STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO,** Complainant,

vs.

**STATE OF WISCONSIN DOA-OSER,** Respondent.

Case 665
No. 64450
PP(S)-350

# Decision No. 31271-B

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**Appearances:**

**Kurt C. Kobelt**, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO.

**David J. Vergeront**, Chief Legal Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of State of Wisconsin DOA-OSER.

## ORDER ON REVIEW OF EXAMINER'S DECISION

On March 31, 2006, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, concluding that the Respondent State of Wisconsin DOA-OSER (State) had not refused to bargain in good faith by failing to provide the Complainant Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO (WSEU or Union) with the names and addresses of current bargaining unit members. Therefore, she dismissed the alleged violation of Secs. 111.84(1)(a) and (d), Stats.

On April 17, 2006, the WSEU filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. The parties thereafter filed written argument in support of and in opposition to the WSEU's petition for review, the last of which was filed on June 22, 2006.

For the reasons set forth in the Memorandum that follows, we affirm the Examiner's decision but depart on one element of her reasoning. Contrary to the Examiner, we conclude that names and addresses of bargaining unit members are presumptively subject to the employer's duty to disclose information that is relevant and reasonably necessary for a union to carry out its responsibilities as exclusive bargaining representative. However, we agree with the Examiner that the stipulated purpose for which the WSEU wanted the information here, i.e., campaigning for votes in a Commission-directed representation election, does not fall within the WSEU's statutory role as exclusive bargaining representative. Accordingly, the presumption favoring disclosure is overcome in this case, and the State had no obligation to furnish the requested information for this purpose.

Having considered the evidence and the arguments of the parties, the Commission makes and issues the following

## ORDER

The Examiner's Findings of Fact, Conclusions of Law, and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

**State of Wisconsin DOA/OSER**

## MEMORANDUM ACCOMPANYING ORDER

### Summary of the Facts

The parties stipulated to the facts, which can be summarized in relevant part as follows.

Until March 10, 2005, WSEU was the certified collective bargaining representative of a bargaining unit comprising several hundred law enforcement employees of the State. On that date, the Commission completed a mail ballot election process in which a different union, the Wisconsin Law Enforcement Association (WLEA), was selected to represent the bargaining unit by a majority of bargaining unit members who voted.

Prior to the election, the WLEA had sought to obtain from both the Commission and the State the names and home addresses of all bargaining unit members in order to communicate with them about the upcoming election.[1] The Commission provided the WLEA with the list of employee names. However, the State refused to provide the home addresses without individual employee authorization, based upon the State's interpretation of a recent privacy-based revision to the state's public records law, viz., Sec. 19.36(10(a), Stats. The State as well as WSEU also objected to the Commission furnishing the address information to WLEA. Before the Commission could hear and resolve that issue, the WLEA withdrew its request and neither the Commission nor the State provided the home address information to WLEA prior to the election.

By electronic mail dated January 21, 2005, while the election petition was pending before the Commission, the WSEU requested the State to provide the WSEU with "a mailing list with names, addresses and classifications of the law enforcement bargaining unit that we represent." The WSEU wanted that list in order to communicate with bargaining unit members about the upcoming election.

By electronic mail dated January 24, 2005, the State denied the WSEU's request, citing the State's intention to remain "neutral" during the election and the State's belief that WSEU had "no collective bargaining or contract administration basis" for requesting the information, but rather wanted it only for purposes of the election. In its response, the State also pointed out that its contract with WSEU required the State to provide various lists containing employee

[1] Pursuant to standard procedures, the State provided the Commission with a list of employee names in order for the Commission to determine whether the WLEA's petition had been supported by the requisite 30% "showing of interest" among the bargaining unit. Also pursuant to standard procedure, the State provided the Commission with the home addresses of those members of the bargaining unit who were eligible to vote in the election, in order that the Commission could conduct a mail ballot election.

home addresses, including a provision requiring a list with addresses on a semi-annual basis and a provision that the State supply biweekly payroll information indicating the names and addresses of employees added to the unit. The State indicated it would "continue to comply with that provision … and will provide those lists in due course." Pursuant to the contractual provisions, the State had supplied WSEU with a seniority list of bargaining unit employees, including a list containing addresses, in July 2004. On January 27, 2006, three days after refusing the WSEU's request and several weeks before the election was conducted, the State supplied to WSEU the contractually-required list of bargaining unit members' names and addresses.

