

Index

Amount of information.....	5
Arbitration hearing, preparation.....	13-14
Benefits, non-unit members	11
Budgets	3
Delay in providing information	6-7
Discovery	13-14
Evaluations.....	19
Family Education Rights and Privacy Act	19-21
FERPA.....	19-21
Grievance-handling	13
Inability to pay, and information.....	9-10
Investigation of grievances	13
Mid-term bargaining.....	12
Non-bargaining unit members	11
Non-grievants	15
Open Records Act, and information.....	18-19
Payment, costs of copying materials	7-8
PERB, interpretation of PERA,.....	3
address.....	25
Permissive subjects of bargaining.....	3,10-11
Personnel files	18-21
Policing contract.....	14
Privacy Law	23
Privacy rights.....	22-23
Private papers, access to	9-10
Private sector precedent.....	3
Public Employment Relations Act (PERA), and rights to information	2-3
Reimbursement of copying costs	7-8
Releases, signed.....	20-21
Remedies	4
Request for information.....	4
Resumes, vitae.....	11, 16-17
Scope of bargaining.....	3,10
Seniority list.....	15-16
Specificity of request.....	6
Teachers, and Chapter 279 hearings.....	17-18
Transcripts of 279 hearing	17-18
Transcripts, educational.....	20-21

IOWA PUBLIC

SECTOR UNIONS'

RIGHTS TO INFORMATION UNDER THE PERA

QUESTIONS AND ANSWERS ON YOUR RIGHTS TO INFORMATION NECESSARY FOR COLLECTIVE BARGAINING OR GRIEVANCE HANDLING

Roberta Till-Retz

Labor Center. The University of Iowa
Copyright © 1991, Roberta Till-Retz



TABLE OF CONTENTS

YOUR BASIC RIGHTS..... 1

PART I. GENERAL ISSUES..... 2

PART II. INFORMATION FOR COLLECTIVE BARGAINING..... 9

PART III. INFORMATION FOR GRIEVANCE HANDLING..... 13

LIST OF ABBREVIATIONS..... 25

ADDRESSES OF STATE OFFICES..... 25

INDEX..... 26

LIST OF ABBREVIATIONS

ALJ ... Administrative Law Judge (formerly Hearing Officer)

FERRA Family Education Rights and Privacy Act, 1974

HO Hearing Officer

NLRB National Labor Relations Board

PERA Public Employment Relations Act (effective July 1, 1974.)

PERB Public Employment Relations Board

ADDRESSES OF OF STATE OFFICES

Iowa Public Employment Relations Board
507 10th Street
Des Moines, Iowa 50309
Phone: 515/281-4414

Iowa Division of Labor
1000 East Grand
Des Moines, Iowa 50319
Phone: 515/281-3606

University of Iowa Labor Center
M210 Oakdale Hall
Iowa City, Iowa 52242
Phone: 319/335-4144

**IOWA PUBLIC
SECTOR UNIONS'**

**RIGHTS TO INFORMATION
UNDER THE PERA**

Lynnville-Sully Community School District, Hearing Officer's Decision, 81 HO 1815 (04/30/81).

Scott County Board of Supervisors, Hearing Officer's Decision, 87 HO 3321 (12/15/87).

Sergeant Bluff-Luton Community School District, Hearing Officer's Decision, 77 HO 984 (07/18/77). Decision of PERB, 77 PERB 984 (09/14/77).

Southeast Polk Community School District, Hearing Officer's Decision, 77 HO 1068 (12/30/77). Decision of PERB, 78 PERB 1068 (03/31/78). Decision of Iowa District Court, Polk County (CE 9-4816) 78 D Ct. 1068 (11/01/78).

State of Iowa, Hearing Officer's Decision, 82 HO 1988 (03/29/82). Decision of PERB, 82 PERB, 1988 (09/02/82).

Washington Community School District, Hearing Officer's Decision, 80 HO 1635 (05/09/80).

Waterloo Community School District, Hearing Officer's Decision, 77 HO 921 (03/30/77). Decision of PERB, 77 PERB 921 (06/07/91).

Waterloo Community School District, Hearing Officer's Decision, 83 HO 2542 (09/09/83).

**QUESTIONS AND ANSWERS ON YOUR RIGHTS TO INFORMATION
NECESSARY FOR COLLECTIVE BARGAINING OR GRIEVANCE
HANDLING**

Your Basic Rights

The Union has the right to receive from the employer information which is relevant to the Union's collective bargaining duties.

The information requested must be related to a mandatory topic of negotiations, necessary for the effective monitoring of the collective bargaining agreement, or related to a grievance or potential grievance.

The Union must make a clear and specific request for the information.

The information must be provided promptly and in a usable form by the employer.

The author wishes to thank Susan Bolte and Jim McClimon of the Iowa Public Employment Relations Board, who read an early draft of this manuscript, and Matt Glasson, Attorney at Law, who provided substantive comments and suggestions. Any errors are solely the responsibility of the author.

1. GENERAL ISSUES

1. What part of the law gives unions the right to get information from the employer?

Chapter 20 of the Iowa Code gives certified employee organizations rights to certain kinds of information held by the employer. Under Chapter 20, the employer commits a prohibited practice by denying the union information for purposes of collective bargaining and grievance handling. The relevant sections of Chapter 20 are:

Section 10.1 It shall be a prohibited practice for any public employer, public employee or employee organization to willfully refuse to negotiate in good faith with respect to the scope of negotiations as defined in Section 20.9.

Section 10.2 It shall be a prohibited practice for a public employer or his designated representative willfully to: [relevant paragraphs only]

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

e. Refuse to negotiate collectively with representatives of certified employee organizations as required by this chapter.

f. Deny the rights accompanying certification or exclusive recognition granted by this chapter.

These paragraphs have been interpreted, in a series of cases beginning in 1977, to include, as part of the duty to bargain in good faith, the duty of the employer to supply the bargaining representative, upon request, with sufficient information to enable it not only to understand and intelligently discuss issues raised in bargaining, but also to carry out its statutory obligation to police and administer existing agreements, and process grievances.

24. Does Iowa's 1990 Privacy Law affect the union right to get personnel information on bargaining unit members?

Our employer has argued that under Iowa's new privacy law, our union has lost all its rights to get information we need for grievance handling and collective bargaining on bargaining unit members. The employer says that from now on, we'll have to get releases on everything we want, not just educational records. Is this right?

No, this law (Chapter 91B of the Code) provides rights to the individual employee (both public and private) to see his or her personnel file, including (but not limited to) performance evaluations, disciplinary records, and other information concerning employer-employee relations. (The individual is not, however, given the right by this law to see reference letters.) The union does not lose or gain any rights under this law, and already had the right to see the personnel files of bargaining unit employees in order to fulfill its collective bargaining obligations.

Cases decided under Chapter 20, The Iowa Public Employment Relations Act regarding the duty of the employer to provide information for collective bargaining and grievance handling

Akron-Westfield Community School District, Hearing Officer's Decision, 82 HO 2264 (09/03/82).

Arrowhead Area Education Agency 5, Hearing Officer's Decision, 84 HO 2521 (12/31/84).

Greene Community School District, Hearing Officer's Decision, 80 HO 1531 (03/13/80). Decision of PERB, 80 PERB 1531 (06/26/80).

Howard-Winneshiak Community School District, Decision of PERB, 85 PERB 2821 and 2981 (10/10/85).

Iowa Central Community College, Hearing Officer's Decision, 80 HO 1499 (02/18/80).

Iowa Western Community College, Hearing Officer's Decision, 76 HO 702 (11/12/76).

23. Is there a common law privacy right which diminishes the union right to see individual employment evaluations?

Our employer is trying to protect employee performance evaluations we need by citing the "common law right to privacy." Does the PERB recognize common law in interpreting our Chapter 20 rights?

Yes, but with reservations, as a leading case suggests. Lynnville-Sully Community School District, Hearing Officer's Decision, 81 HO 1815 (04/30/81).

Facts: When the union wanted teacher evaluations from the District, the District raised "the common law right to privacy" as a defense along with Chapter 22 and FERPA. (see above) The employer claimed the issues were similar to those decided by the U.S. Supreme Court in the Detroit Edison case (440 U.S. 301, U.S. Supreme Court 1979) where the union's rights to see individual test scores were overridden by the right to privacy.

Ruling: Release of individual employment evaluations--common law/Detroit Edison considerations. The Hearing Officer disagreed with the analogy. Unlike Detroit Edison, this request did not threaten the evaluation process or the evaluation instrument, ruled the Hearing Officer. Also unlike the Detroit Edison case, getting releases from the individual teachers in this case would have been more than a "minimal burden" for the union. Finally and most importantly, this case fails the Detroit Edison "balancing test" of the competing claims of individual privacy versus the union's duty to represent its members under the contract. "Without the evaluations the contract's provision for staff reduction becomes form without content.... The organization would be forced simply to trust, and not effectively review, the determination regarding the comparability of teachers' skill and ability." "...the common law right to confidentiality does not bar release of individual employee evaluations without their consent," and the union gets the information.

2. How does the language of the PERA get interpreted? Who interprets it?

The PERA has been interpreted by both the Iowa Public Employment Relations Board and the courts. A case begins with a decision by an administrative law judge (formerly hearing officer). If the case is appealed, a decision will be issued by the PERB. The party has a right to appeal the PERB's decision to the Iowa Supreme Court. Decisions at any of these levels may have value in setting precedents, though obviously, the higher the tribunal, the more authority its decisions will have.

Remember three considerations when exercising your rights to information under the Public Employment Relations Act:

The first is that the Public Employment Relations Board (PERB) and its Administrative Law Judges are guided in this area, as in others, by precedent set in private sector labor law. Thus, when confronting a situation not yet ruled on by the agency, look to the private sector law for guidance. Consult your union's legal counsel or the PERB staff for their opinions on whether you have rights of access.

But, and here is the second consideration, the limited scope of bargaining in Iowa's public sector has been narrowly interpreted to have a limiting effect on the information unions can request for bargaining. (See Case #10, below, where a union was denied information on a permissive subject of bargaining.) Since a union wants to be prepared to bargain permissive as well as mandatory subjects at the table, this appears to be a very restrictive reading of the implications of "scope" for the rights to get information.

Finally, Iowa's public sector unions, faced with the need to present and justify their collective bargaining proposals to neutral parties at fact-finding and arbitration, may actually have somewhat broader rights to get information for bargaining purposes--especially budget and financial information--than private sector unions. The PERB has read these rights rather broadly.

3. What are the remedies for employer violations of the duty to provide unions with information?

If our employer denies our union information we need to bargain, what penalties will be imposed by the PERB?

The employer will be ordered to provide the information, and to cease and desist from the prohibited practice in future dealings with the union.

4. Do we always have to make a formal request for information?

We bargained our last contract in ignorance of some crucial personnel information which our employer knew about, but didn't tell us, although we obviously would have asked for different language if we had known. Under good faith bargaining, shouldn't the employer have told us?

No, says the PERB, not unless you ask. Scott County Board of Supervisors, Hearing Officer's Decision, 87 HO 3321 (12/15/87).

Facts: The Deputy Sheriff's Association negotiated language on pay step schedules, under the assumption that certain individuals would be retiring at certain dates, thus triggering a round of promotions to vacant slots. When one individual retired early, a member promoted as a result of his retirement failed to receive the negotiated step increase and actually ended up with a slight decrease in pay. The union argued that, had the County informed it of the early retirement, it would have negotiated the contract so as to assure that the member would have received the scheduled wage increase he was denied.

Ruling: Information provided without request. Good faith or bad faith aside, ruled the Hearing Officer, citing an expert: "An employer's duty to supply the bargaining representative with information does not arise until the union makes a request for a demand that the information be furnished." (Morris, The Developing Labor Law, 1983.) The employer was not obligated to supply unrequested information.

22. Is it ever possible to get education information without individual consent?

One of our stewards is going to law school and has prepared an argument that we can get educational records without signed consent because the grievance procedure is really a "quasi-judicial" process under the PERA. Is she right? Do we have the right to obtain educational transcripts without the consent of the individuals involved?

