STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME LOCAL 514A, BERLIN CITY EMPLOYEES UNION, Complainant,

vs.

CITY OF BERLIN, Respondent.

Case 47
No. 59285
MP-3689

Decision No. 30126-A

Appearances:

Mr. Aaron N. Halstead, Shneidman Hawks & Ehlke, S.C., 217 South Hamilton, P.O. Box 2155, Madison, WI 53701-2155, appearing on behalf of the Complainant.

Mr. James R. Korom, vonBriesen, Purtell & Roper, S.C., 411 East Wisconsin Avenue, P.O. Box 3262, Milwaukee, WI 53201-3262, appearing on behalf of the Respondent.

MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INFORMATION

The Complainant, AFSCME Local 514A, Berlin City Employees Union, filed a complaint with the Wisconsin Employment Relations Commission on October 16, 2000, alleging that the Respondent, City of Berlin, violated Wis. Stats. Sec. 111.70(3)(a)1,3, and 4. The WERC appointed Karen J. Mawhinney, a member of its staff, to serve as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing was scheduled for June 11, 2001. Respondent filed its answer on May 26, 2001. On June 1, 2001, the Respondent notified the Examiner of its request for information from the Complainant. The parties agreed to treat the Respondent's request as a Motion before the Examiner and filed briefs by September 4, 2001. Having considered the argument of the parties, the Examiner makes and issues the following

ORDER

Respondent's Motion to Compel Production of Documents and Information prior to the hearing is denied.

Dated at Elkhorn, Wisconsin, this 24th day of October, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

CITY OF BERLIN

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INFORMATION

The Respondent argues that the Union should be compelled to produce the information requested because it would shorten and simplify the hearing process by allowing the City to effectively prepare for the hearing. The production of the information would serve the interests of due process because the City would have advance notice of the facts and evidence to be presented at the hearing and to have access to exculpatory evidence. An order requiring production of information is consistent wit the parties' mutual obligation to share information as part of their overall good-faith bargaining obligation.

The Respondent notes that in determining whether good cause exists to grant pre-hearing discovery, Commission Examiners have strongly considered the complexity of the case. Good cause has been found for pre-hearing discovery in cases where the hearing would be unnecessarily protracted and the record would be unduly burdened in the absence of discovery. The Respondent states that this case is sufficiently complex to warrant pre-hearing discovery. The complaint alleges violations of 3 different statutory provisions that involve over 25 incidences of prohibited practices, with numerous witnesses, meetings and documents involved. Without any of the Union's documents, written statements or notes relating to all of the meetings and communications alleged in the complaint, the City cannot understand the events from the perspective of the Union. The Union has sole possession of this information, just as in STATE OF WIS. (DEPT. OF EMPLOYMENT RELATIONS), DEC. NO. 22733-A (MCLAUGHLIN, 11/85), where the Union was ordered to produce its accounting and other records in a fair share complaint case.

The Respondent notes that the requested information pertains primarily to the Union's perception of the facts that led to the allegations in the first place. The City cannot gain advance notice of evidence to be used against it prior to hearing if it is denied the opportunity to review this evidence. Its due process rights would be subverted if the Union were permitted to hide exculpatory information in its possession that might assist the City in preparing its defense. Moreover, production of the requested information is consistent with the parties' mutual obligation to share information as part of their overall good-faith bargaining obligation. The information is not privileged under the lawyer-client privilege or the work-product doctrine. The work-product doctrine is a qualified privilege that gives way upon a showing that the party seeking discovery has substantial need of the materials and cannot obtain them by other means without undue hardship. The requested information has been substantially generated from the Union's internal investigation of these allegations and it is the only source from which the City may obtain such information.

The Union states that the City's request appears to presume that the proceedings before the Commission are akin to judicial proceedings in which full-blown discovery is permitted. Condoning the type of request made by the City would tend to encourage parties to engage in extensive written discovery before every hearing, thereby changing the nature of practice before the Commission and for the parties. The Union submits that the City's request is overboard and burdensome, and this type of request would be found oppressive and unduly burdensome if made in a state civil proceeding.

The Union has not discovered cases in which the Commission discusses the scope of a union's obligation to respond to an employer's request for information. Because the employer is the requestor, the usual considerations that arise from the duty to represent do not exist. The City bears the burden of showing that the information is relevant and reasonably necessary to its defense in this case. The City

will not be able to show that it has a need for extensive portions of the information, because such information is equally available to the City. For example, the City requests personal notes related to meetings at which City representatives were present. While the City may argue that it has a different perspective regarding what transpired during those meetings, contradictions are standard fare in any hearing. The Union objects to the City's request to notes generated by Lee Gierke, the Union's staff representative, because the work-product doctrine applies to such notes. The Union, in a reply brief, states that it has already shared with the City far more than adequate notice regarding the factual basis for its complaint by a detailed complaint and 23 separate attachments to the complaint.

Formal discovery is the exception rather than the rule in administrative proceedings. NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28909-A (NIELSEN, 11/96). The Commission has found good cause for pre-hearing discovery where the Commission was concerned that without pre-hearing discovery, the hearing would be "unnecessarily protracted and the record will be unduly burdened." MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 18408-A (WERC, 10/81). Pre-hearing discovery is likely to enhance case preparation and shorten the hearing. As Examiner Burns noted in D.C. EVEREST AREA SCHOOL DISTRICT, DEC. NO. 29946-C (9/00), because pre-hearing discovery is the exception rather than the rule, it must be concluded that neither enhancement of case preparation, nor the shortening of hearing, is sufficient in and of itself to provide "good cause" to order pre-hearing discovery. Moreover, a party who has good cause to argue "surprise" may seek an adjournment of the hearing or request a continuation or additional days of hearing.

The Examiner is not convinced that the City has demonstrated a need for pre-hearing discovery. There is no indication of how long the hearing would likely be, or whether the record would be unduly burdened. Moreover, the City admits that it seeks information relating to the Union's perception of the facts, which it will have an opportunity to hear at hearing. The City has the right to cross-examine witnesses and rebut or offer countervailing evidence. Parties frequently have different perceptions of the facts or they would not necessarily have a dispute or litigation. The City's attempt to obtain work-product information prepared by Gierke is beyond the reach of discovery.

The Respondent has not presented a compelling case to be an exception to the rule against pre-hearing discovery. Accordingly, the Respondent's Motion is denied.

Dated at Elkhorn, Wisconsin this 24th day of October, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

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