STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANKLIN SECRETARY / OFFICE ASSISTANTS / EDUCATIONAL ASSISTANT BARGAINING UNIT, Complainant,

vs.

FRANKLIN SCHOOL DISTRICT, Respondent.

Case 93
No. 68541
MP-4473

Decision No. 32711-A

Appearances:

Christine Galinat, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin, 53708, appearing on behalf of the Franklin Secretary / Office Assistants / Educational Assistant Bargaining Unit.

Mark L. Olson and **Geoffrey S. Trotier**, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, 53202, appearing on behalf of the Franklin School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 6, 2009, the Franklin Secretary / Office Assistants / Educational Assistant Bargaining Unit filed a complaint with the Wisconsin Employment Relations Commission, asserting that the Franklin School District had committed certain prohibited practices in violation of Sections 111.70(3)(a)1 and 111.70(3)(a)4 of the Municipal Employment Relations Act. The Commission appointed Danielle L. Carne to act as Examiner, to make and issue Findings of Fact and Conclusions of Law and to issue appropriate Orders. On April 23, 2009, the Franklin School District answered the complaint, denying any alleged violation and making certain affirmative defenses. A hearing on the matters at issue was held in Franklin, Wisconsin, on July 8, 2009. A transcript of the proceeding was made and received by the undersigned on July 17, 2009. Thereafter, the parties filed initial and reply briefs, that last of which was received on September 21, 2009, whereupon, the record was closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following

FINDINGS OF FACT

1. At all relevant times, the Franklin Secretary / Office Assistants / Educational Assistant Bargaining Unit ("Union") has been a labor organization that represents, for collective bargaining purposes, full-time and part-time secretaries, office assistants, and educational assistants of the District, as well as the accounting specialist.

2. At all relevant times, Ted Kraig ("Kraig") has been the UniServ Director assigned to provide assistance to the Union. Among other things, it is Kraig's responsibility to participate in the bargaining and enforcement of collective bargaining agreements to which the Union is a party.

3. At all relevant times, the Franklin School District ("District") has been a municipal employer operating a public school system.

4. At all relevant times, Judith Mueller ("Mueller") has been the Director of Human Resources for the District. Among other things, it is Mueller's responsibility to oversee the bargaining and enforcement of collective bargaining agreements to which the District is a party.

5. At all relevant times, the Union and the District were parties to a collective bargaining agreement in effect from July 1, 2007 through June 30, 2009 ("Agreement"). Article VIII of the Agreement provides, in pertinent part, the following:

ARTICLE VIII – PROMOTIONS AND TRANSFERS

. . .

Section 2:
Promotions to another job classification or from part-time to full-time shall be determined on the basis of relative ability, experience, and other qualifications as substantiated by an employee's personnel record including his/her performance appraisals. The District shall investigate all internal references provided by current employees. Where qualifications are equal, seniority shall be the determining factor.

For purpose of enforcing the seniority clause of this provision, the Union shall have the right to review documentation of the results of any ability tests taken by the senior candidate and the successful candidate.

. . .

Section 5:
With regard to determinations as to qualifications, the decision of the Superintendent of Schools shall be final.

. . .

6. On September 19, 2008, the District posted a notice seeking applicants for a high school office assistant position ("Office Assistant"). The Office Assistant position is full-time, eligible for benefits, and a part of the bargaining unit represented by the Union.

The Office Assistant is primarily responsible for working with parents, students, and District personnel on issues related to student attendance at the high school. Among other things, the position is required to answer the telephone, greet visitors, file, photocopy, and distribute the mail, to draft and type memoranda, correspondence, reports, and newsletters, to organize and maintain student immunization and attendance records, to manage the health room, to supervise students in the library, lunchroom, hallways, and other school grounds, and to be familiar with all classroom and school rules and procedures and to provide assistance and direction to students.

At the time when the District was seeking to hire an Office Assistant in 2008, District representatives intended to revise the job duties in a way that would give the position greater responsibility. One of the specific things District representatives wanted was for the new Office Assistant to create a newsletter article more than one time per year. District representatives also discussed requiring greater analysis of the student attendance data from the Office Assistant.[1]

7. In response to the posting, the District received applications both from internal candidates already employed by the District and external candidates not employed by the District. Ultimately, after a multi-step screening process, the District hired Laurel Waters, one of the internal candidates.

8. Soon thereafter, Kraig began to learn that members of the bargaining unit had concerns about the hiring process through which the Office Assistant position had been filled. Three of the internal candidates, namely Denise Slawney ("Slawney"), Terri Tubbs ("Tubbs"), and Gail Klatt ("Klatt"), each had more seniority with the District than the successful candidate. Slawney, the most senior candidate, had filled-in for the position, on a substitute basis, for weeks at a time in the years leading up to the posting, and she consistently had received positive feedback from the District with regard to her substitute work in the position. Yet Slawney, along with Tubbs and Klatt, had not reached the interview stage during the

[1] District representatives designed the testing protocols described in Finding of Fact 11 to account for changes the District contemplated making to the Office Assistant position.

hiring process. Kraig also learned that bargaining unit members who had applied for the position were particularly concerned about a customer service orientation assessment that had been administered by the District as part of the screening process. Individuals who felt they had years of experience providing excellent customer service as District employees understood that they had not achieved satisfactory results on that assessment. Some bargaining unit members indicated to Kraig that they suspected that the selection process for the Office Assistant position had been engineered to produce a specific outcome.

9. Kraig took steps to investigate the concerns expressed by bargaining unit members with regard to the District's selection process. As part of his preliminary investigation, Kraig obtained releases from Slawney, Tubbs, and Klatt for the purpose of reviewing their personnel files. Noting the generally positive performance evaluations in Slawney's file, which evaluations included positive feedback specifically regarding Slawney's prior work as a back-up in the Office Assistant position, reinforced Kraig's belief that Slawney should have been a strong candidate for the position.

10. The Union filed grievances on behalf of Slawney, Tubbs, and Klatt, which grievances asserted that the District had violated the Agreement with respect to the filling of the Office Assistant position.[2]

11. On October 22, 2008, Union and District representatives participated in Step 1 meetings with regard to the three grievances related to Slawney, Tubbs, and Klatt and the Office Assistant position. Each grievant attended a meeting that was also attended by Kraig, Union president Barb Gallagher ("Gallagher"), high school principal Mike Cady ("Cady"), associate principal John Budish, and associate principal Chad Nelson. At these meetings, Cady provided and explained documentation that summarized the following information pertinent to the selection process that had been followed by the District in filling the Office Assistant position:

At the first stage of the selection process, District representatives had reviewed the applications, letters of interest, and references from the fourteen applicants for the position. The personnel files of internal applicants were also reviewed at this stage.

The second stage of the selection process involved an "SRI" or "perceiver" test. This test was used to assess an individual's ability to provide good administrative support for the District. The District imposed a cut-off score for the perceiver test, barring any candidate who scored less than twenty-four from advancing to the next stage of the screening process. Three of the external applicants were eliminated at this stage of the process. As current employees of the District, Slawney, Tubbs, and Klatt already had adequate perceiver test scores in their personnel files and were, therefore, among the eleven candidates that advanced to stage three of the selection process.

[2] Later, after the events that are relevant to this case, the Union elected only to pursue the grievance related to Slawney's effort to be promoted into the Office Assistant position. The Union based this decision on the fact that Slawney was the most senior candidate and its assessment that she was also the most qualified candidate.

The third stage in the selection process required the remaining eleven candidates to take three written skills tests. One of those skills tests was a document preparation test. The purpose of the document preparation test was to evaluate a candidate's writing ability and proficiency with Microsoft Word. Having received input from a high school associate principle and working from a test that previously had been used by the District, Mueller designed this test. The test provided candidates with information in the form of seven bullet points, and required candidates to author a mock newsletter regarding attendance-related issues, incorporating certain substantive and design concepts. Points were awarded on a four-point scale for conventions (such as punctuation), word choice, and visual appeal and then averaged into a final score. Candidates who received 3 to 4 points received a "recommended" rating for the document preparation test; candidates who received a score of 2.5 to 2.9 received a rating of "conditionally recommended"; and candidates who received a score of 2.4 or less received a rating of "not recommended". Mueller scored the document preparation test, with the identities of the test-takers obscured.

