STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NWTC-FACULTY ASSOCIATION, Complainant,

vs.

NORTHEAST WISCONSIN TECHNICAL COLLEGE, Respondent.

Case 100
No. 59009
MP-3658

Decision No. 29955-A

Appearances:

Mr. David Brooks Kundin, Executive Director, Bayland UniServ, 1136 North Military Avenue, Green Bay, Wisconsin 54303, on behalf of Complainant, NWTC-FA.

Davis & Kuelthau, S.C, by **Attorney Robert W. Burns**, P.O. Box 1534, Green Bay, Wisconsin 54305-1534, on behalf of Respondent, NWTC.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

NWTC-Faculty Association (NWTC-FA), filed a complaint herein on June 28, 2000, before the Wisconsin Employment Relations Commission wherein it alleged that the Northeast Wisconsin Technical College (NWTC) had unlawfully failed and refused to release an investigatory report regarding sexual harassment complaints made against two bargaining unit members, which the NWTC-FA felt was relevant and necessary to the processing of grievances. On August 11, 2000, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner in the case. Also, on August 11, 2000, a Notice of Hearing in the case was issued. On August 31, 2000, the Respondent timely filed its answer and

affirmative defenses in the case. Hearing in the case was held on September 12, 2000, at Green Bay, Wisconsin. A stenographic transcript of the proceedings was made and received by September 28, 2000. The parties directly exchanged their briefs and all briefs were received by the Examiner by December 11, 2000. Having considered the evidence and arguments and being fully advised in the premises, the Examiner makes the following

FINDINGS OF FACT

1. Complainant, NWTC-FA (Union) is a labor organization with its offices c/o Bayland UniServ, 1138 North Military Avenue, Green Bay, Wisconsin 54303-4414. The Union has had a collective bargaining relationship with Northeast Wisconsin Technical College (College) for many years in a unit consisting of

> All certified personnel teaching at least 50% of a full teaching schedule at Northeast Wisconsin Technical College, including classroom teachers, librarians, guidance counselors, other special teachers, and other related professional personnel who are employed in a professional capacity to work with students and teachers, but excluding teaching personnel teaching less than 50% of the full teaching schedule, coordinator directors, supervisors, clerical and custodial employees.

2. Respondent, Northeast Wisconsin Technical College (College) is a municipal employer within the meaning of the Municipal Employment Relations Act, Sec. 111.70(1)(j), Wis. Stats. The College's principle offices are located at 2740 West Mason Street, Green Bay, Wisconsin 54307-9042.

3. On November 22, 1999, the Union filed grievances on behalf teachers D__ A__, W__ K__ and G__ M__, all of whom had received written reprimands from the College as a result of an investigation conducted by College Affirmative Action Officer Michael Diaz pursuant to a complaint made by another college employee alleging sexual harassment. 1/ In its November 22, 1999 letter, the Union also formally requested "a complete copy" of the report authored by Mr. Diaz, which it believed formed the basis for the discipline.

1/ During the processing of the grievances, the College reduced A__'s written warning to an oral warning, but left M__'s discipline as issued. K__'s grievance was settled and apparently withdrawn. A__ and M__'s grievances have been moved forward to arbitration, but they are being held in abeyance pending the outcome of this case.

4. In a letter January 24, 2000, the College responded to the Union's request by providing a three-page excerpt of the Diaz report along with a letter, which read in relevant part as follows:

. . .

> In regard to your request for a copy of the investigatory report, the College will not be providing the full report as the confidentiality concerns in the report outweigh the benefit of the Faculty Association receiving a copy. Although, enclosed are copies of pages of the report which summarize the statements taken by the three Faculty Association members, A__, K__, and M__.

. . .

5. As one of the grievances settled, (K__), the two relevant pages of the Diaz report (A__ and M__) read as follows:

. . .