No, says the PERB, affirming a Hearing Officer decision. Greene Community School District, Hearing Officer's Decision, 80 HO 1531 (03/13/80). Decision of PERB, 80 PERB 1531 (06/26/80).

Facts: In preparing the grievant's promotion denial case for arbitration, the union requested the personnel file of the successful candidate, which included college transcripts and other educational records. The School District argued that federal law (FERPA) prevented the release of "any personally identifiable information in education records" without the consent of the individual. The union did not have the consent of this individual, who in any case may not have been overly anxious to assist a proceeding which might cost him his new position. The union appealed to the PERB, citing an overriding need for information obviously relevant to the case. The union argued that (1) the information sought was subject to judicial discovery under public law and (2) the grievance procedure to which both parties had agreed was a substitute for the judicial system.

Ruling: Education information without individual consent. The PERB did not agree with the union's interesting and sensible argument that it should have a right to the file of the successful candidate despite the lack of consent. The PERB admitted that the information "may be of critical relevance to the just resolution of a grievance" but had no "further answer" to the parties except for the union to process the grievance in civil court where a judge would have rights of discovery and subpoena.

5. Can we be asked to get the information elsewhere when we ask for a very large amount of information?

We have requested a very large amount of information from our employer. The employer agrees we have a right to it, but says, a) the amount we have requested is too great for it to handle, and, b) we can get some of it by going to the County auditor's office. We think the employer has to provide all of it—not palm the job off to another agency. Who's right?

You are, ruled the Hearing Officer in a 1976 case. Iowa Western Community College, Hearing Officer's Decision, 76 HO 702 (11/12/76).

Facts: In preparing for bargaining wages, the union wrote a letter to the employer requesting 8 items it said it needed for bargaining, naming the years for which it wanted the following: average and total faculty salaries, total budget figures, total salaries paid to non-faculty, a complete faculty salary schedule, the number of faculty, non-faculty, and administrators, the total amount of unspent money carried forward each year, the area School District tax base, and the amount of money raised from all sources. Too much! complained the District: you can get this data yourself from the Department of Public Instruction and by reading the minutes of the secretary to the Board. The District eventually presented some of the data: the union filed under the PERA for all the information.

Ruling: Information available elsewhere. The union does not have to get the information from other sources, just because it's available there, ruled the Hearing Officer, citing a private sector case: "The employer's duty to supply data is not affected by the fact that the union may obtain it elsewhere." (Building Construction Employers Association, NLRB Decision, 185 NLRB No. 8 08/21/70).

Ruling: Amount of information requested. The union's request for information was not "too much," the Hearing Officer ruled. "The spectrum of relevant information for public sector employee organizations in Iowa is much broader than would be normally considered relevant for private sector unions..." The needs to prepare for fact-finding and arbitration by neutrals unfamiliar with the financial/wage situations at issue justify broad requests; in this case "all information requested" was deemed relevant to the preparation of the case. The union got the data.

21. Must the grievant sign a release for his/her personnel file because of FERPA?

One of our bargaining unit members was denied a promotion and we want her complete personnel file. We understand that FERPA mandates releases for educational records, but we only want her personnel file. She knows we need it and has said we can have it. Can we get the file without bothering to get her signature to release it to us?

Possibly, but it would probably be wiser to have her sign a written release. PERB has ruled in a somewhat similar case in Greene Community School District, Hearing Officer's Decision, 80 HO 1531 (03/13/80). Decision of PERB, 80 PERB 1531 (06/26/80).

Facts: In preparing the grievant's promotion denial case for arbitration, the union requested the personnel files of the grievant. The District consented verbally to the release of the files. The School District argued that the files contained educational records, and federal law prevented the release of "any personally identifiable information in education records". The District never asked the grievant for a written release and made it clear that it would not provide the information even if written consent were given. The request was denied; the union filed a charge under the PERA.

Ruling: Educational records of grievants. The District committed a prohibited practice, ruled the Hearing Officer. Once consent is obtained, the District was obligated under the PERA to provide information covered by FERPA to the authorized bargaining agent in pursuit of information relevant to its collective bargaining responsibilities.