Another skills test administered by the District was a data management test intended to evaluate a candidate's proficiency with Microsoft Excel. The test was designed by an administrative assistant employed at one of the District's elementary schools. Candidates were asked to create an Excel spreadsheet using provided attendance-related data. The points were awarded for each of the eight steps completed on the test, including applying certain mathematical functions, using colors to highlight certain portions of the spreadsheet, and creating a label document. The total number of points was then divided in half. Candidates who received four points or more received a "recommended" rating for the data management test; candidates who received a score of two to three received a rating of "conditionally recommended"; and candidates who received a score of zero to one received a rating of "not recommended". Mueller also scored this test, with the identities of the test-takers obscured.

The third skills test administered by the District was a customer service orientation assessment, the purpose of which was to reveal a candidate's capacity to provide good customer service. The assessment and the accompanying scoring guide were purchased by the District from a private vendor. The assessment asked candidates to rate a series of declaratory statements – one such statement read, for example, "sometimes I can be perceived as being selfish" – based on whether they strongly agree, agree, are neutral, disagree, or strongly disagree with the statements. Applicants were required to state whether they tended to be selfish or generous, whether they enjoyed helping others, whether they could be cold and distant, and whether they could work as part of a team. The pre-established scoring system assigned a certain number of points to each possible response on the assessment, and candidate performance was measured on a scale of 100. Candidates who received a score of 79 or greater on the assessment received a rating of "recommended"; candidates who received a score of 77 to 78 received a rating of "conditionally recommended"; and candidates who received a score of 76 or less received a rating of "not recommended". Scores for the customer service orientation assessment were totaled by Mueller's administrative assistant.

The documentation provided by the District to the Union during the grievance meeting also summarized the scores achieved by Slawney, Tubbs, Klatt, and the successful candidate for the Office Assistant position, Waters. The documentation revealed that these candidates had received the following scores for the document preparation test:

Candidate	Conventions	Word Choice	Visual Appeal		Recommendation
Slawney	2	2	1.5	1.8	Not Recommended
Tubbs	2	2	2	2	Not Recommended
Klatt	3	1	2	2	Not Recommended
Waters	3	3	4	3.3	Recommended

They received the following scores for the data management test:

Candidate	Points	Recommendation
Slawney	5	Recommended
Tubbs	6	Recommended
Klatt	0	Not Recommended
Waters	3	Conditionally Recommended

And they received the following scores for the customer service orientation assessment:

Candidate	Points	Recommendation
Slawney	75	Not Recommended
Tubbs	76	Not Recommended
Klatt	72	Not Recommended
Waters	88	Recommended

The recommendations that were assigned to each candidate for each of the three skills tests were then converted to point values, which were added into one overall testing score for each candidate. The District gave two points for a "recommended" rating, one point for a "conditionally recommended" rating, and zero points for a "not recommended" rating. The documentation provided by the District to the Union in the grievance meeting revealed that Slawney, Tubbs, Klatt, and Waters had received the following overall scores:

Candidate	Service Orientation Test	Document Preparation Test	Data Management Test	Points
Slawney	NR-0	R-2	NR-0	2
Tubbs	NR–0	R-2	NR-0	2
Klatt	NR-0	NR-0	NR-0	0
Waters	R-2	CR-1	R-2	5

The documentation provided by the District at the grievance meetings further revealed that in-person interviews had been granted to individuals with a total score of three points and

greater. Based on this requirement, seven of the eleven applicants, including the three grievants, were eliminated through the skills testing stage of the screening process and, therefore, not granted interviews.

12. Following the Step 1 grievance meetings, Kraig sent the following correspondence, on October 29, 2008, to Mueller:

> Dear Dr. Mueller:
>
> Pursuant to Wis. Stat. § 111.70, in order to investigate and process a grievance, our Union hereby requests the following information:
>
> 1) A copy of the job posting and a complete job description for the High School Attendance Secretary position.
>
> 2) Complete copies of all tests administered by the District to applicants for the position of High School Attendance Secretary.
>
> 3) All results of the above referenced tests, including the full and complete answers/responses to each test question by the following people: each of the three grievants, each of the four applicants interviewed by the District for the position.
>
> 4) All other application materials provided by the following people: each of the three grievants, each of the four applicants interviewed by the District for the position.
>
> 5) The complete personnel records of the following people: each of the three grievants, each of the four applicants interviewed by the District for the position.
>
> 6) A complete record of the District's reference checks for the following people: each of the three grievants, each of the four applicants interviewed by the District for the position.
>
> 7) Any and all record of the deliberation and decision making process for choosing an applicant to fill the position, including but not limited to documents used for evaluating applicants and notes taken by those involved in the selection process.
>
> 8) Copies of all tests administered by the District within the past two years to applicants for positions in the Secretary, Office Assistant and Educational Assistant bargaining unit.

Please provide this information no later than November 6, 2008.

If any part of the information we are requesting is unavailable or denied, please provide a written explanation. Our Union will accept the remaining information without prejudice to our position that we are entitled to all the information we have requested.

Please do not hesitate to contact me if you have any questions.

. . .

13. In response to Kraig's document request, Mueller sent the following correspondence dated November 10, 2008:

Dear Mr. Kraig:

This letter will represent the position of the Franklin Public School District in response to your letter to me dated October 29, 2008. That letter was a request for information regarding a vacancy which has been filled by the District for the position of the Office Assistant.

In response to your October 29, 2008 request for information, I am forwarding, here, the following information:

- September 19, 2008 District Posting of Position for the Office Assistant vacancy.

- Job Description for the position of Office Assistant, which was posted in the District in September, 2008.

- Skills Testing results for the Office Assistant vacancy, which was posted in the District in September, 2008.

- Relevant language from the contract between the District and the Secretary Aide union, specifically Article VIII—Promotions and Transfers.

The contract language forwarded here clearly defines the scope of the District obligation to provide information to the Union regarding promotions and transfers within the bargaining unit. The enclosed information is in conformance with the language of Article VIII, and fulfills the obligation of the District to provide information to the Union regarding promotions and transfers within the bargaining unit. The District is not contractually (or, by extension, legally) obligated to provide further information to the Union regarding this issue, and the filling of this vacancy.

> Let me refer you to the language of Article VIII, Section 5 of the contract. This language states:
>
> > "With regard to terminations as to qualification, the decision of the Superintendent of Schools shall be final."
>
> This language unequivocally states that the decision of the District in the matter is to be considered final and binding upon the parties; while the Union may not agree with the decision of the District regarding the filling of this Office Assistant vacancy, the determination of the Superintendent regarding the qualifications of the candidate who was chosen to fill the position cannot be challenged under the contract. Therefore, your request for information which exceeds this obligation of the District pursuant to Article VIII of the contract is clearly inconsistent with the contractual obligations of the District, and with other contractual directives which address and limit the ability of the Union to challenge District decisions regarding promotions and transfers within the bargaining unit.
>
> Please feel free to contact me if you have questions regarding the position of the District as stated here, or regarding the content of the documents which are forwarded with this letter.
>
> . . .

The "[s]kills [t]esting results" referenced in and provided with Mueller's letter was essentially the outline of the screening process that had been provided to the Union by the District at the prior grievance meetings, but the document had been enhanced to include testing scores for all eleven candidates who had taken the skills tests, rather than just the scores for Slawney, Tubbs, Klatt, and Waters.[3]

14. Subsequently, on November 17, 2008, Kraig and Mueller discussed the Union's document request over the telephone. During that conversation, Mueller expressed general uncertainty as to whether the District was obligated, under Section 111.70, Wis. Stats., to provide the requested information to the Union. Mueller also expressed specific concern about releasing the service orientation assessment to the Union, because it had been purchased from a vendor and the District did not want to be precluded by dissemination of the test from being able to use it in the future. Kraig suggested that the Union would be willing to enter into a confidentiality agreement that would limit the distribution of the requested information to Kraig, Gallagher, and the Union's legal counsel and would limit the use of the information to the evaluation and processing of the grievances that had been filed on behalf of Slawney, Tubbs, and Klatt. Mueller indicated that she would consider the information request further

[3] In this document, only the scores achieved by Slawney, Tubbs, Klatt, and Waters were specifically identified as belonging to those candidates; the other seven scores were anonymous.

and consult with the District's attorney about the matter. However, in a subsequent conversation, Mueller indicated to Kraig that the District was not willing to provide any additional information beyond that which had been included with her correspondence of November 10, 2008, including under the terms of a confidentiality agreement.

