevitably affect the contractual evaluation process. Complainant alleges that it needs the information on the form to be able to assist teachers through a contractual mentoring program or to determine whether a principal is using impermissible criteria when assessing a teacher's performance.

Complainant argues the Examiner erred when finding that the forms are not relevant to Complainant's duty to police the bargaining agreement. Under the liberal discovery standard, the forms are relevant to Complainant's ability to ensure that teachers receive the contractually mandated notice of performance problems; policing the disciplinary process to ensure that the just cause standard is met; and ensuring that the contractually established right to academic and disciplinary freedom is honored.

The Examiner also erred when he considered the absence of an existing grievance when determining the relevancy of the information sought. Complainant asserts that the Commission has long held that information requested need not relate to a particular grievance to be relevant. Indeed, Complainant argues that without the information, it has no way of knowing whether a grievance should be filed which, in turn, demonstrates the relevancy of the information sought. Complainant contends that the Examiner's "circular reasoning not only defies logic, but is perversely circular."

Should the Commission reverse the Examiner's determination that the information is not relevant, the Complainant contends that the Respondent does not have a legitimate and substantial confidentiality claim which need to be balanced against Complainant's need for the information. Complainant asserts that the Respondent cannot raise confidentiality claims on behalf of teachers; that the confidentiality interest of the administrators would not be affected by release of the forms; and that the integrity of the evaluation process does not depend on confidentiality.

Should the Commission determine that the Respondent does have legitimate confidentiality claims, Complainant asserts that its need for the information outweighs the Respondent's need for confidentiality.

In reply to the arguments made on review by Respondent, Complainant asserts that Respondent misunderstands why the disputed information is relevant. Complainant contends that it needs access to the completed forms to determine whether they constitute an

extra-contractual evaluation using impermissible criteria; to ensure that teachers are informed of deficiencies in a timely manner; and so that it can informally recommend mentoring to teachers who have been identified on the forms as having deficiencies.

Complainant also reiterates that it is not seeking information regarding the evaluation of administrators and argues that any such information on the forms can be redacted. It again argues that the Respondent's attempts to raise the confidentiality of teachers with performance deficiencies should be rejected. Should the Commission find this teacher confidentiality interest to be present, then Complainant asserts it should at least receive the names of the teachers for whom forms exist so that it can seek the teacher's permission for release of the information in question.

Given all of the foregoing, the Complainant asks that the Respondent be ordered to provide the forms to Complainant.

Respondent

Respondent urges affirmance of the Examiner.

It contends the Examiner properly concluded that the forms are not relevant and reasonably necessary to Complainant's duty to administer the contract.

Should the Commission conclude that the information is relevant and reasonably necessary, Respondent asserts that it has established legitimate and substantial confidentiality concerns which outweigh the necessity for the information.

DISCUSSION

In MORAINÉ PARK VTAE, DEC. NO. 26859-B (WERC, 8/93), the Commission set forth the following general statement of the law applicable to the duty to supply information:

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 "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 relates 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 employees. The exclusive representative is not entitled to relevant

information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees. The employer is not required to furnish information in the exact form 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. (footnotes omitted)

The parties agree that the foregoing principles govern the resolution of their dispute. They disagree over whether the Examiner properly applied these principles to the facts of the case.

We have modified the Examiner's decision because we find that the completed forms and names in question are relevant and reasonably necessary to the Complainant's ability to fulfill its role as the collective bargaining representative. However, because we find the Respondent has reasonable confidentiality concerns which outweigh the Complainant's need for the completed forms, we have affirmed the Examiner's conclusion that the Respondent was not obligated to provide the forms and names and his dismissal of the complaint.

As to the relevance and reasonable necessity of access to the forms themselves, Complainant correctly notes that the applicable standard for relevancy is a very liberal one. Applying this "discovery" standard to the facts of the case, we find the completed forms are relevant. The forms do contain information regarding deficiencies in teacher performance and it is apparent that deficiencies, if not remedied, can ultimately lead to discipline. In its role as the collective bargaining representative, Complainant obviously has a very real interest in the obligation to protect employees against discipline through enforcement of the various contractual protections it has bargained relating to evaluations and discipline. We further conclude that the information on the forms is reasonably necessary to Complainant's ability to enforce these contractual protections.

In reaching these conclusions, we have considered and rejected the Examiner's view that the information is not relevant and reasonably necessary because Respondent and/or the employee would ultimately receive notice of performance deficiencies pursuant to existing contractual protections and because the completed forms are not used in nonrenewal or discipline of teachers. While both of these Examiner observations are correct, we do not find them sufficient under the lenient "discovery" standard of relevancy which is applicable to this proceeding. In effect, we believe that the Examiner applied a somewhat tougher standard when he reached his conclusions.

While the reasons cited by the Examiner are not sufficient to defeat the relevant and reasonably necessary standard, they certainly are appropriately considered when balancing the degree of Complainant's interest in the information against the confidentiality interests cited by Respondent as part of its defense in this case.

Contrary to Complainant, we find those confidentiality interests to be substantial. The record definitively demonstrates that the forms were created as part of the Respondent's effort to monitor the performance of its supervisory employees and are retained and used by management solely for that purpose. Through the testimony of Baum and Greenwald, the record persuades us

that unless the confidentiality of the information on the forms is maintained (including the names of the employes), Respondent's ability to effectively monitor the performance of its supervisors will be significantly compromised. Secondly, that same testimony persuades us that if the confidentiality of the forms (including the names of the employes) is not maintained, the supervisors' ability to utilize various informal supervisory techniques to improve employe performance will also be negatively affected.

When we balance these confidentiality interests against the relevance and need for the information (particularly in light of: (1) the ultimate availability to Complainant of information about deficiencies through existing contractual provisions; and (2) the absence of any evidence that the completed forms have been or will be used to discipline/nonrenew employes), we conclude that the confidentiality interests predominate and thus that Respondent was not and is not obligated to provide the completed forms or the names of involved employes to Complainant.

Our balancing of competing interests is limited to the facts and issues before us in this case. Thus, for instance, we need not, and do not resolve the issue of whether Complainant would be entitled to receive a completed form for an employe in the context of a disciplinary or non-renewal proceeding involving that same employe.

Dated at Madison, Wisconsin this 24th day of September, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner