

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 382, AFSCME, AFL-CIO, Complainant,

vs.

TREMPEALEAU COUNTY, Respondent.

Case 83
No. 57349
MP-3494

Decision No. 29598-A

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, on behalf of Local 382, AFSCME, AFL-CIO.

Weld, Riley, Prenz & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by **Mr. Stephen L. Weld**, on behalf of Trempealeau County.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On March 2, 1999, Local 382, AFSCME, AFL-CIO, hereinafter the Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that Trempealeau County, hereinafter Respondent, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2 and 4, Stats., by refusing to provide information Complainant requested and which is relevant and necessary to assist Complainant in meeting its responsibilities with respect to collective bargaining and contract administration. The Commission appointed David E. Shaw of the Commission's staff, to act as Examiner and make and issue findings of fact, conclusions of law and order in the matter. On May 17, 1999, Respondent filed its answer wherein it denied it has committed any prohibited practices

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by refusing to provide the requested information. A hearing was held before the Examiner on May 19, 1999 in Whitehall, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by July 27, 1999.

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. Local 382, AFSCME, AFL-CIO, hereinafter Complainant, is a labor organization affiliated with Wisconsin Council 40, AFSCME, AFL-CIO, a labor organization having its principal office located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. At all times material herein, Daniel Pfeifer has been the Staff Representative of Wisconsin Council 40 assigned to represent the Complainant in collective bargaining and contract administration.

2. Trempealeau County, hereinafter Respondent or County, is a municipal employer with its principal office located at the Trempealeau County Courthouse, 36245 Main Street, P.O. Box 67, Whitehall, Wisconsin 54773-0067. At all times material herein, Bev Monahan has been employed as the Respondent's Personnel Director/Assistant Administrative Coordinator.

3. At all times material herein, the Complainant has been the exclusive collective bargaining representative of all regular full-time and regular part-time employees of the Trempealeau County Courthouse, including professional employees, but excluding supervisory, confidential and casual employees and elected officials.

4. In October of 1995, Monahan sent Pfeifer a letter wherein she raised the possibility of the Respondent having a salary study done and requested that the Complainant consider contributing toward the cost of the study.

On August 19, 1996, a joint committee of the Respondent's Personnel/Bargaining Committee and Finance Committee passed a resolution recommending that the Respondent contract with a consultant, David M. Griffith and Associates, hereinafter DMG, to do a job analysis study and compensation plan to produce a classification and compensation plan that would be internally and externally equitable. Said resolution did not state which positions in the County would be covered by the study.

In negotiations for the parties' 1997-1998 Collective Bargaining Agreement, the Respondent proposed that the parties split the cost of the study and agree that in lieu of a wage increase, the parties would agree to be bound by the classification and pay range assignments

recommended in the study. The Respondent subsequently amended its proposal to have the County pay for the cost of the study, but the Complainant would not agree to be bound by the study before seeing the results and the Respondent dropped its proposal. The parties subsequently reached agreement on a 1997-1998 Agreement.

In January of 1997, the Respondent decided to proceed with the classification and compensation study, and by a one vote margin, decided to include both represented and non-represented positions in the study. There was an informational meeting held which all employees were required to attend. All employees were required to fill out a "comprehensive position questionnaire" to be utilized by DMG, and in February and March of 1997, one employe from each classification was interviewed about their job.

At a meeting on April 30, 1997 of the Respondent's Joint Personnel and Finance Committee, DMG presented "draft working papers" and draft job descriptions which included represented positions. This was the only data the Respondent received from DMG regarding represented positions and placed positions in pay range groupings, but did not list any salary numbers. The Respondent had noted a number of problems with inaccuracies regarding wage information in some of DMG's earlier listing of employe salaries. At that meeting, the Joint Committee voted to continue the study, but only as to non-represented positions. The study was eventually completed as to the non-represented positions and a final report was issued regarding those positions.