15. The Union never provided a proposed confidentiality agreement to the District, and the parties never entered into such an agreement with regard to the information that had been requested by the Union.

16. In late November of 2008, Mueller sent an e-mail message to Kraig and Gallagher, offering to them the opportunity to meet in Mueller's office for the purpose of reviewing the testing battery and results. Kraig and Gallagher went to Mueller's office for that purpose on November 25, 2008. The meeting lasted for approximately thirty minutes. Mueller, Kraig, and Gallagher initially discussed several issues unrelated to the information request, such as plans for an upcoming bargaining session. Then, for some period of time between ten and thirty minutes, Mueller, Kraig, and Gallagher reviewed and discussed testing materials that had been used in the Office Assistant screening process.

During the discussion regarding the testing materials, Mueller showed to Kraig and Mueller copies of each of the three tests. Mueller discussed the tests generally with Kraig and Gallagher and described how each one had been used to determine whether the applicants were qualified for the Office Assistant position. For the document preparation and data management tests, Mueller showed Kraig and Gallagher sample results, comparing high-scoring answers with lower-scoring answers. Mueller did not identify any response as belonging to a specific candidate. For the customer service orientation assessment, Kraig and Gallagher expressed specific interest in understanding how candidate responses had been evaluated. Kraig and Gallagher had noted during the meeting that some of the questions on the assessment seemed subjective in nature. Mueller, however, did not share with Kraig and Gallagher any candidate responses from the service orientation assessment; nor was Mueller able to share the scoring guide the District had purchased with the assessment, because it was in Mueller's administrative assistant's office.

During this meeting, Kraig and Gallagher viewed the shared information from where Mueller held it, in her hands. Mueller did not offer to allow Kraig and Gallagher to handle the documents; nor did they ask to do so. Kraig and Gallagher were allowed to ask questions regarding the test materials, and they did so. Although Kraig and Gallagher were not instructed that they were prohibited from taking notes, they did not do so. They also did not receive copies of any documents reviewed during the meeting. At the end of the meeting, Kraig made what Mueller describes as a "last ditch effort" to get the testing materials: he asked Mueller if she would allow them to take copies of the documents that had been reviewed during the meeting, and Mueller responded that she would not.

17. The Union did not seek to obtain copies of the skills tests administered by the District through any other source, either by purchase directly from a vendor in the case of the

service orientation assessment or by obtaining the data management test from the District secretary who had developed that particular test and who was also a member of the bargaining unit.

18. The Union did not seek to have the two bargaining unit members who were interviewed for the position, one of whom was the successful candidate, release their personnel records for review directly to the Union.

19. The District had sufficient explanation as to why the Union wanted the information it requested. The series of events which included the District's process for filling of the Office Assistant position, the Union's filing of the Slawney, Tubbs, and Klatt grievances, the Step 1 grievance meetings involving District and Union representatives, the District's receipt of the information request from the Union, and the in-person and telephone conversations regarding the information request between Kraig, Gallagher, and Mueller, gave the District reasonable opportunity to understand that the Union wanted the information it had requested to be able to determine whether the Office Assistant position had been filled in accordance with Section VIII(2) of the Agreement. After the meeting in Mueller's office, the Union did not provide to the District any additional explanation as to why it wanted the information it had requested. Further, the District neither requested any additional explanation as to why the Union wanted the information, nor did it indicate to the Union that it did not understand why the information had been requested.

20. Section VIII(2) of the Agreement between the District and the Union does not constitute a waiver of the Union's statutory right under the Municipal Employment Relations Act to obtain relevant and reasonably necessary to carrying out its representational duties.

21. The information requested by the Union is relevant and necessary for the Union's ability to carry out its representational duties.

22. With the appropriate safeguards in place, the District's confidentiality interests do not outweigh the Union's interest in obtaining the requested documents.

On the basis of the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

1. The District, by refusing to provide the information requested by the Union in correspondence of October 29, 2008, has committed prohibited practices and, more particularly, has refused to bargain collectively with the Union in violation of Section 111.70(3)(a)4, Wis. Stats., and has, derivatively, interfered with municipal employees in the exercise of their rights guaranteed in Section 111.70(2), Wis. Stats., in violation of Section 111.70(3)(a)1, Wis. Stats.

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

ORDER

It is hereby ORDERED that

1. The District shall cease and desist from refusing to provide the information requested by the Union.

2. The District shall, within twenty (20) days of the date of this decision, provide any information requested in Kraig's correspondence dated October 29, 2008, that has not yet been provided. The information shall be provided under the following conditions:

a. The information shall only be viewed by the president of the Union, the UniServ Director assigned to provide assistance to the Union, and legal counsel for the Union.

b. The information shall only be utilized for the limited purpose of processing the existing grievance related to Denise Slawney's effort to be promoted to the Office Assistant position.

c. Any violation of parts 2(a) or 2(b) of this Order shall result in payment of $10,000 by the Union to the District.

d. Any dispute as to whether the Union has adhered to parts 2(a), 2(b), or 2(c) of this Order shall be resolved through the grievance arbitration procedures set forth in the Agreement between the District and the Union. Although the Agreement defines a grievance as "a dispute concerning the interpretation or application of [the Agreement]", the grievance procedure shall also apply to any dispute regarding the confidentiality provisions set forth as parts 2(a), 2(b), and 2(c) of this Order. Insofar as the provision in the Agreement setting forth the grievance arbitration procedures implies that grievances may only be brought by the Union, that mechanism shall also be available to the District for the purpose of resolving disputes related to the confidentiality provisions set forth as parts 2(a), 2(b), and 2(c) of this Order.

3. The District shall notify all of its employees represented by the Union of its intent to comply with the Order herein by posting in conspicuous places on its premises, where notices to employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such copies shall be signed by the District's chief negotiator and shall be posted upon receipt of a copy of this Order. Such notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced, or covered by other material.

4. The District shall notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this decision what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin, this 14th day of May, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES REPRESENTED FOR PURPOSES OF COLLECTIVE BARGAINING BY THE FRANLIN SECRETARY / OFFICE ASSISTANTS / EDUCATIONAL ASSISTANT BARGAINING UNIT

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 that:

> WE WILL NOT refuse to bargain with the Franklin Secretary / Office Assistants / Educational Assistant Bargaining Unit by refusing to provide information that is relevant and necessary for the Franklin Secretary / Office Assistants / Educational Assistant Bargaining Unit to carry out its representational duties.

Dated this _____ day of _____, 2010.

By _____
Superintendent
Franklin School District

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY THE FRANKLIN SECRETARY / OFFICE ASSISTANTS / EDUCATIONAL ASSISTANT BARGAINING UNIT FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED, OR OBSCURED IN ANY WAY.

FRANKLIN SCHOOL DISTRICT

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

The focus of this case is the well-settled tenet of labor law that the duty to bargain in good faith requires an employer to supply a union representing its employees with information that is relevant and reasonably necessary for carrying out those representational duties. Commission caselaw consistently has recognized that the duty to bargain set forth in the Municipal Employment Relations Act incorporates this doctrine. *See, e.g.,* MILWAUKEE COUNTY, DEC. NO. 32728-B (WERC, 1/10), MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-B (WERC, 9/98), MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93). The contours of the duty have been set forth repeatedly 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 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.

See, e.g., MADISON METROPOLITAN SCHOOL DISTRICT, *supra*, MORAINE PARK VTAE, *supra*.

It has not been suggested and does not appear as if the information at issue in this case, pertaining to the selection process used by the District to fill the Office Assistant position, is related to wages or fringe benefits. Thus, pursuant to the applicable standard, the requested information is not presumptively relevant and reasonably necessary to the Union's ability to carry out its duties as bargaining agent. Rather, the Union bears the burden of providing proof of relevance and reasonable necessity.