## The Examiner's Decision and the Positions of the Parties

The Examiner noted that the Commission has stated that information related to "wages" and "fringe benefits" is "presumptively relevant" to the duties of an exclusive bargaining representative, so that a union need not specifically justify each request for such information on a case by case basis. However, contrary to WSEU's argument, the Examiner held that the names and addresses of bargaining unit members were not "presumptively relevant" to an incumbent union's duties. Accordingly, the Examiner required the Union to demonstrate the relevance of the requested information. Here it was undisputed that the Union sought the information in the instant situation in order communicate and campaign regarding the upcoming election. The Examiner viewed that purpose as unrelated to the Union's bargaining or contract administration duties and hence concluded that the State had no duty to furnish the information.

The WSEU challenges the Examiner's decision on essentially two grounds. First, WSEU argues that the names and addresses of bargaining unit members, like wage and fringe benefit information, are presumptively relevant to a union's ability to carry out its negotiations and contract administration duties. As such, WSEU should not have been required to demonstrate a specific purpose for obtaining that information. The WSEU contends that this issue (whether names and addresses are presumptively relevant) is one of first impression for the Commission, and that the Commission should do as it has done before in similar cases, i.e., follow the considerable body of precedent that has arisen under the National Labor Relations Act (NLRA) holding that names and addresses of unit members are presumptively relevant.. Second, WSEU contends that its purpose in seeking the names and addresses in this situation, i.e., to persuade bargaining unit members of the value of retaining WSEU's representational services, is organizing activity that has been held to be a legitimate basis for requesting information under the NLRA.

The State argues that the Examiner correctly decided that it had no duty to furnish the information for the purpose WSEU advanced here. In addition, the State argues that the Commission does not follow NLRA precedent regarding access to employee addresses in an

election context. The State notes that the Commission has thus far not followed the practice of the National Labor Relations Board (NLRB), which requires employers in election cases to provide the union(s) on the ballot with a so-called "Excelsior list" of employee names and addresses for use in communicating with bargaining unit members about the election. In addition, the State claims that the recent amendment to the Wisconsin public records law, contained in Sec. 19.36(10)(a), Stats., precludes the State from giving WSEU or anyone else employee address information unless specifically authorized by the employee or unless required by a collective bargaining agreement. Finally, the State argues that the WSEU has limited or waived whatever statutory right it may have to this information, by contractually agreeing to receive the information in the time frames and for the purposes set forth in the contract.

In responding to the State, the WSEU notes that the NLRB's Excelsior rule governing access of unions who are petitioning for representation has nothing to do with an established representative's right to information pursuant to the employer's duty to bargain. As to waiver, WSEU cites the prevailing principle that a waiver of bargaining rights must be "clear and unmistakeable." In this case, according to WSEU, there is no such waiver, because the contract does not expressly prevent the Union from requesting names and addresses for purposes other than monitoring dues receipts and seniority, nor does it expressly prevent the Union from requesting the information at intervals other than those required under the contract.

## Discussion

The Examiner properly held, in accordance with longstanding precedent, that the State's duty to bargain requires it to furnish information requested by a union where the information is relevant and reasonably necessary for the union to carry out its negotiations and contract administration duties. STATE OF WISCONSIN, DEC. NO. 17115-C (WERC, 3/82). She then held that the WSEU's request for the names and addresses of bargaining unit members for purposes of campaigning for votes in the upcoming Commission-directed election did not meet that standard.

We agree with WSEU that the names and addresses of bargaining unit members, like wage and fringe benefit information, is presumptively within the State's duty to disclose pursuant to its duty to bargain in good faith under Sec.111.84(1)(d), Stats. The purpose of such a presumption is to encourage employers generally to comply with requests for information of these kinds without demanding specific justifications from the union. This in turn discourages case by case litigation when such requests are made. As to whether unit members' names and addresses ought to fall within a presumption of disclosability, we agree

with the National Labor Relations Board (NLRB) that is does. We adopt the following rationale advanced by the Second Circuit Court of Appeals, enforcing the NLRB's order in the seminal private sector decision on the subject, PRUDENTIAL INSURANCE COMPANY V. NLRB, 412 F.2D 77 (2ND CIR. 1969):

> It seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf it acts. Thus, a union must be able to inform the employees of its negotiations with the employer and obtain their views as to bargaining priorities in order that its position may reflect their wishes. ... Further, in order to administer an existing agreement effectively, a union must be able to apprise the employees of the benefits to which they are entitled under the contract and of its readiness to enforce compliance with the agreement for their protection.