5. By the following letter of February 27, 1998 to Monahan, Pfeifer requested a copy of the study on behalf of the Complainant:

Dear Bev,

Since the AFSCME Unions will, in the near future, be sending the notices to reopen contract negotiations, the undersigned hereby requests a copy of the wage study. The undersigned is requesting the wage study under the open records law and for preparation for the negotiations for successor collective bargaining agreements.

If there is any cost for the reproduction and transmission of the wage study, please bill the undersigned.

Sincerely,

Daniel R. Pfeifer /s/
Daniel R. Pfeifer
Staff Representative

The Respondent sent Pfeifer a copy of DMG's "Final Report" in March of 1998 which pertains only to non-represented positions.

On July 11, 1998, the Complainant requested a copy of the "preliminary wage study" from DMG that had included the positions represented by the Complainant. The Respondent again furnished the Complainant with a copy of the final report pertaining only to non-represented positions.

In the course of the parties' negotiations for a 1999 Agreement the Respondent has not made any proposals related to DMG's report or the preliminary data Respondent received from DMG, or relied on such data for its position in negotiations. In the course of those negotiations, the Complainant has made several requests to the Respondent for the "preliminary wage study" from DMG that covered positions represented by Complainant. At date of hearing, the Respondent had not furnished the Complainant with said information.

6. The preliminary information provided to the County by DMG on April 30, 1997 that included positions represented by the Complainant, relates to the wages of the employees in those positions and is relevant and reasonably necessary to the Complainant's ability to carry out its duties as to negotiating a successor agreement with the Respondent.

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

CONCLUSION OF LAW

The Respondent Trempealeau County, its officers and agents, by refusing to provide Complainant Local 382, AFSCME, AFL-CIO, with the preliminary information developed by David M. Griffith and Associates that pertained to the Respondent County's represented positions, committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

That Respondent Trempealeau County, its officers and agents, shall immediately:

1. Cease and desist from refusing to provide Local 382, AFSCME, AFL-CIO, with the preliminary information from DMG requested by Local 382.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
 - a) Immediately provide Local 382, AFSCME, AFL-CIO, with the information it has requested with respect to the preliminary information submitted by DMG.
 - b) Notify Trempealeau County employes represented by Local 382, AFSCME, AFL-CIO by 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 (20) 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 7th day of September, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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 employees represented by Local 382, AFSCME, AFL-CIO that:

WE WILL NOT refuse to bargain with Local 382, AFSCME, AFL-CIO, by refusing to provide relevant and necessary information as requested by Local 382 that will permit it to properly exercise its function of bargaining a successor collective bargaining agreement.

WE WILL NOT refuse to bargain with Local 382, AFSCME, AFL-CIO in any like or related manner.

Dated this _____ day of _____, 1999.

TREMPEALEAU COUNTY BOARD OF SUPERVISORS

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.

TREMPEALEAU COUNTY

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The Complainant has alleged that Respondent has committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2 and 4, Stats., by refusing to provide Complainant with a copy of DMG's "preliminary initial report" that included recommendations regarding bargaining unit positions represented by the Complainant. The Respondent denies it has committed a prohibited practice by refusing to provide the requested information because it is neither relevant or reasonably necessary to the Complainant's role in bargaining or contract administration and because the data is so preliminary and may contain errors.

POSITIONS OF THE PARTIES

Complainant

The Complainant asserts that the information in question, the preliminary DMG data, included information regarding the ranking of all County positions, including bargaining unit positions represented by Complainant, which ultimately affects the wages of bargaining unit employees, a mandatory subject of bargaining. Citing, RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23094-A (Crowley, 6/86) and PROVIDENCE AND MERCY HOSPITALS, 320 NLRB No. 60, affirmed, CA1, 19967 153 LRRM 2097, Complainant asserts that information that deals with the wages of employees is "presumptively relevant". Illustrating the information's relevance, Respondent's Personnel Director testified that she recommended that the Respondent discontinue including bargaining unit positions in the study because the Complainant might be able to use the information in bargaining.

The Respondent has argued that the preliminary report was not completed and might contain errors, and further argued that it did not use any portion of the study in bargaining. In HOFSTRA UNIVERSITY, 324 NLRB No. 95, 156 LRRM 1198, the National Labor Relations Board, hereinafter NLRB, overturned a decision by an Administrative Law Judge, hereinafter ALJ, finding that by refusing the union's request for a draft report on job responsibility content for bargaining unit employees, the employer violated its obligation to furnish the presumptively relevant information even though it had terminated the project for which the report was prepared and the ALJ had expressly found that the employer had not adopted any proposal in the report, nor had it used the draft report to formulate any position taken in bargaining. Like the Commission, the NLRB has held that information pertaining to wages is considered presumptively relevant. In this case, the intent of the DMG study was to establish wages, and the Respondent had proposed in negotiations that the parties implement the wages established by the study, sight unseen. Thus, the Respondent cannot now claim that the study is not relevant to wages.

While the Respondent also asserts that it did not use the requested information in subsequent negotiations, in that regard, the NLRB held in HOFSTRA:

“It is true, as the Respondent argues, that in WASHINGTON HOSPITAL CENTER, SUPRA – a case involving presumptively relevant information – the employer used the information the union sought. We do not agree, however, that WASHINGTON HOSPITAL CENTER or any other case the Respondent cites holds that information pertaining to bargaining unit matters must be relied on by the possessor for bargaining or other purposes for the information to be presumptively relevant. Such a rule would put in one’s hands the ability to decide unilaterally whether information pertaining to wages, hours and working conditions was relevant. The Respondent may not have utilized any of the information contained in the draft report and may have decided it was not relevant to bargaining, but because the requested information was presumptively relevant, the Union was entitled to examine the information and determine for itself whether it was relevant to bargaining.”

(156 LRRM at 1200)

The Respondent has also claimed that it does not believe the information in the draft document was accurate or complete. Complainant is requesting a copy of the document to examine the information and determine for itself whether the information is accurate, complete or relevant. Further, the Respondent could continue to argue the accuracy or relevance of the document during the negotiation process.

Respondent

The Respondent asserts that the standard governing union requests for information was established by the Commission’s decision in STATE OF WISCONSIN, DEC. NO. 17115-C (WERC, 3/82), wherein it was held:

Intertwined with the duty to bargain in good faith is a duty on the part of the Employer to supply a labor organization. . .upon request, with sufficient information to enable the labor organization to understand and intelligently discuss issues raised in bargaining. . . Information requested by a labor organization must be relevant and reasonably necessary to its dealings in its capacity as the representative of the employees.

(At pp. 4-5)

The Respondent then cites STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS), DEC. NO. 27708-A (McLaughlin, 1/95), wherein the union sought financial data regarding the UW Hospital and Clinic. The examiner held that the union had failed to demonstrate how any of the requested data affected any bargaining proposal, and, accordingly, found that the requested information to be neither relevant nor necessary. Noting that the duty to bargain in good faith does not require the release of data relevant to the union's formulation of its own bargaining strategy, the examiner concluded that disclosure of information regarding the financial health of the employer entities was not required, since the State had not claimed that it did not have the ability to pay. While the information sought might have been good background for the union in negotiations, the examiner concluded that the data was not relevant to any demonstrated bargaining issue. In that case, the union had also requested wage surveys which the State had conducted and relied upon, at least in part, to justify its offer. Under those circumstances, the employer was held to be obligated to supply the survey. In this case, the Respondent has not based its wage offer on the study. The bargaining unit positions were dropped from the study at a very preliminary stage and the Complainant has stipulated that Respondent made no bargaining proposals dealing with implementing the study. That preliminary information was neither relied on, nor utilized, by Respondent in preparing for contract negotiations. The information is thus not relevant to any present or potential bargaining proposal of Respondent.

While an employer must disclose "relevant" information to a union upon request, the union must demonstrate the relevance of the requested information to its duty to represent the employees. CITY OF JANESVILLE, DEC. NO. 22943-A (Gallagher, 3/86). Information has been deemed to be relevant when it is necessary to process a grievance or to evaluate or respond to a bargaining proposal. Here, it is undisputed that Respondent has not proposed that the study be implemented for bargaining unit positions, nor was it utilized in preparing for 1999 negotiations. The former union president testified that it was the Complainant, not the Respondent, that has brought up the study in bargaining and that Complainant "would like to see the report." Thus, Complainant's request is motivated by curiosity, rather than specific concerns regarding mandatory subjects of bargaining, and thus does not meet the legal threshold.