> Statement of employee # 09072
>
> On October 21, 1999 this office conducted an interview with employee 09072. The interview took place in People Soft Room B. In addition to interviewee, Mrs. Pam Mazur, Associate Dean Trades and Technical, and Rick Van Goethem, Faculty Association Representative were present. The interview started at 1:50 p.m. and concluded at 1:53 p.m.
>
> Prior to the interview the employee was advised that he was not required to give a statement. Employee understood my statement and decided to talk to me. During the interview I asked the employee whether or not the allegations brought against him by employee 14533 with regards to the incident in the closet were true. Employee acknowledged that the allegation was true and that he would like to apologize to employee 14533 for any grief he might have caused.
>
> Employee 09072 stated that the action was not malicious in any way and that it was just a gag. According to employee 09072 words, "I was attempting to make 14533 part of the group".
>
> It is of note to say that shortly thereafter this statement was taken, employee 09072 apologized to Kathy Myrick for any grief caused by his actions.

. . .

Statement of employee # 03011

On October 22, 1999 this office conducted an interview with employee 03011. The interview took place in People Soft Room B. In addition to interviewee, Mr. Don Jaworski, Associate Dean Trades and Technical, and Kevin Wiegan, Faculty Association Representative were present. The interview started at 2:00 p.m. and concluded at 2:30 p.m.

Prior to the interview the employee was advised that he was not required to give a statement. Employee understood my statement and decided to talk to me. The employee has 23 years of seniority in the Technical College system and has worked 13 years of that time in the T& T division.

Employee acknowledged saying a comment with regards to deer ticks. Employee was not sure if employee 14533 was present during the comment. Employee did recall employees 09166, 08857 and Kathy Myrick as present. According to employee, the above individuals had no reaction to the comment.

Employee does not recall about any color jokes in the coffee room or seen employee 14533 in the area when jokes were said. Employee describes the coffee room as a very professional area, used to relieve daily stress. Employee states emphatically that if a comment appears to be offensive, it will be stopped.

Employee describes having contact with employee 14533. He describes employee 14533 as an individual who appeared to be frustrated with her current position due to a system failure with the computer and the amount of work to be accomplished under 10255's guidance.

Employee acknowledged to have said a comment with regards to a quitting pool, but it was meant as a joke.

Employee stated that he liked employee 14533 and given the opportunity was willing to apologize to 14533 for any comment that might have caused grief.

6. By letter dated May 9, 2000, the Union sent a second request to receive a full copy of the Diaz report, which read in relevant part as follows:

. . .

Pursuant to the provisions contained in Sections 19.31-19.39, Wisconsin Statutes, I am hereby requesting a copy of the Investigative Report that was

conducted by NWTC that included interviews with grievants D__ A__ and G__ M__, among others, in its entirety.

It is my understanding of the Wisconsin Public Records Law that we are entitled to that report in its entirety, with the possible exception of deleting the name of the complainant who filed the initial complaint that led to the report being generated.

Again, pursuant to the provisions of Sections 19.31 through 19.39, I am giving you, the custodian of that report, until May 31, 2000, to produce that report. I will pay a reasonable fee for copying it, and it is my understanding that the report itself is only fifteen (15) pages.

. . .

7. By its letter dated May 31, 2000, the College (by Attorney Robert W. Burns) again refused to provide a copy of the Diaz report. That letter read in relevant part as follows:

. . .

Please be advised that I am responding to your letter of May 9, 2000 to Ms. Sandy Ryczkowski of Northeast Wisconsin Technical College. You asked for a response on or before this date. Please be advised that it is the position of the College that the investigative reports you have requested are exempt from disclosure under the Wisconsin Public Records Law.

As noted in Section 19.35, Wis. Stats., reference can be made to the exemptions under Section 19.85 Wis. Stats., and the investigative reports you seek are exempt for reasons consistent with the rationale expressed in Sections 19.85 (1)(c) (employment and performance data of a public employee); (f) (disciplinary data of specific persons, preliminary consideration of specific personnel problems, or the investigation of charges which, if discussed in public, would be likely to have a substantial adverse affect upon the reputation of any person referred to in such investigation.) In addition, strong public policy considerations exist which require such investigative reports to remain confidential so as not to chill complaints from employees and avoid retaliation under harassment or other similar policies.