Under the "discovery type" standard applied by the Commission and others,[4] relevance is broadly construed in cases such as this one. As the Commission recently acknowledged, the "relevant and reasonably necessary" standard has come to require, in practice, the disclosure of information that will be "useful" to a union in representing its members. UNIVERSITY OF WISCONSIN SYSTEM, DEC. NO. 32239-B (WERC, 8/09). *See also*, ALLEN STORAGE AND MOVING COMPANY, INC., 2003 WL 430501 (N.L.R.B. DIV. OF JUDGES), PROCTOR & GAMBLE MFG. CO. V. NLRB, 603 F.2D 1310 (9TH CIR. 1978), NLRB V. ACME INDUS. CO., 385 U.S. 432, 437 (1967).

Wavier and Deferral

At the outset, it is necessary to address the District's waiver and deferral arguments. These arguments are rooted in Article VIII(2) of the Agreement, the provision that is the primary focus of this case and worth setting forth here again:

> Promotions to another job classification or from part-time to full-time shall be determined on the basis of relative ability, experience, and other qualifications as substantiated by an employee's personnel record including his/her performance appraisals. The District shall investigate all internal references provided by current employees. Where qualifications are equal, seniority shall be the determining factor.
>
> *For purpose of enforcing the seniority clause of this provision, the Union shall have the right to review documentation of the results of any ability tests taken by the senior candidate and the successful candidate.* [Emphasis added.]

According to the District, the last sentence of the above provision constitutes a waiver of the Union's right, in the context of a promotion dispute, to obtain from the District any information other than that set forth above, regardless of whether the information might be relevant and necessary to the Union's ability to carry out its representational duties. Thus, the District asserts, the Union is entitled only to that information identified in Article VIII(2), which provides for substantially less than that which the Union has requested. Specifically, while the Union has requested copies of tests, answers, application materials, and personnel files, under the Agreement it is entitled only to "documentation of the results of any ability tests taken"; while the Union has requested information concerning the three non-senior applicants who were interviewed by the District but not selected for the position, under the Agreement it is only entitled to information concerning the "senior applicant" and the "successful applicant"; and while the Union has requested that it be allowed to possess copies of documentation, under the Agreement it is only entitled to "review" the available information.

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[4] As has been recognized, *see, e.g.*, TREMPEALEAU COUNTY, DEC. NO. 29598-A (SHAW, 9/99), *aff'd and modified,* 29598-B (WERC, 1/00), 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 National Labor Relations Board and the federal courts in this area.

It is has been well-settled that a waiver of statutory rights by contract must be established by clear and unmistakable evidence. *See, e.g.,* MILWAUKEE COUNTY, *supra,* RIVER FALLS SCHOOL DISTRICT, DEC. NO. 30563 (WERC, 2/03), WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 23805-C (WERC, 11/87), CITY OF APPLETON, DEC. NO. 14615-C (WERC, 1/78). Such evidence can be in the form of contract language, bargaining history, or past practice. ID. The record in this case does not contain any past practice or bargaining history evidence that would support the District's waiver claim. Thus, the focus is on the express or implied meaning of the Agreement.

Contrary to the District's suggestion, I am not persuaded that Article VIII(2) constitutes an express waiver of the Union's statutory right to obtain information, and the arguments presented in the District's post-hearing briefs on this subject illustrate the basis for that conclusion. The District asserts, repeatedly, that Article VIII(2) provides that the District is obligated to allow the Union to access "only" to the information specifically identified in the Agreement. Importantly, however, Article VIII(2) does not feature the word "only". The District's need to augment the provision with such an explicitly limiting term is implicit recognition that the provision falls short of an express waiver.

Nor am I persuaded that the language of Article VIII(2) can be construed as an implied waiver of the Union's statutory right. The thrust of the District's argument here is that the Agreement, by identifying information that *is* available to the Union in promotional situations, implies that the District and the Union have agreed that no other documents shall be available. The interpretive notion of *expressio unius*, however, falls far short of the clear and unmistakable evidence required to support a waiver. Others have held likewise. *See, e.g.,* MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-A (Gratz, 5/88), *aff'd* 24729-B (WERC, 9/88) (finding that a provision in the collective bargaining agreement that required certain types of information to be provided to union did not represent a waiver of the union's statutory right to obtain additional information); NEW YORK TELEPHONE COMPANY, 930 F.2D 1009, 1012 (2D CIR. 1991) (refusing "to find that by creating *a* procedure for access to the relevant personnel data, the parties necessarily intended to make it *the* exclusive procedure, thereby closing off all other avenues for attaining such information"); HAWKINS CONSTRUCTION CO., 210 NLRB 965, 967 (1974) (holding that a provision in a collective bargaining agreement that explicitly gave the union the right to grieve over the discharge of a job steward did not constitute a waiver of the right to grieve over any other employee); UNIVIS, INC. 169 NLRB 37, 39-40 (1968) (holding that a provision in a collective bargaining agreement that provided to the union the right to obtain a copy of the work standard applicable to each incentive job was not a waiver of the right to any additional information concerning the incentive system, such as the time-study data requested by the union); OTIS ELEVATOR COMPANY, 102 NLRB 770, 778 (1953) (holding that the collective bargaining provision expressing the employer's obligation to furnish certain information to the union regarding a wage incentive system could not be read to imply a waiver on the union's part of its statutory right to obtain additional information regarding the system).

I am particularly disinclined to find a waiver based on such a theory where the nature of the right at stake is as basic as it is here. The Commission recently has recognized the fundamental importance of the statutory right to obtain relevant and reasonably necessary information, holding that a contractual provision setting forth protocols for an employee or designee to obtain access to the employee's personnel file was not sufficiently clear and unmistakable to constitute a waiver of that right. MILWAUKEE COUNTY, *supra*. In the present case, the Union's ability to obtain the information it has requested implicates its need to determine whether certain positions are being filled in accordance with the system set forth in the Agreement. As the Union points out, the District's interpretation, if accepted, would bar the Union from accessing personnel files and references in promotion disputes, and this is the very information on which the District is contractually obligated to base its promotional decisions. Further, under the District's interpretation, if the District elected not to require ability tests for a promotion, the Union would not be entitled to any information at all relating to how the promotion decision was made. Such a limitation would leave the Union in a position of having to rely solely on the District's assertions that it had adhered to the Agreement.

The District argues that the last sentence of Article VIII(2) is stripped of meaning if it is not read as a waiver. I disagree that the limitation for which the District advocates is the only possible function of the sentence. It can just as easily be read as establishing a contract-based minimum guarantee that the information referenced therein will be automatically available to the Union, regardless of the circumstances or whether such documents meet the statutory relevant and reasonably necessary standard.

In its reply brief, the District attempts to approach the waiver issue from a slightly different angle. It argues that, if it is not clear that Article VIII(2) constitutes a waiver of the Union's statutory right or if one accept the Union's assertion that it cannot bargain away any right under Section 111.70, Wis. Stats., the provision should be read at least as a waiver of the Union's right to argue the relevancy of any information beyond that referenced in the provision. In other words, the District argues that the parties have bargained relevancy into the Agreement. This is the opposite side of the same coin, and the argument fails on the same basis as the District's statutory waiver argument. Regardless of how Article VIII(2) is interpreted, on its face it does not constitute the clear and unmistakable evidence required to find a waiver.

Throughout its post-hearing arguments, the District is careful to measure the adequacy of the information it has provided in response to the Union's request against what is required under Article VIII(2). Obviously, given the conclusion that Article VIII(2) does not constitute a waiver of the Union's statutory right to obtain relevant and necessary information, that provision will not be used in any part of what follows here as a baseline for evaluating the adequacy of the what the District has provided. Further, inasmuch as I am not persuaded that the District's obligation in this case is confined to the terms of the Agreement, I am also not persuaded that it is necessary or appropriate to defer this matter to arbitration. The language of the Agreement does not clearly address itself to this dispute, as required. *See, e.g.,* SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94). The right asserted by

the Union here is based in the Municipal Employment Relations Act, not in the Agreement between the District and the Union.

Section 111. 70, Wis. Stats.

The Union's claim in this case is that the information it requested in its October 29, 2008 correspondence was necessary and relevant to its ability to process the grievances that had been filed in relation to the Office Assistant position on behalf of Slawney, Tubbs, and Klatt and that the District's failure to provide the information constituted a refusal to bargain in violation of Section 111.70(3)(a)4 and, derivatively, Section 111.70(3)(a)1 of the Municipal Employment Relations Act.[5] The record establishes that the District did provide some information in response to the Union's request. Thus, the focus of this decision is the extent to which the information provided by the District satisfied the Union's request and, given certain defenses raised by the District, the extent to which any failure on the District's part to provide requested information constitutes a statutory violation.

Explanation Accompanying the Union's Information Request

Under the basic principles established in this area, an employer has an obligation to provide information only after a union has made a good faith demand for such information. LA CROSSE SCHOOL DISTRICT, *supra*, MORAINE PARK VTAE, *supra*, MADISON METROPOLITAN SCHOOL DISTRICT, *supra*. The District argues that this case should be dismissed because the Union failed to adequately identify a basis for its request. In other words, the District believes the Union failed to demonstrate to the District what information it was looking for in the documents it had requested or how the requested information was relevant and reasonably necessary to its obligation to carry out its representational duties.

It is clear that an employer has the right to understand the basic nature of an information request. While the degree of specificity required varies, an employer cannot be expected to guess at the object of an information request in order to avoid liability. MORAINE PARK VTAE, DEC. NO. 26859-A (Nielsen, 10/92), *aff'd and modified*, DEC. NO. 26859-B (WERC, 8/93). In the federal arena, it has been recognized that union's "bare assertion" that it needs information, with nothing more, is not adequate. SARA LEE BAKERY GROUP, INC. V. NLRB, 514 F.3D 422, 431 (5TH Cir. 2008). A showing of relevance "must be more than a mere concoction of some general theory which explains how the information would be useful in determining if the employer has committed some unknown contract violation". BRAZOS ELECTRIC POWER CO-OP., INC., 241 NLRB 1016, 1024. It has also been emphasized, however, that the burden placed on the union to provide an explanation establishing relevance has been described as "minimal". US TESTING COMPANY, 160 F.3D 14, 19 (D.C. CIR. 1999).

[5] The basis for the 111.70(3)(a)1, Wis. Stats., allegation is that a failure to bargain in good faith in violation of Section 111.70(3)(a)4, Wis. Stats., necessarily interferes with, restrains and coerces municipal employees and, therefore, also constitutes what is traditionally referred to as a "derivative" violation of Sec. 111.70(3)(a)1, Wis. Stats. WINNEBAGO COUNTY, DEC. NO. 32468-C (WERC, 10/09).

The District insists in its post-hearing submissions that the Union refused to provide any justification, at any time, either orally or in writing, for its information request. It asserts that Kraig stated to Mueller only that the Union was entitled to receive the requested information pursuant Section 111.70, Wis. Stats., and that Mueller had "no idea" why the Union wanted it. These assertions are inconsistent with the record.[6] First, Kraig's October 29, 2008 correspondence to Mueller stated that the Union wanted the information requested therein "in order to investigate and process a grievance". This explanation certainly is not weighted down with detail, but, as has been said in similar circumstances, UNITED STATES TESTING COMPANY, INC., *supra* AT 19, context is everything. The Commission has recognized that the purpose of an information request can be established for an employer by the circumstances surrounding the request. STATE OF WISCONSIN DOA-OSER, DEC. NO. 31271-B (WERC, 8/06). The adequacy of a request for information must be judged not from communications alone, but in light of the entire pattern of facts available. ISLAND CREEK COAL CO., 292 NLRB 480, 490 (1989), *citing* OHIO POWER COMPANY, 216 NLRB 987 (1975). Where the relevance of information is apparent from the face of a request or where the circumstances surrounding a request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, the reason need not be stated specifically and the employer is obligated to divulge the requested information. WEST PENN POWER CO. V. N.L.R.B., 394 F.3D 233, 243 (4TH CIR. 2005), *citing,* NLRB V. A.S. ABEL COMPANY, 624 F.2D 506, 513 N. 5 (4TH CIR. 1980). Indeed, the filing of grievances prior to a related request for information has been said to create "obvious presumptive relevance" for an employer. EQUITABLE GAS COMPANY, 227 NLRB 800, 802 (1977).

Here, before the District received the Union's request for information, the Slawney, Tubbs, and Klatt grievances had been filed and discussed, at a Step 1 meeting, between Union and District representatives. The references to the grievants and the nature of the documents requested in Kraig's October 29 letter established a clear link between the information request and those grievances. Further, although it is not clear how much detail pertaining to the Union's request was conveyed during Kraig's subsequent interactions with Mueller – Mueller's uncontradicted testimony is that it was less detail than provided by Kraig at the hearing – it is clear that Kraig and Mueller had some discussion regarding the information request. During these exchanges, the District neither indicated to the Union that it did not understand what information was being sought, nor did it ask the Union for more explanation related to its reason for the request. I find that all of these factors add up to much more than a bare assertion. All of the surrounding circumstances gave the District a reasonable, sufficient opportunity to specifically understand that the Union suspected that the Office Assistant position that had been filled in the fall of 2008 had not been filled in accordance with Section VIII(5) of the Agreement and wanted to look behind the process.

In arguing that it was entitled to more explanation than provided by the Union, the District relies on LA CROSSE SCHOOL DISTRICT, *supra*. In that case, it was held that a request for information was inadequate because it

[6] Obviously, the lengthy testimony provided by Kraig at hearing as to why the Union wanted the information will not be considered in evaluating whether the Union provided sufficient explanation to the District at the time that it was making the request.

> . . . did not specify that a particular test question or questions were problematical or that the test was unrelated to the job or unfair overall or that this information was critical in determining whether the District's decision as to qualifications was arbitrary, capricious, discriminatory, or unreasonable on the facts.

The examiner opined that, "had the Union articulated a more specific problem with the test, the balance may have tipped in its favor". Although the District suggests, based on this case, that the Union was obligated to identify some specific problem with the testing protocols at issue here before the District could be compelled to provide the requested information, I find that such an expectation exceeds the minimal burden applicable to such situations. It also seems impractical. It is difficult to understand how Union representatives could have identified specific problems with the tests or the way they were scored prior to having had a meaningful opportunity – that is, an opportunity beyond the limited exposure certain bargaining unit members had when they were taking the tests – to review those materials.

Tests and Results

As discussed, the basic question to be answered regarding the tests and results requested by the Union – and, indeed, the focus of analysis regarding all of the information at issue in this case – is whether they are relevant and reasonably necessary to the Union's ability to carry out its representational duties. Particularly under the liberal standard applied by the Commission, there really is very little question that they were. As Examiner Crowley aptly summarized with regard to this general issue under similar circumstances in the LA CROSSE SCHOOL DISTRICT, *supra,* case:

> . . . the test questions and answers lead to a conclusion on the relative ranking of bidders for the position. Job relatedness of the test, fairness of administration, clarity of test questions and the correctness of test answers are all relevant to a grievance on the District's selection and thus the request meets the reasonably relevant test.

The Union has established in the present case that it had the same reasons for wanting to examine the tests and answers. It is undisputed that those materials were relied on by the District in the screening process it used to fill the Office Assistant position. The results of the tests narrowed the field of candidates from eleven to four, determining which applicants were eligible to participate in the interview process that produced the successful candidate. Each of the three grievants was eliminated from the process because of her performance on the tests. Even Slawney, the applicant who successfully had been performing the Office Assistant position on a relatively consistent basis in the past, had not performed well enough on the tests to earn an interview. Further, the information the District shared with the Union at the Step 1 grievance meetings suggested that there were minimal differences between the scores of those applicants who earned interviews and those who did not, which meant that even a slight scoring error could have significant ramifications for a candidate. Based on all of these factors,

the Union had an interest in reviewing the tests to determine whether they were related to the qualifications established by the District and to review the responses to establish that they were scored fairly and accurately.

The District argues that the tests and results should not be considered relevant, based on its reading of the Agreement at Article VIII(5). That provision states the following:

> With regard to determinations as to qualifications, the decision of the Superintendent of Schools shall be final.

According to the District, the Superintendent's contractually-conferred authority to establish the qualifications for the Office Assistant position puts the question of whether the grievants were qualified beyond the Union's reach. The District's argument here is that, pursuant to Article VIII(5), the superintendent decides not only what qualifications are required for a position, but also which candidate best fits those qualifications. Thus, according to the District, because its determination that the Slawney, Tubbs, and Klatt were not qualified is final, the testing materials through which they were deemed to be such cannot be utilized to wage any challenge and therefore cannot be relevant to the Union's ability to carry out its representational duties. It is clear from the record in this case, however, that the Union does not agree with this reading of the Agreement. Kraig specifically explained at hearing that it is the Union's position that the District has absolute authority to establish qualifications under Article VIII(5), but that the Union can challenge the District's conclusion as to who best fits those qualifications under Article VIII(2). Thus, it has only been established on the record that there is an interpretive debate between the parties as to the meaning of the Agreement, the existence of which suggests that it cannot be concluded that the tests and results are irrelevant to the Union's representational obligations.

The determination that the tests and results are relevant and reasonably necessary, however, is not the end of the analysis. As both parties have acknowledged, the right to information in these situations is not absolute. UNIVERSITY OF WISCONSIN SYSTEM, *supra*. A bargaining representative is not entitled to even relevant information where the employer can demonstrate reasonable good faith confidentiality concerns or privacy interests on behalf of its employees. ID. A union's need for information is to be weighed against the employer's legitimate concerns in this area. ID.

The District has raised such concerns in this case. In arguing that there are privacy interests that dictate against the release of the testing results, the District relies on the seminal case of DETROIT EDISON CO., 440 U.S. 301 (1979). In that case, a union had requested aptitude tests and results that had been used by the company to screen applicants for a certain job classification. The employer refused to provide the tests, the applicants' test papers, and their scores, maintaining that complete confidentiality was necessary, in part, to protect the applicants' privacy interests. The specific factors that dictate the outcome of DETROIT EDISON CO., however, are simply not present here. As the Court discussed, aptitude tests are not designed to measure current knowledge and skills relevant to a job, but, instead, to measure

the examinee's ability to acquire such knowledge and skills. The Court recognized a special sensitivity to any person to the disclosure of information that may be taken to bear on his or her basic competence. Further, the company had specifically promised examinees that their tests would remain confidential. For this reason, the tests and test scores were kept in the offices of the company's industrial psychologists that, as members of the American Psychological Association, had an ethical obligation not to reveal the tests or report actual test numerical scores to management or employee representatives. Further, the company presented evidence that showed that the disclosure of individual scores in the past had resulted in the harassment of some lower scoring examinees that had, as a result, left the company. Finally, the company had provided to the union copies of test-validation studies performed by an outside consultant and industrial psychologists.

Here, there has been no contention or evidence that would suggest that the tests administered by the District were aptitude tests, such that revealing candidate responses implicate the highly personal privacy interests that concerned the Court in DETROIT EDISON CO. Nor was there any assurance of confidentiality provided to the candidates who took the District's skills tests, any ethical obligation on the part of District employees to maintain the confidentiality of the tests, or any suggestion that the revelation of scores has had a negative impact in the past. Moreover, the Union does not have the option here of relying on the outside validation of the testing materials: the word processing and data management tests were created and scored internally; and while the service orientation assessment was purchased from an outside vendor, that fact does not equate to independent, reliable validation.

Having found that there are no privacy factors that dictate against the release of the testing materials, it is nevertheless clear that the District has a legitimate confidentiality interest in preserving the integrity of the testing materials. Although the Union accurately points out that there is no evidence on the record specifically indicating how much the District spent purchasing the customer service orientation assessment and developing the Word and Excel tests, it is fair to conclude that resources were invested. The District legitimately asserts that it amassed these materials with the intention to re-use them when screening applicants for future vacancies. The District does not want to have to go through the time and expense of creating skills tests each time it needs to fill a position, and the only way to preserve the ability to use these materials again is to keep them out of the hands of individuals to whom they might be administered in the future. Both the DETROIT EDISON CO. and LA CROSSE SCHOOL DISTRICT cases, *supra*, recognize the validity of such concerns.

Confidentiality interests, however, are not a complete shield for an employer found to have them. UNIVERSITY OF WISCONSIN SYSTEM, *supra*. The Commission has held that access to information should be limited only to the extent necessary to protect an employer's interests. MILWAUKEE COUNTY, *supra,* University OF WISCONSIN SYSTEM, *supra*. It seems that a confidentiality agreement, such as the one proposed by Kraig, would have accommodated both the District's need to maintain the integrity of the testing battery and the Union's interest in obtaining the information it requested. Confidentiality agreements have been recognized as a useful tool for striking a balance between an employer's interests and a union's interest in

similar situations. *See, e.g.,* UNITED STATES TESTING COMPANY, ID. The District, however, has contended that there were several problems with the proposed confidentiality agreement. The logic behind these arguments generally seems to be that, if such problems are found to have been valid, the District cannot be faulted having declined to release the materials even under the protection of such an agreement.

First, the District takes the position that confidentiality agreements have been found not to adequately protect a party's confidentiality interests in this kind of situation. In so arguing, the District relies, in part, on the LA CROSSE SCHOOL DISTRICT*, supra,* decision, asserting that the concept of a confidentiality agreement was rejected in that decision as something that would not have provided adequate sanctions to enforce any breach. The District's reliance on that case, however, is misplaced. The only assurance of confidentiality provided to the employer there was the union's assertion that it had handled information discreetly in the past and that there had been no previous complaints regarding any prior disclosure. It was those assurances that the examiner found to not provide adequate protection to the employer, but such a finding has no bearing on whether an actual confidentiality agreement can offer protection to the parties who enter into one. Moreover, in rejecting the union's assurances of confidentiality, the LA CROSSE SCHOOL DISTRICT case relied on DETROIT EDISON, *supra,* which is even more removed from the present situation. In that case, the Court found fault with a remedy in an enforcement proceeding that barred the union from taking any action that might cause the tests at issue to fall into the wrong hands. The Court's issue with the remedy was that the union had not been a party to the enforcement proceeding and therefore could not be subject to a contempt citation if it chose to ignore the restrictions set forth in the enforcement decision. This conclusion has no bearing on the enforceability of the kind of confidentiality agreement contemplated in this case, and it does not justify the District's unwillingness to enter into such an agreement.

The District also suggests that it cannot be faulted for not having entered into a confidentiality agreement, because the Union never provided a draft of such an agreement to the District for review. The record establishes, however, that Mueller indicated to Kraig that the District would not enter into a confidentiality agreement. Having received such a response, the Union cannot be faulted for not having provided a draft confidentiality agreement to the District. More importantly, however, it was really the District's burden, not the Union's, to see that the possibility of such an agreement was fully explored. Once an employer has identified confidentiality concerns that impact the release of information requested by a union, the employer has an affirmative duty to take steps to accommodate the competing interests that have emerged. KLB INDUSTRIES, INC., 2009 WL 259628 (NLRB DIV. OF JUDGES), 32, *citing,* GTE SOUTHWEST INC., 329 NLRB 563, 564 N. 6 (1999) ("We find no merit in the Respondent's argument that the Union made no attempt to accommodate or to guarantee confidentiality. The Respondent, not the Union, was the party that was required to seek accommodation."). This duty has been said to include the burden to come forward with an offer of accommodation that will meet the needs of both parties, such as proposing alternatives or seeking to bargain a resolution. ID., ALLEN STORAGE AND MOVING COMPANY, INC., *supra* at 17. This expectation is at odds with the LA CROSSE SCHOOL DISTRICT case,

supra, cited by the District. The suggestion in that case that the union had been at fault for its failure to pursue accommodations that would have protected the district's confidentiality interests seems to imply a misaligned burden.[7]

Certainly Mueller's offer to allow Kraig and Gallagher to review testing materials in her office in late November of 2008 must be recognized as an attempt on the District's part to satisfy its duty to offer an accommodation to the Union. Prior to that meeting, the Union had received descriptions of the tests and summaries of the scores achieved by the candidates. In her office, Mueller showed Kraig and Gallagher the actual tests, as well as sample responses related to the Word and the Excel tests. Although the District acknowledges that what Mueller shared with Kraig and Gallagher at that meeting was not as much as the Union had requested, it correctly points out that an employer is not required to furnish information in the exact form requested by the bargaining representative. MORAINE PARK VTAE, *supra*. Just as a union's right to information is not absolute and is to be determined on a case-by-case basis, the same is true for the type of disclosure that will satisfy that right. MILWAUKEE BOARD OF SCHOOL DIRECTORS, *supra*. It specifically has been held that an oral briefing by the employer can suffice to satisfy a request for information. MORAINE PARK VTAE, *supra*.