Even if the preliminary study was arguably relevant, the documents prepared by DMG regarding bargaining unit positions is so preliminary and so unverified that Respondent has never utilized or relied on the data. One of the reasons Respondent has resisted release of this preliminary draft data is that it would tend to confuse. It also makes no sense to permit Complainant access to information it refused to pay for, especially when Respondent, who did pay for the work, has not analyzed or utilized it to develop bargaining proposals.

In its reply brief, Respondent asserts that the contention that the Respondent received an initial “report” from DMG, which Complainant characterizes as a “preliminary wage study”, is erroneous. Complainant has received all “reports” generated by DMG, however, no “report” was ever generated by DMG with respect to bargaining unit positions. Also, the data sought is neither relevant nor necessary. In the data, no numbers are attached to positions or to pay grades, and while positions were preliminarily placed in pay grades, crucial decisions as to the number of points for a position, a pay grade’s range, or the number of points between ranges were not yet determined. Decisions as to the final scope and design of the study were not made until July, 1997, long after the bargaining unit positions were dropped from the study. It was only after those decisions were made that the wage ranges for the various pay grades were considered. Thus, the data prepared by DMG regarding bargaining unit positions never reached the level of a “preliminary wage study”.

Complainant appears to argue that any information regarding wages of bargaining unit employees, no matter how remote, and no matter that the information was not considered in developing employer wage proposals, is presumptively relevant because wages are a mandatory subject of bargaining. That is not the law. Again, in *STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)*, SUPRA, it was held that an employer must furnish sufficient information to enable a labor organization to understand and intelligently discuss issues raised in bargaining. There, the examiner relied on *STATE OF WISCONSIN*, SUPRA, wherein the Commission had said: “. . .What is important is whether the information sought is relevant to bargaining,” and noted that the State had relied on the study in developing its initial wage proposal and ordered release of the study.

In *PROVIDENCE AND MERCY HOSPITALS V. NLRB*, SUPRA, relied upon by Complainant, the Court of Appeals defined “relevance”:

Relevance, like beauty, sometimes lies in the eye of the beholder, and parties can differ about what information is (or is not) relevant to a union’s functions qua bargaining agent. Stated in traditional terms, requested information is relevant if it seems probable that the information will be of legitimate use to the union in carrying out its duties and responsibilities qua bargaining agent. See *NLRB V. ACME INDUS. CO.*, 385 U.S. 432, 437 [64 LRRM 2069] (1967). Put another way, requested information should be deemed relevant if it is likely to be of material assistance in evaluating strategies that may be open to the union as part of its struggle to minimize the adverse effects of the employer’s decisionmaking process on persons within the bargaining unit.

In that case, the union was concerned about rumors of an impending merger and requested information about the impact of such an event on bargaining unit jobs. Despite assurances that the merger would not result in a loss of unit jobs, jobs were, in fact, lost and the Court held

that the requested information should have been provided to assist the union in carrying out its role as agent for the employees. In *HOFSTRA UNIVERSITY, SUPRA.* cited by Complainant, the union requested a copy of an outside consultant's report which contained various proposals which were never adopted. The union stated that it feared the employer intended to displace a classification within the bargaining unit with non-unit employees and/or subcontract the work. The NLRB therefore deemed the requested information to be relevant and necessary to the union's role as bargaining representative of the employees. Unlike those situations, Complainant here was not motivated by concerns about potential loss of unit jobs or displacement of unit work, but was preparing for a bargaining session. Unlike the situation in the *STATE OF WISCONSIN, SUPRA,* Respondent has not relied upon the data in making a wage proposal. Thus, this case is more akin to *STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS),* in which the requested material was not ordered supplied to the union.