Pursuant to Section 19.35 (4)(b), you are hereby advised that this determination is subject to review by mandamus under Section 19.37(1) or upon application to the Attorney General or a District Attorney. Please contact me if you have any questions with respect to this response.

. . .

8. The underlying discipline that was issued to Grievant A__ on October 28, 1999, reads in relevant part as follows:

. . .

> The College has completed its investigation regarding the allegations brought forward.
>
> The findings indicate that you acknowledged making comments about a quitting pool and that you were remorseful and apologetic for any stress caused to the complainant.
>
> As a result of these findings, the following actions will be taken:
>
> 1. A copy of this memo will be placed in your personnel file.
>
> 2. A personal apology to the complainant and a letter of apology will be written by you to the complainant by Friday, November 5, 1999. A copy of the apology letter should be forwarded to Sandy Ryczkowski, Human Resources Manager, to be attached to this memo in your personnel file.
>
> 3. You are required to contact the College's Employee Assistance Program by Friday, November 5, to schedule an appointment for counseling regarding this incident. Appointments can be made during the non-instructional part of your work day.
>
> Any additional incidents of this nature will result in further disciplinary action or discharge.

. . .

9. The underlying discipline that was issued to Grievant M__ on October 28, 1999, reads in relevant part as follows:

. . .

> The College has completed its investigation regarding the allegations brought forward.
>
> The findings indicate that you acknowledged your involvement in the storeroom incident and that you were remorseful and apologetic for any stress caused to the complainant.

As a result of these findings, the following actions will be taken:

4. A copy of this memo will be placed in your personnel file.

5. A personal apology to the complainant and a letter of apology will be written by you to the complainant by Friday, November 5, 1999. A copy of the apology letter should be forwarded to Sandy Ryczkowski, Human Resources Manager, to be attached to this memo in your personnel file.

6. You are required to contact the College's Employee Assistance Program by Friday, November 5, to schedule an appointment for counseling regarding this incident. Appointments can be made during the non-instructional part of your work day.

Any additional incidents of this nature will result in further disciplinary action or discharge.

. . .

10. The parties entered into the following factual stipulation at the hearing in this case:

In October, 1999, there was an investigation. At least two employees were interviewed by College Representative Diaz, A__ and M__. A__ and M__ were then disciplined as a results of Diaz's investigation. Grievances were filed for A__ and M__, and those are now pending arbitration. On more than one occasion, the Union asked for Mr. Diaz' complete report. The District declined. Union Representative Wiegman saw the parts of the report which were not provided to the Union during the processing of the grievances. The Union, however, did receive three pages which are contained in this summary before the WERC in this case.

11. The Diaz report was 15 pages in length. Union Representative Kevin Wiegman reviewed the Diaz report, but was not given a copy thereof during the processing of the A__ and M__ grievances. Only managers of the College saw the full Diaz report. At their interviews with Diaz, as well as before the Board at hearings regarding their grievances, A__ and M__ did not deny making the statements they admitted making to Diaz during his investigation, which formed the basis for their being disciplined by the Board. During the processing of the grievances, the Union argued solely that the statements made by A__ and M__ did not warrant the discipline given.

12. There has been only one prior case of alleged sexual harassment investigated by the College, the Gaywont case. That case was settled by the parties. Although the Union had

made a request to see the full investigative report leading to the discipline of Mr. Gaywont and although the College offered to show the report to the Union during the processing of that

grievance, the Union never took advantage of the College's offer to view the full report, as the case was ultimately settled.

13. The College denied the Union a full copy of the Diaz report because the College wants to create an environment where potential complainants in sexual harassment situations will feel comfortable coming to the College with a problem or situation and so that others who are witnesses to such problems or situations will feel comfortable coming to the Board during an investigation and giving evidence regarding these complaints. The College further believed that maintaining the integrity of their investigation and the confidentiality of any person who came forward during these investigations was necessary to make sure that the College would be free of discrimination and/or sexual harassment. In this regard, the College has had a policy prohibiting sexual harassment and discrimination since at least 1985 and that policy was most recently revised in April, 1999. The policy reads in relevant part as follows:

. . .

> Employee harassment is specifically prohibited. Harassment is defined as any unwanted, deliberate or repeated unsolicited comments, gestures, graphic materials, physical contacts or solicitation of favors which is based upon age, race, creed, color, handicap, martial status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record. Harassment shall extend to physical contacts or solicitation of favors which is based upon any of the aforementioned protected categories when:
>
> 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or educational status; or,
>
> 2. Submission to or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting such individuals; or
>
> 3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work or learning environment.
>
> Any acts which may be regarded as harassment are to be reported in writing as follows:
>
> 1. If committed by students, report in writing to Student Services, with a copy to the Vice-President of Human Resources.

> 2. If committed by faculty or support staff, to be reported in writing to Vice-President of Occupational and Academic Services, with a copy to the Vice-President of Human Resources.

3. If committed by administrative or management staff, to be reported in writing to the President with a copy to the Vice-President, Human Resources.

In a pamphlet, also available at the College, entitled "Do You Believe You're a Victim of Discrimination and/or Sexual Harassment?" the College defined sexual harassment and discrimination and described some of the forms which sexual harassment can take (verbal abuse, gestures, physical contact, etc.). The College pamphlet went on to state "NWTC wants to ensure that all victims and witnesses of "incidence" [sic] are treated with dignity, respect, courtesy and sensitivity—YOUR CONFIDENTIALITY WILL BE RESPECTED."

14. The written warnings issued to A__ and M__ are based solely on admissions made by A__ and M__ during Diaz's investigation. Union Representatives were present at the meetings at which these admissions were made. Union Representative Wiegman was allowed to view the report during the processing of the grievances.

15. The remainder of the Diaz report, which the College has refused to give to the Union, does not contain information that is relevant and necessary to Complainant's processing of the A__ and M__ grievances. The evidence contained in the unreleased portions of the Diaz report were not relied upon by the College in reaching its decision to issue A__ and M__ disciplinary warnings. Rather, the College relied solely on M__ and A__'s admissions during the Diaz investigation, as stated in the October 28, 1999 warnings they received.

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

CONCLUSION OF LAW

Respondent Northeast Wisconsin Technical College, its officers and agents, by refusing to provide Complainant, NWTC-FA with a full and complete copy of the Diaz report concerning, *inter alia*, the actions of bargaining unit members A__ and M__, has not refused to bargain collectively with NWTC-FA in violation of Sec. 111.70(3)(a)1, 2 and 4, Stats.

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

ORDER

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

Dated in Oshkosh, Wisconsin, this 12th day of January, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

NORTHEAST WISCONSIN TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant has alleged that Respondent has committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 2 and 4, Stats., by refusing to provide Complainant with a full and complete copy of the Diaz investigatory report involving certain activities of, *inter alia*, Grievants A__ and M__. The Respondent denies it has committed a prohibited practice by refusing to provide the requested information because that information is neither relevant nor reasonably necessary to the Complainant's role in contract administration or in the processing of the A__ and M__ grievances. Respondent also argues that the unreleased portions of the Diaz investigatory report contain confidential information; that the WERC is without jurisdiction to require the release this confidential information, citing Sec. 19.35(f), Wis. Stats. Finally, Respondent urged that the relevant portions of the Diaz report were released to the Union and because the Grievants have essentially admitted the conduct contained in those portions of the released Diaz report and their admissions were the sole basis upon which the College disciplined them, the release of the remainder of the Diaz report is unnecessary.

POSITIONS OF THE PARTIES

Complainant

The Union contends that it needs the full Diaz report because it is relevant and necessary to the Union's duty to represent its members and process grievances. In this regard, the Union cited and discussed TREMPEALEAU COUNTY, DEC. NO. 29598-A (SHAW, 9/99). The Union contended that the College should not be allowed to decide what information is relevant as this interferes with and restrains Municipal employees in the exercise of their rights under Wisconsin Law. The Union argued that the same arguments were appropriate in the instant case as were used by the Union in the MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27807-A (CROWLEY, 1/94). The Union argued that the information it requested is presumptively relevant because it involves information concerning wages and fringe benefits, citing TREMPEALEAU COUNTY, supra. In addition, the Union noted that without the report, no discipline would have issued against A__ and M__. Therefore, the report is relevant and its relevancy is proven by the existence of the pending arbitration cases.

The Union argued that the College has the burden to show that the Diaz report contains such confidential and sensitive information as to out-weigh the Union's right to its release. The Union further urged that it never sought the names of any witnesses and that didacting names and other identifying information from the Diaz report before release would be

appropriate. Therefore, in the Union's view, the College will get a strategical advantage in arbitration by keeping the report a secret, as the report will have to be revealed at the arbitration hearings.

The Union argued that if the information is likely to lead to admissible evidence, the material itself does not have to be admissible to be relevant and necessary, citing MADISON METRO SCHOOL DISTRICT, DEC. NO. 28832-A (SHAW, 9/98). Here, the Union conceded that if the grievances were not pending, the Union would not be entitled to the information. The College has made the decision to discipline A__ and M__ and the integrity of the process and issues of confidentiality cannot override the employees' right to confront their accusers. Therefore, the College should not be able to use the ploy of confidentiality/integrity of the investigation to avoid the College's statutory duties to release the information to the Union. The Union stated in its brief that, ". . . any report that was generated by the complaining employee which presumably contains statements by the employee and others regarding the complaints, MUST be relevant and necessary to the Union's effort to defend D__ A__ and G__ M__ against allegations by the very complaining employee who caused the report to be generated."

College

The College has no legal obligation to provide the Union with a copy of the complete Diaz report. In this regard, the College noted that it has a legitimate interest in maintaining and protecting the confidentiality of its investigatory process and disclosure of the entire report would be contrary to the College's sexual harassment policy. The College cited several cases including MADISON TEACHERS, INC., supra and DETROIT EDISON CO. VS. NLRB, 99 S. CT. 1123 (1979) for the proposition that both the Courts and the Commission have recognized confidentiality as a basis upon which employers may withhold information in a bargaining context. In this regard, the College noted that it has maintained the confidentiality and integrity of its investigatory process by allowing only a few key managers (the decision makers in the underlying grievance cases) access to the full Diaz report.

The College urged that disclosure of the full Diaz report would be against public policy because it would result in employees being reluctant to come forward during future sexual harassment or other investigatory processes. The College noted that it has already given the Union all of the evidence the College will rely on in the arbitration cases and which the Board relied on in determining that A__ and M__ deserved to be disciplined for their activities. Thus, because the Board did not consider the full Diaz report in its deliberations regarding the discipline of A__ and M__, the Union should not be granted access to the full report.

The College argued that Sec. 19.35, Stats., exempts from disclosure documents that contain personal identifiable information. Thus, the Union's arguments that Public Records laws require the production of the full Diaz report is misplaced. In any event, the WERC lacks jurisdiction to determine such a claim.

The College contended that the issue in the underlying grievances is actually whether the discipline was warranted. As this narrow issue is all that will be before the arbitrator, the College noted that the Union was given the statements that the College Board considered and relied upon in issuing the discipline (the statements of A__ and M__) and as the Board did not rely on any other portion of the Diaz report, the remainder of that report is not relevant to the underlying grievances. Furthermore, the College noted that it has fully accommodated the Union by giving it the documents that it relied upon in meting out the discipline for A__ and M__. As the College has a legitimate confidentiality concern regarding the privacy interests of employees, this accommodation to the Union is sufficient and the College should not be required to issue the full report to the Union.