6. Must the request be specific?

We have asked our employer for information relating to holiday pay paid over the last few years. The employer says the request is too vague and general and won't give us anything until we specify "who, when, and what". Is our employer within the law on this demand?

Probably, given a series of rulings on specificity, most clearly stated in Iowa Central Community College, Hearing Officer's Decision, 80 HO 1499 & 1588 (02/18/80).

Facts: In preparing for collective bargaining, the Education Association representing the college faculty requested a copy of a report issued by a visiting accreditation team. The Association understood that the team had made certain recommendations regarding the financial resources of the College, the budgeting process, the faculty evaluation system, and reorganization of the administrative structure. Since there was every reason to believe the College would consider implementation of these recommendations, the union felt its request was clearly relevant and necessary to its bargaining preparations. The College ignored the request from the union, while distributing copies to select locations and individuals. The Association filed prohibited practices charges on failure to provide information. At the hearing the College argued that the request from the union was not clear or specific enough as to whether the Education Association wanted the preliminary report of the visiting team or the final report of the Accrediting Association.

Ruling: Specificity of request. The union's letter to the employer, asking for a copy of the report of "the team that visited the campus on Feb. 6, 7, and 8th" was adequately specific, ruled the Hearing Officer. In seeking relevant information, the employee representative must clearly specify what information it is seeking, and the union complied. The employer was in violation by withholding the report.

7. Is it a prohibited practice just to stall on meeting information requests?

We have made repeated requests for some important information our union needs. The employer admits we have the right to it, but keeps stalling. Pretty soon it will be too late for us to use. Can we file--and win--a prohibited practice charge on excessive delay?

right of the public to examine records; a certified bargaining agent is not "the public," and its statutory duty to represent bargaining unit members "overrides the individual's right to maintain the privacy of matters in their personnel file."

20. Does FERPA prevent our employer from providing us with such personnel information as individual employment evaluations?

We want to see evaluations of teachers who were kept on staff out of line of seniority in a staff reduction process. These are bargaining unit members, so we think we have the right. But the School District says teacher evaluations are protected confidential records under FERPA and we'll risk losing federal funds if the records are released to us. Is the District right on this one?

Probably not, unless the records are educational records, rather than staff evaluations used for employment purposes, according to a 1981 case, Lynnville-Sully Community School District, Hearing Officer's Decision, 81 HO 1815 (04/30/81).

Facts: The contract stated that decisions on staff reduction would be based on "relative skill, ability, competence, and qualification of current employees" and that in cases of equality between employees, "contract renewals will be given to the employee(s) with the greater seniority." When a bargaining unit member was laid off on the grounds that although her skill and ability were equal, her qualifications were not, the union asked for proof in the form of the evaluations of all the other teachers in the grievant's teaching area. The District refused to provide them, citing the restrictions of the Federal Family Education Rights and Privacy Act of 1974 (FERPA). FERPA precludes payment of federal funds to school districts which release confidential information in the education records of a student, unless there is written consent, a court order, or a subpoena.

Ruling: Release of individual employment evaluations--FERPA considerations. The evaluations at issue in this case were employment, not educational records, ruled the Hearing Officer, and thus the request came under the FERPA exception for evaluations of individuals "made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee." The union had a right to the evaluations to enable it to carry out its representation and collective bargaining responsibilities.

Yes, ruled a Hearing Officer in a 1984 case. Arrowhead Area Education Agency 5, Hearing Officer's Decision, 84 HO 2521 (12/31/84).

Facts: An employer was repeatedly asked to provide information for a union to use in assisting a member file a grievance. The employer eventually furnished the information after nearly one month had elapsed. Compilation of the material had taken only one-half hour. The union asked the PERB to rule on this delay.

Ruling: The Agency was in violation of the PERA, ruled the Hearing Officer, citing a private sector case, Aeolian Corp. (247 NLRB 1231 1980.) "...the fact that it took nearly a month to tender information which the Agency claimed upon its release was available to the public and which required only approximately one half hour to compile, warrants the conclusion that the Agency unlawfully delayed the information's release."