The burden is on Complainant to demonstrate the relevancy of the requested information to its duty to represent the employees in bargaining. The "relevancy" requirement has not been met in this case. Since Respondent did not use the data in preparing its wage offer, it had no duty to turn the information over to Complainant, and no prohibited practice has been committed.

DISCUSSION

The Commission has consistently 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.

MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 2883-A, B (WERC, 9/98), pp. 7-8; citing, MORAINÉ PARK VTAE, DEC. NO. 26859-B (WERC, 8/93).

While both parties cite the “relevant and reasonably necessary” standard, they differ on its application to the facts in this case. The Complainant asserts that as the information requested relates to wages, it is “presumptively relevant”, regardless of whether the Respondent has utilized or relied upon the information in bargaining. The Respondent asserts that since it has not utilized or relied upon the data to justify its position in bargaining, the information is not relevant or reasonably necessary to Complainant’s bargaining responsibilities.

The information requested in this case relates to the placement of bargaining unit positions in various pay grade groupings of County job classifications which was done at the time as a preliminary step in doing the compensation and classification study. The Respondent’s Personnel Director testified (Tr. 42) and the Respondent’s own bargaining proposals in the previous negotiations (Joint Ex. 8) establish that at least part of the original bases for doing the classification and compensation study related to the number of reclassification requests being received from Complainant’s members and a desire to develop a more equitable salary structure. The preliminary data in question placed County positions in pay range groups, albeit without specifying the salary ranges for the groups (Tr. 39). The relevance of such information to bargaining wages and the placement of positions in the salary structure is apparent. As such, the information relates directly to wages and is, therefore, presumptively relevant and necessary to Complainant’s functions and responsibilities as the exclusive bargaining representative of the employees in those bargaining unit positions. That being the case, no proof of relevancy or necessity are needed, and the burden is on the Respondent to justify non-disclosure. MORAINÉ PARK, SUPRA. While examiners and the Commission have on occasion noted that the employer relied on the information to justify its position in bargaining in finding that the information sought was relevant and reasonably necessary to the union’s fulfilling its responsibilities as bargaining agent, e.g., STATE OF WISCONSIN (DER), DEC. NO. 27708-A, SUPRA, and STATE OF WISCONSIN, DEC. NO. 17115-C, SUPRA, the Commission has not modified its standard or otherwise indicated it no longer would recognize the presumption of relevance and necessity with regard to wage-related information.

Although the Commission is not obligated to follow federal precedent in interpreting and applying the Municipal Employment Relations Act, both the Commission and its examiners have taken guidance from the NLRB and the federal courts in this area. In *STATE OF WISCONSIN*, DEC. NO. 17115-C, SUPRA, the Commission, in setting forth the standard to be applied in these cases, specifically cited *SHELL OIL CO. v. NLRB* (CA9 1971) 77 LRRM 2043 and *BOSTON HERALD-TRAVELER CORP. v. NLRB* (CA1, 1955) 36 LRRM 2220, with regard to the presumption of relevance and necessity as to wage-related information. (At 5). The Complainant also cites *PROVIDENCE AND MERCY HOSPITALS*, 320 NLRB No. 60, 152 LRRM 1085 affirmed, (CA1, 1996) 153 LRRM 2097 and *HOFSTRA UNIVERSITY*, 324 NLRB No. 95, 156 LRRM 1198 in support of its position.

The NLRB's decision in *PROVIDENCE* was affirmed on appeal and in its decision, the Court of Appeals explained the relevancy standard:

Stated in traditional terms, requested information is relevant if it seems probable that the information will be of legitimate use to the union in carrying out its duties and responsibilities qua bargaining agent. See *NLRB v. ACME INDUSTRIES CO.*, 385 U.S. 432, 437 [64 LRRM 2069] (1967). Put another way, requested information should be deemed relevant if it is likely to be of material assistance in evaluating strategies that may be open to the union as part of its struggle to minimize the adverse effects of the employer's decisionmaking process on persons within the bargaining unit. See *WESTERN MASS. ELEC. CO. v. NLRB*, 589 F.2d 42, 48 [100 LRRM 2315] (1st Cir. 1978). These liberal formulations of the test make manifest that the relevancy threshold is low and that the standard is neither onerous in nature nor stringent in application. This is as it should be, for a union cannot be expected to chart a prudent course without reliable and reasonably specific information about the employer's plans.