Finally, the College argued its collective bargaining agreement with the Union gives it the right to determine which aspects of the investigation should be disclosed to the Union. In this regard, the College noted that the Management Rights clause gives it the right to decide how to proceed on an employee complaint and that under Article IV, Section K, of the collective bargaining agreement, the Diaz report could be considered a record "necessary for operational purposes" and, therefore, the College would have an unrestricted right to retain the document in a separate file and refuse to issue the entire report to the Union, pursuant to a 1991 arbitration award admitted herein.

Reply Briefs

Complainant

The Union noted that the College's reliance on cited cases was "misguided." In this regard, the Union noted that the employer waived its right to claim the confidentiality exception to disclosure when it identified the complaining employee during the investigation with various employees. As the Union never sought the release of the complaining employee's name or the names of other witnesses and has never resisted didacting any identifying material, the Union urged that there is no basis upon which to deny it disclosure of the full Diaz report. The Union further noted that no sexual harassment occurred in this case and asked in that regard who should be the protected person when there is no victim. The Union further contended that the accused grievants should be able to face their accusers and that this fundamental due process right is being denied to A__ and M__ by the College's denial of the full Diaz report to the Union.

The Union argued that the College should not be allowed to dictate what issues are in dispute in grievance arbitration cases and noted that despite its contentions, the College has not accommodated the Union after asserting the confidentiality claim in this case. In regard to the prior arbitration case proffered by the College, the Union noted that that case did not deal with confidentiality and is inapplicable to the instant matter.

College

The College argued that the cases cited by the Union are either distinguishable or the Union's reliance thereon is misplaced. Regarding TREMPEALEAU COUNTY, the College noted that the Commission ordered disclosure of the information because it related directly to wages, and as such, was presumptively relevant. The College noted that there was no argument by the employer in that case that confidentiality should be a basis upon which to deny the information to the Union. Therefore, as there is no presumption of relevancy in the instant case, the burden of proof is on the Union to show both the relevancy and necessity of disclosing the full Diaz report. The College urged that the Union has failed to meet this burden.

The College argued that the Union's reliance on the MILWAUKEE BOARD OF SCHOOL DIRECTORS, supra, is also misplaced, noting specifically that the information in that case was found to be presumptively relevant and necessary. Thus, both cases cited by the Union support the College's conduct herein. In this regard, the College noted that the Diaz report was not relevant to wages and fringe benefits and, therefore, not presumptively relevant. In addition, the College has raised legitimate confidentiality concerns in this case and it has maintained the integrity and confidentiality of the report throughout the grievance proceedings as well as this proceeding. As the College did not base the disciplinary actions it took against A__ and M__ on the complaint or any part of the Diaz report, except the M__ and A__ admissions, the College urged that the Union is not entitled to disclosure of the full Diaz report and the complaint should be denied in its entirety.

DISCUSSION

The law is well-settled in Wisconsin concerning a municipal employer's duty, upon request, to provide information to its employee's exclusive collective bargaining representatives. Examiner Crowley effectively described the state of the law in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27807-A (CROWLEY, 1/94); Aff'd by Op of Law, DEC. NO. 27807-B (WERC, 2/94), as follows:

> 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 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. (Citations omitted.)

See also, MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-A (SHAW, 6/97); TREMPEALEAU COUNTY, DEC. NO. 29598-A (SHAW, 9/99).

The information requested by the Union in this case does not relate to wages and fringe benefits and is, therefore, not presumptively relevant and necessary to carrying out the bargaining agent's duties. Thus, the Union in this case has the initial burden to demonstrate the relevance and necessity of its receipt of the complete Diaz report to its duty to represent A__ and M__ in their grievances.