412 F.2d at 84. The National Labor Relations Board (NLRB) has continued to apply the "well-settled" presumption to information regarding employee names and addresses. See, e.g., ETHAN ENTERPRISES, INC., 342 NLRB NO. 15 (2004).

The presumption relieves the requesting union of the burden of establishing "proofs of relevancy or necessity," and instead places "the burden ... on the employer to justify its non-disclosure." MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93). It is apparent, however, that the presumption is not irrebuttable. If the circumstances make it plain that the information requested is not relevant or reasonably necessary for the union to carry out its duties as collective bargaining representative (and the employer bears the burden of so proving), then the information need not be supplied.

In this case, the WSEU has stipulated that it sought the names and addresses on January 21, 2005 for purposes of communicating with unit members to persuade them to vote for the WSEU in the upcoming representation election. Even without this stipulation, the circumstances in which the request was made warranted the State's assumption that the WSEU's purpose was related to the election campaign. The purpose for the information, in short, was clear in the circumstances. The question, therefore, is whether that undisputed purpose falls outside what would be relevant and reasonably necessary for WSEU to carry out its statutory duties as collective bargaining representative.

A union that is an exclusive bargaining representative has the responsibility of negotiating contracts with the employer that govern the wages, hours, and working conditions of bargaining unit members. Once negotiated, the union must administer the contract, which involves assisting bargaining unit members in enforcing their rights under the contract and otherwise monitoring the employer's compliance with the agreement. The union and the

employer have a continuing obligation to negotiate in good faith even while a contract is in effect, though the scope of that obligation will vary from unit to unit depending upon the what the contract covers or otherwise provides.

Fulfilling the foregoing statutory responsibilities usually costs money. Therefore, we agree with WSEU that a union may have "institutional" interests, such as encouraging membership and collecting dues, that are closely related to the union's effectiveness in bargaining and contract administration and may warrant disclosure of information about bargaining unit members that is not tied to a specific bargaining proposal or grievance. As WSEU points out, the court in PRUDENTIAL, in upholding the NLRB's order that the employer furnish the union with the names and addresses of bargaining unit members, was undeterred by the fact that "the Union may use this information to solicit new members within the unit. . . . [U]nion solicitation is itself hardly an evil – especially where, as here, the union is already the exclusive bargaining representative of the employees it is soliciting." 412 F.2d at 85. Indeed, in PRUDENTIAL, the union's primary interest was in obtaining the names and addresses of employees who were in the unit but who had not joined the union, so that the union could solicit their support and thereby bolster the union's fiscal status. Like the court in that case, we view such an "institutional" purpose, which directly strengthens the union's ability to negotiate and enforce the contract, as well within the realm of what is "relevant" to the union's statutory responsibilities. That sort of institutional purpose would not defeat the presumption of entitlement.

However, while some "institutional"and/or organizing purposes can meet the standard for requiring disclosure, not every institutional/organizing purpose will bear the necessary relationship. In this case, WSEU's obvious and acknowledged institutional purpose was to retain its status as exclusive bargaining representative *in the future*. Unlike the situation in PRUDENTIAL, where the incumbent union was soliciting additional members among a group of employees it already represented and for whom it had current responsibilities, the WSEU's purpose here had nothing to do with carrying out its duties as the *present* collective bargaining representative. Rather, WSEU, like WLEA, was seeking the names and addresses of employees who *potentially* would fall within its *future* statutory responsibilities. While this is certainly a legitimate and worthy purpose for a union, including an incumbent union, to seek such information, it does not flow from WSEU's current representative status and therefore is not a basis upon which we can compel the State to provide the information.

Accordingly, we conclude that the State did not violate the law in refusing to provide names and addresses of unit members in response to the WSEU's January 21 request.

Nothing in this decision should be read to undermine the WSEU's or any other incumbent union's presumptive entitlement to the names and addresses of bargaining unit members, or to a union's actual entitlement to that information, where – as is normally the case – the information facilitates communicating with unit members about wages, hours, and

working conditions, contractual issues, and other matters within an incumbent union's statutory responsibilities. Indeed, there could be situations where an incumbent union seeks such information at a time that coincides with a pending decertification election, but where the union can establish that the information is related to its current responsibilities. In this case, once the State pointed to circumstances dispelling the presumption favoring disclosure, the WSEU did not proffer any such non-election based purpose. A union's entitlement to information in an election context is a function of the Commission's administration of its election procedures, interpreted in light of the pertinent provisions of the state's public records law, and would apply equally to all parties to the election.

Dated at Madison, Wisconsin, this 7th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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