The Board and the courts have put a gloss on the test for relevancy – a gloss that alters the burden of persuasion depending upon the nature of the data sought by the union. When “the requested information concerns wages and related information for employees in the bargaining unit, the information is presumptively relevant to bargainable issues.” *SOULE GLASS & GLAZING CO. v. NLRB* 652 F. 2d 1055, 1093 [107 LRRM 2781] (1st Cir. 1981) (citation and internal quotation marks omitted). In such cases the employer must either disprove relevance or explain why it cannot furnish the information. See e.g. *NLRB v. BORDEN, INC.* 600 F.2d 313, 317 [101 LRRM 2727] (1st Cir. 1979).

(153 LRRM 2100-2101; Emphasis added.)

The factual situation in PROVIDENCE does not make the standard cited by the Court less applicable in this case. To the contrary, the information sought in this case, the preliminary data submitted by DMG, relates directly to wages and is of legitimate use to Complainant in bargaining. Therefore, under the above-stated standard, it is presumptively relevant to Complainant's bargaining responsibilities, and it is not necessary that the Respondent rely on the information in bargaining.

It is the Respondent then, that has the burden of rebutting the presumption by demonstrating why the information sought in this case is not relevant. In that regard, the Respondent asserts that the information provided by DMG in the early stages was too preliminary and unverified to be useable and was likely to confuse, and again, it did not rely on the information in bargaining. The HOFSTRA UNIVERSITY decision by the NLRB provides some guidance in this regard. In HOFSTRA, the union sought a copy of a draft report from a consultant evaluating clerical positions that the union represented in order to prepare for negotiations for a successor agreement. The employer refused the union's request on the bases that no final report was prepared, as it had terminated the project, and because it did not use the draft report to formulate any position it took in bargaining. In reversing the ALJ's determination that the draft report was not relevant for those reasons, the NLRB stated:

The questionnaire used by the consultant to prepare the draft report contained questions designed to determine "What you do, How and When you do it." The Respondent's director of human resources explained to the Union that the purpose of the questionnaire was to "find out what the responsibilities of the individuals are . . . and, also, what the job content was." The consultant analyzed the answers in the returned questionnaires and made proposals in the draft report submitted to the University. Given the above, we find that the draft report relates to job responsibilities and content and therefore encompasses mandatory subjects of bargaining and thus is presumptively relevant. WASHINGTON HOSPITAL CENTER, 270 NLRB 396, 400-401 [116 LRRM 1459] (1984). That the Respondent made no use of the draft report is irrelevant since the information contained in the report is presumptively relevant to the Union in fulfilling its obligations as statutory bargaining representative. 3/

Further, the Respondent's hiring of the consultant occurred shortly before bargaining for a successor agreement began between the Respondent and the Union. The Union made clear to the Respondent that it was requesting the information to prepare for bargaining. In testimony elaborating on its need for the information, the Union explained that it feared the University was displacing a certain unit employee classification with nonbargaining unit employees and that it was concerned about the possibility of subcontracting unit work – both concerns related to mandatory bargaining subjects. The president's statement about the purpose of the consultant's study and the information sought in the

questionnaire the consultant used strongly suggest that the draft report might relate in some way to these bargaining subjects. 4/ Thus, rather than simply requesting information about which it was curious, the above shows that the Union's request was bottomed on specific concerns about mandatory bargaining subjects. 5/

...

It is true, as the Respondent argues, that in WASHINGTON HOSPITAL CENTER, SUPRA – a case involving presumptively relevant information – the employer used the information the union sought. We do not agree, however, that Washington Hospital Center or any other case the Respondent cites holds that information pertaining to bargaining unit matters must be relied on by the possessor for bargaining or other purposes for the information to be presumptively relevant. Such a rule would put into one party's hands the ability to decide unilaterally whether information pertaining to wages, hours and working conditions was relevant. The Respondent may not have utilized any of the information contained in the draft report and may have decided it was not relevant to bargaining, but because the requested information was presumptively relevant, the Union was entitled to examine the information and determine for itself whether it was relevant to bargaining.