Even taking such flexibility into account, however, what the District provided to the Union in this case was insufficient. First, what the District provided was insufficient because, contrary to the Commission's mandate, the District was holding back more than was necessary to protect its interests. As discussed above, it appears that the District could have safely allowed the Union to possess copies of the testing materials for analysis, while using a confidentiality agreement to protect its interest in maintaining the privacy of that information.

Second, the access provided by the District was insufficient because it did not provide the Union with the information it had requested. The Union wanted the opportunity to analyze the tests and answers – generally to understand the tests, to determine whether they were related to the qualifications established by the District for the position, and to ensure that they were scored accurately and fairly. The District spent no small amount of effort at hearing in this case and in its post-hearing briefs explaining, for the benefit of the examiner, the nature of the tests and the scoring system. This level of detail is inconsistent with the District's claim that Kraig and Gallagher should have been able to gather the information the Union wanted about the tests and responses from the bargaining unit members who had taken the tests and from where Mueller held them during the meeting in her office. Although the District faults Kraig and Gallagher for not asking enough questions or taking enough notes during the meeting in Mueller's office, and Mueller insists that she never placed a limit on the amount of time Kraig and Gallagher spent in her office, it was the conditions under which the information

[7] With regard to the issue of a confidentiality agreement, the District also refers to a mediation session the parties participated in prior to the hearing in this case. The District argues that the Union "further demonstrated the insincerity of its intent through its inflexibility and intractability during these negotiations, refusing to provide the District with any assurances that a negotiated confidentiality agreement would be honored or adhered to by the Union". As the District recognizes, this information is not admissible. Further, contrary to the District's contention, it is not particularly instructive.

was being shared, not some failing on the part of Kraig and Gallagher, that limited the benefit of the exchange. In arguing otherwise, the District places much emphasis on Kraig's statement at hearing that he and Gallagher "got enough information from the meeting with [Mueller] to see what was being tested". A review of the record clearly indicates that Kraig was indicating that they had gleaned everything they could about the materials in the setting of Mueller's office, but that the Union still wanted a chance to independently analyze the testing materials. Mueller could have understood this to be the case, too, from what she described at hearing as Kraig's "one last ditch effort" to get copies of the materials at the end of the meeting – a request Mueller denied.

The District attempts to link this situation to the one at issue in MORAINE PARK VTAE, *supra*. There, in the course of a dispute over the appropriate contractual salary range for a new position, the union asked for a description of the procedure used by management personnel in the determination of the classification and salary range assignment given to bargaining unit positions. Office meetings occurred where the employer provided a step-by-step explanation regarding the placement of positions. When the union filed a prohibited practice complaint contending that it had not received all information to which it was entitled under the same standard at issue in the present case, it was found to not be lacking anything. The Commission found that the conferences between the union and the employer were substantial in both time and detail, the process and results had been explained thoroughly, and all questions asked by the Association had been answered. Further, the Association was unable to identify a need to receive the information in the exact form requested or in a different form than had been provided, and it did not communicate a lack of understanding regarding the decision-making process. For all of the reasons discussed in the preceding paragraph in relation to the present case, however, it simply cannot be concluded that the Union acquired all of the information it needed from its interactions with District representatives.

Finally, the District argues that it is necessary to take into consideration the Union's admitted failure here to obtain the testing documents from other sources. The District asserts that the Union should have tried to purchase the customer service orientation assessment from the vendor. It also asserts that the Union was aware that one of the District's secretaries had created the Excel test, but the Union never approached that individual to get a copy of the test. It further suggests that the Union could have obtained information about the tests from the bargaining unit members who sat for them. While evidence concerning whether a union has sought alternative means for obtaining information is not sufficient to defeat the relevant and reasonably necessary showing, it is appropriately considered at a later point, when attempting to balance other concerns regarding the release of information raised by an employer, such as those relating to confidentiality, against a union's information needs. MADISON METROPOLITAN SCHOOL DISTRICT, *supra*. I am not persuaded, however, that the Union's failure to obtain the testing information from any other source tips the scale in favor of non-release. First, any effort on the Union's part to simply talk to the bargaining unit members who took the tests would have resulted in spotty information at best regarding the tests and no information at all regarding the District's method for scoring them. Indeed, Kraig's conversations with those individuals shortly after they took the tests did not answer the Union's questions, but rather

gave rise to the concerns that prompted Kraig to initiate the investigation that ultimately led to the information request. Further, it seems clear that the District's basis for not providing the information to the Union was not that it was burdensome,[8] but rather that it was confidential. If Kraig had gone to the private vendor and the District's secretary and obtained copies of the tests, in the end the Union would possess the exact documents the District could have provided. The fact that the District would promote such a solution suggests that it is not as interested in the confidentiality of the tests as it is in shifting the leg-work to the Union, and such an interest is not compelling.

Other Materials

Beyond the skills tests administered by the District for the Office Assistant position and the results of those tests, the Union also requested additional information related to the District's process for filling the Office Assistant position. Specifically, the Union requested application materials that had been provided by each of the three grievants and each of the four applicants interviewed by the District; the personnel records for each of the three grievants and the four applicants interviewed by the District for the position; a complete record of the reference checks for each of the three grievants and the four applicants interviewed by the District; any and all record of the deliberation and decision making process for choosing an applicant to fill the position, including documents used for evaluating applicants and notes taken by those individuals involved in the selection process; and copies of all tests administered by the District within the past two years to applicants for positions in the bargaining unit.

Starting with the last item, the District contends that the additional testing materials requested by the Union should be deemed irrelevant. Specifically, the District argues that the responsibilities for the Office Assistant position had been revised prior to posting in the fall of 2008 and that the testing protocols were designed to take into account these changes, rendering any tests administered for the position prior to such revisions irrelevant. This argument does not persuade me that this information is irrelevant. As the Union has persuasively asserted, such materials are relevant and reasonably necessary to its ability to understand the big picture – to have some perspective on what the District normally does in a hiring process to determine qualifications and the extent to which the process used on this occasion, including the testing battery, represents a deviation from that practice. To the extent that the Union wants to try to track any changes that were made to the position with any changes that were made to the testing materials, the requested information is relevant.

The District argues that the other materials requested (the personnel records, records relating to reference checks, the application materials submitted by the applicants, and the notes taken by the District during the selection process) also are not relevant. Specifically, the District asserts that those materials cannot be relevant because they were considered at stages

[8] Although the District's post-hearing briefs describe the Union's information request as burdensome at several points, that characterization consistently has been made only in passing, and the District never has actually argued that it should not have been obligated to provide the information on that basis.

in the selection process that came before or after the testing stage at which the grievants were excluded. Even accepting at face value the District's assertion that the selection process was conducted in such a way that each progressive stage served as a gateway to the next, such an assertion does not render these other materials irrelevant. First, most of this information is referenced in Article VIII(2) as information the District is supposed to rely on in making promotions. The District cannot agree to such a provision and then legitimately expect that such information will not be available to the Union when challenges to promotion decisions arise. Further, the Union has said that its most cynical version of what occurred here is that the District engineered a certain outcome. If that is the Union's theory, it is entitled to look behind every stage of the process for filling the Office Assistant position to determine whether it can build a case supporting it on a direct or comparative basis. Thus, all of these materials are relevant to the Union's purpose.

The records of deliberation and decision making requested by the Union have been referred to in this proceeding primarily as the notes taken by District representatives during the selection process. The District asserts that this information represents incomplete, private musings that are prone to misconstruction and are not a fair reflection of the District's decision-making process and, therefore, also should not be available to the Union. Individuals are naturally sensitive about the unpolished thoughts they record, but District representatives have no apparent basis beyond this reaction for having developed an expectation of privacy with regard to information utilized or developed in the course of selecting an Office Assistant. Again, the District cannot agree to a promotional system with the Union and then expect that information related to the steps they take in making promotions will be shielded from disclosure. Thus, insofar as these notes exist, they are relevant and are not protected by the District's asserted confidentiality concerns from disclosure to the Union.