The unusual facts of this case clearly demonstrate that the Union has failed to meet this burden of proof. In this regard, the Examiner notes that the College argued, without dispute from the Union, that the only portion of the Diaz report it considered in deciding to discipline A__ and M__ were the statements and admissions of A__ and M__ made during that investigation, requiring a conclusion that the remainder of the report is neither relevant nor necessary to the Union's duty to process the grievances of A__ and M__. In addition, the College asserted, without dispute by the Union, that the sole issue remaining in the arbitration cases pending regarding the discipline meted out to A__ and M__ is whether the level of discipline given was appropriate in the circumstances. In these specific circumstances, the Union did not have an absolute right to receive the full Diaz report, as only those portions of the report containing A__ and M__'s admissions are relevant and necessary to the Union in representing A__ and M__ in their pending grievances.

The Union has argued that the College should not be allowed to decide what information is relevant to the Union's duty to represent employees. Technically, the Union's assertion is correct. However, as the College in this case referred and relied only upon the admissions of A__ and M__ in its decision to discipline those employees, the remainder of the Diaz report is irrelevant to the A__ and M__ grievances and is not necessary to the Union's duty to properly process those grievances. In addition, the fact that A__ and M__ have admitted the actions for which they were disciplined, supports a conclusion that the Union's assertion is inapplicable here.

The Union has also argued that the information it requested (the full Diaz report) is presumptively relevant because it involves information which concerns wages and fringe benefits. I disagree. The cases relied upon by the Union and the College here demonstrate that information concerning grievance arbitration matters does not relate to wages or fringe benefits

and, therefore, is not among those items which the Commission has found to be presumptively relevant and necessary.

In addition, the Union has argued that the College has the burden to show that the full Diaz report contains confidential and sensitive information so as to out-weigh the Union's right to its release. As I have found the information requested by the Union to be neither relevant nor necessary to its processing of the A__ and M__ grievances, it is unnecessary to determine whether the College's arguments regarding confidentiality and Sec. 19.35, Stats., are applicable to this case. The Union urged that A__ and M__ should be given the right to confront their accusers in the grievance arbitration cases and that the College will receive a strategical advantage in those cases if the College alone has access to the full Diaz report. As the Union failed to contest the College's assertions that only the remedy is at issue in the pending grievance arbitration cases, the Union's arguments on this point are immaterial.

The Union asserted in its initial brief that any report that was generated by a complaining employee is necessarily relevant and necessary to a union's effort to defend grievants against allegations by the complaining employee. The facts of this case demonstrate that the Union's assertion is not applicable here. Here, the Board relied only upon the admissions of A__ and M__ in deciding to discipline them, making only their admissions relevant and necessary.

The Union also argued that the College waived its right to claim the confidentiality exception to disclosure of information when it identified the complaining employee during the investigation and allowed various college managers to view the Diaz report. I disagree. In this regard, I note that the College restricted the access of its managers to the full Diaz report and that all of the managers who viewed the report were decision makers in the A__ and M__ disciplinary actions. In addition, it is difficult to conceive how the College would have proceeded with its investigation had it not, in some small way, revealed to employees who gave statements regarding the incidents, the identity of the complaining employee. In any event, the record showed that the College followed its sexual harassment policy in investigating the actions of A__ and M__. As this case is a complaint case sounding in Wisconsin law, the applicability and usefulness of the 1991 grievance arbitration award (authored by the Examiner) is not present. In addition, that case is factually distinguishable from the instant case. Therefore, I have not considered the relevancy or applicability of that award in this case.

In summary, the evidence in this case demonstrates that the information the Union seeks to have disclosed is neither relevant nor reasonably necessary to the Union's duty to represent employees A__ and M__ and the College is not obligated under MERA to disclose

that information. For these reasons, the complaint has been dismissed. Also, for the reasons stated above, no determination of the College's arguments regarding Sec. 19.35, Stats., has been made. As the Union has failed to provide any evidence supporting a violation of Sec. 111.70(3)(a)2, Stats., no finding has been made in that regard.

Dated at Oshkosh, Wisconsin, this 12th day of January, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

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