We find that the Respondent, by refusing to furnish the draft report to the Union, violated Section 8(a)(5) and (1) of the Act.

...

3/ Our dissenting colleague assumes arguendo that the draft report was presumptively relevant, but concludes that the Respondent rebutted the presumption by showing that the project was abandoned and that no bargaining proposals were based on the draft report. We disagree. In our view, the fact that the Respondent did not use the draft report establishes only that the Respondent decided the report was not relevant to its purposes. Under Sec. 8(a)(5) of the Act, however, the key inquiry is whether the information sought by the Union is relevant to its duties. NLRB v. LEONARD B. HERBERT, JR. & CO., 696 F.2D 1120, 1124 [112 LRRM 2672] (5th Cir.1983) (emphasis added)

Because employers and unions often have divergent interests, information that is not considered relevant by one party may be highly relevant to the other. Furthermore, the Supreme Court has adopted a discovery-type standard of what constitutes relevant information. *ACME INDUSTRIAL, SUPRA.* 385 U.S. at 437. Under that liberal standard, where, as here, the information requested pertains to employees' working conditions, "the information must be disclosed unless it plainly appears irrelevant." *TELEPROMPTER CORP. v. NLRB*, 570 F.2D. 4, 8 [97 LRRM 2455] (1st Cir. 1977). In sum, the Respondent's failure to take some action based on the draft report is not conclusive and does not "plainly" establish that the report would be of no use to the Union in carrying out its statutory duties and responsibilities.

...

5/ The dissent faults the Union for failing to show that the draft report was relevant to a proposal it wished to make in bargaining. However, because the draft report contained information pertaining to unit employees' working conditions, it is not required that the Union show the precise relevancy of the requested information to particular current bargaining issues. *TELEPROMPTER CORP., SUPRA.* 570 F.2D at 8. Further, we fail to see how the Union's request could be more specific when it did not know what the draft report contained beyond the obvious fact that it dealt with unit employees' working conditions.

(156 LRRM 1199-1200, Emphasis added).

Similarly, in *MADISON METROPOLITAN SCHOOL DISTRICT, SUPRA*, the Commission held that the requested information was relevant and reasonably necessary to the union's responsibilities in bargaining and contract administration even though there was no current grievance or dispute pending involving the information. See, also, in that regard *NLRB v. ITEM Co.*, 220 F.2d 956 (CA5), cert. denied, 350 U.S. 836 (1955).

While the preliminary information sought in this case may contain inaccuracies and may be in very rough form, that goes to its reliability, which the parties can debate in negotiations if the Complainant decides to utilize the data. The fact that the Respondent may have chosen not to utilize the data for those reasons does not affect its "relevance" to Complainant. As the NLRB stated in HOFSTRA, "because the requested information was presumptively relevant, the Union was entitled to examine the information and determine for itself whether it was relevant to bargaining." (156 LRRM at 1200).

For the foregoing reasons, the Respondent has been found to have violated its duty to bargain by refusing to provide the Complainant with DMG's preliminary data that included the bargaining unit positions, and has been directed to provide that information to Complainant's representatives immediately.

As the Complainant presented no evidence relevant to a finding of a violation of Sec. 111.70(3)(a)2, Stats., no finding has been made in that regard.

The Complainant has requested that it be awarded costs. As noted above, the Commission has in the past noted an employer's reliance on the information in bargaining in finding such information to be "relevant and reasonably necessary" to the union's bargaining functions. Thus, while the Respondent has been found to be in violation of MERA, Commission precedent in this area is not so clear as to be able to reasonably conclude that Respondent's position in this case was frivolous or taken in bad faith as required to award costs and attorney fees. CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98).

Dated at Madison, Wisconsin this 7th day of September, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

DES/gjc
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