As to the Union's request for personnel files, it should be noted that the Union has reviewed the personnel files maintained by the District for Slawney, Tubbs, and Klatt. Further, because two of the interviewees were not District employees, they did not have personnel files. Thus, the personnel files at issue are those of the successful applicant and the other District employee who was interviewed but not awarded the position. The District argues that it was not obligated to release the requested personnel files because the Union failed to first approach the employees to whom they belong – they are both members of the bargaining unit – to seek their release. The District asserts that it is being asked unfairly to do the Union's "dirty work" of dealing with the release of these materials. As stated above, a union's failure to obtain information from an alternative source can be considered in the balancing test between an employer's confidentiality interests and a union's interest in obtaining information. ID. Here, the Union persuasively contends that there would have been a certain amount of antagonism involved in seeking the personnel files of certain bargaining unit members for the potential purpose of arguing that they were advanced in the selection process beyond more qualified bargaining unit members. The District, on the other hand, is not faced with that particular conflict of interest. Thus, the Union's failure to seek to obtain the requested personnel files does not shift the balance in favor of the District.

The District also argues that employee privacy interests prevent the release of the requested personnel files. The Commission recently has held that a general discinclination to provide a union access to personnel files against employee wishes is not an adequate basis for refusing to provide such information under 111.70, Wis. Stats. MILWAUKEE COUNTY, *supra*. The District asserts here that it has a policy to not release personnel files without employee authorization and that such a policy creates an expectation of privacy among District employees. No such policy ever was produced at hearing, however, and the Agreement does not appear to contain a reference to one either.[9] Further, even if such a policy does exist, the District's arguments do not establish how it could be understood to override the Union's rights under Section 111.70, Wis. Stats. The policy the District relies on is one that apparently would have been unilaterally established. The Commission has held, however, that even a provision in a collective bargaining agreement that establishes a protocol for employees or their designee to access personnel files should not be construed, absent clear evidence, as a mutually accepted limitation on a union's right to such information. ID. As a general principle, a union's interest and corresponding right to information is not merely derivative of whatever right an employee may have, but transcends that interest. ID.

The District also argues that the release of the requested personnel files is subject to limitations set forth in Section 103.13, Wis. Stats. That provision provides as follows:

> **(1) Definition.** In this section, "employee" includes former employees.
>
> **(2) Open records.** Every employer shall, upon the request of an employee, which the employer may require the employee to make in writing, permit the employee to inspect any personnel documents which are used or which have been used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records, except as provided in subs. (5) and (6). An employee may request all or any part of his or her records, except as provided in sub. (6). The employer shall grant at least 2 requests by an employee in a calendar year, unless otherwise provided in a collective bargaining agreement, to inspect the employee's personnel records as provided in this section. The employer shall provide the employee with the opportunity to inspect the employee's personnel records within 7 working days after the employee makes the request for inspection. The inspection shall take place at a location reasonably near the employee's place of employment and during normal working hours. If the inspection during normal working hours would require an employee to take time off from work with that employer, the employer may provide some other reasonable time for the inspection. In any case, the employer may allow thee inspection to take place at a time other than working

[9] These observations are made keeping in mind that there is a passing reference in the record to the fact that Kraig gained access to the personnel files maintained by the District for Slawney, Tubbs, and Klatt by obtaining releases from those employees. The fact that authorizations were used in those instances, however, does not establish that the District has a policy requiring releases that would create an expectation of privacy among its employees.

hours or at a place other than where the records are maintained if that time or place would be more convenient for the employee.

(3) Personnel record inspection by representative. An employee who is involved in a current grievance against the employer may designate in writing a representative of the employee's union, collective bargaining unit to other designated representative to inspect the employee's personnel records which may have a bearing on the resolution of the grievance, except as provided in sub. (6). The employer shall allow such a designated representative to inspect that employee's personnel records in the same manner as provided under sub. (2).

(4) Personnel record correction. If the employee disagrees with any information contained in the personnel records, a removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement cannot be reached, the employee may submit a written statement explaining the employee's position. The employer shall attach the employee's statement to the disputed portion of the personnel record. The employee's statement shall be included whenever that disputed portion of the personnel record is released to a 3rd party as long as the disputed record is a part of the file.

(5) Medical records inspection. The right of the employee or the employee's designated representative under sub. (3) to inspect personnel records under this section includes the right to inspect any personal medical records concerning the employee in the employer's files. If the employer believes that disclosure of an employee's medical records would have a detrimental effect on the employee, the employer may release the medical records to the employee's physician or through a physician designated by the employee, in which case the physician may release the medical records to the employee or to the employee's immediate family.

(6) Exceptions. The right of the employee or the employee's designated representative under sub. (3) to inspect his or her personnel records does not apply to:

(a) Records relating to the investigation of possible criminal offenses committed by that employee.

(b) Letters of reference for that employee.

(c) Any portion of a test document, except that the employee may see a cumulative total test score for either a section of the test document or for the entire test document.

(d) Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes.

(e) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.

(f) An employer who does not maintain any personnel records.

(g) Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding.

(7) Copies. The right of the employee or the employee's representative to inspect records includes the right to copy or receive a copy of records. The employer may charge a reasonable fee for providing copies of records, which may not exceed the actual cost of reproduction.

(8) Penalty. Any employer who violates this section may be fined not less than $10 nor more than $100 for each violation. Each day of refusal or failure to comply with a duty under this section is a separate violation.

I am not persuaded by the District's argument that 103.13(6) prevented it from providing to the Union the requested personnel files. The apparent purpose of that provision is to establish the right of an individual employee (or that employee's designated representative if a grievance is pending) to inspect the employee's personnel file. It is not clear on the face of Section 103.13 that the privileges or limitations set forth therein apply to situations where a union is seeking information to carry out its representational duties under Sec. 111.70, Wis. Stats. Neither does there appear to be any Commission precedent holding that Section 103.13 is properly applied to limit an employer's statutory obligation to provide such information. Rather, the District relies on canons of statutory construction to suggest that such interplay should be inferred. Without more, I am not willing to apply Section 103.13 to narrow the well-established right unions have to obtain information.

Enforcement Procedure

The Commission has provided that, to accommodate the competing interests that can arise in a case such as this one, an examiner can exercise her discretion to reach an accommodation that will serve the interests of justice and the purposes of the Municipal Employment Relations Act. BROWN COUNTY, DEC. NO. 31367-C (WERC, 11/05). Here, there

is obvious tension between the District's confidentiality concerns and the Union's need for the information it has requested. Paragraph two of the Order accompanying this decision directly implements protections that might otherwise have been achieved through a confidentiality agreement. Though there is no indication on the record before me that suggests that the Union would not, in its handling of the requested information, honor its asserted confidentiality, the Order is intended specifically to address the array of concerns in this area raised by the District. It also establishes a contract-based mechanism for resolving disputes that may arise with regard to whether the confidentiality requirements set forth in the Order have been followed. I am persuaded that these elements balance the parties' competing interests and allow for the immediate exchange of the requested information.

Attorney Fees

The Union has requested that it be awarded attorney fees and costs. While this decision finds that the District acted in violation of the Municipal Employment Relations Act, the precedent in this area was not so clear as to reasonably conclude that the District's position in this case was frivolous or taken in bad faith. CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98). Thus, fees and costs will not be awarded to the Union.

Conclusion

The Agreement between the parties does not constitute a waiver of the Union's statutory right to obtain information that is relevant and necessary to the Union's right to carry out its representational duties. Moreover, the District had a reasonable opportunity to understand the nature of the Union's information request. The information requested by the Union is relevant and reasonably necessary to the Union's ability to carry out its representational duties. The concerns raised by the District did not militate against the release of such information to the Union, though they do warrant the imposition of conditions under which the information requested by the Union shall be released.

Dated at Madison, Wisconsin, this 14th day of May, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

DLC/gjc
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