Related Ruling: Where an employer delayed providing information needed for bargaining until after fact-finding and finally provided it just before the arbitration hearing, the Hearing Officer found the employer in violation of the PERA, ruling that "the timeliness of providing the requested information is nearly as important as the ultimate providing of the information itself. To fail to provide the information in a timely fashion is tantamount to refusing to provide the information at all where the employee organization is denied the opportunity to use that information in the preparation of its fact-finding or arbitration materials." Iowa Central Community College, Hearing Officer's Decision, 80 HO 1499 & 1508 (02/18/80).

8. Who pays for the costs of copying information?

We are arguing with our agency head over whether and how much we have to pay the agency for copies of the budget data we need to prepare for bargaining. The Director claims PERB wants us to settle these issues between ourselves. We say there's gotta be a law. Who's right?

Both of you are, according to a leading PERB case which builds on a side issue ruling in 77 PERB 984. In a 1985 decision in Howard-Winneshiak Community School District, Decision of PERB, 85 PERB 2821 and 2981 (10/10/85), the PERB issued a statement of general principles on the issue of copying charges and responsibilities.

Ruling: Rights to transcripts of grievant's private hearings under Chapter 279

>By choosing to use the grievance procedure, an employee does not lose rights under Chapter 279 to obtain transcripts, and in this case the grievant himself had requested the transcript.

>The intent of the Legislature that an employee be provided a copy of the transcript made at private hearing extends to providing the employee with a copy for her/his presentation to the arbitrator under the grievance procedure.

>The transcript was needed to allow the Union to "knowingly and intelligently process the grievance."

>The fact that the grievant could have obtained information in the transcript from other sources "does not affect the right of a party to receive the information...."

19. Does Chapter 22 of the Iowa Code, the Open Records Act, prevent the union from getting access to personnel information to process grievances?

Chapter 22 (formerly 68A) of the Iowa Code was written to allow citizens' access to public records. But to protect some confidential records, an exception was made. The law says that "personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts" can only be released to the public under extraordinary circumstances, such as by court order. Doesn't that present an obstacle to our efforts to get information we need for handling certain kinds of personnel issues?

No, says the PERB in Lynnville-Sully Community School District, Hearing Officer's Decision, 81 HO 1815 (04/30/81).

Ruling: Release of individual employment evaluations—Chapter 22 considerations. "Chapter 22 [formerly 68A] is to be liberally construed. A presumption exists in favor of disclosure of public records and the government carries the burden of justifying nondisclosure." In construing this chapter, the PERB has noted that it addresses the

Ruling: Reimbursement for copying costs.

- > The employer must make information requested for bargaining available to the Union at a reasonable time and place.
- > The union must be given a chance to make a copy of the material.
- > The employer may charge a reasonable amount for photocopying, not to exceed the actual cost. This may not include overhead costs (lights, electricity, etc.).
- > The employer shall inform the union ahead of time of the cost implications of the information request and confirm that the union wishes to incur them.
- > The cost may include clerical labor costs for time spent photocopying, but may not include time for assembly of material or observation of the copying process.
- > The employer may not discriminate against the union in this process by, for example, assessing charges other parties are not required to pay.
- > The employer may not charge the union for the time of administrators or others who assemble the information requested.
- > The employer may not require pre-payment or on-the-spot payment for photocopying information unless normal billing procedures have proven inadequate.
- > The employer is not required to prepare documentation (eg., statistical analysis) which is not already in existence. Once the data becomes available, however, it must be furnished to the union.
- > The employer may not bill the union for the costs of preparing data requested by the union which the employer has generated for its own use during bargaining.
- > "Except when faced with, for example, dilatory or harassing behavior, the preferred solution for a party dissatisfied with the means and costs of providing information is to negotiate."

Ruling:

> Information for a non-contractually based complaint: Relying on Section 20.9 ("Negotiations shall also include ... grievance procedures for resolving any questions arising under the agreement"), the PERB ruled that Chapter 20 does not obligate the employer "to provide information to a party to an adjudication in a procedure other than one that arises from Chapter 20." Since this grievance fell under the University's policy manual and not the contract, the employer had no duty to provide information.

> Confidentiality of resumes: This issue was not settled in this case, however the Hearing Officer commented in her decision that she was "somewhat troubled" by the employer's claim of confidentiality. The employer cited no authority to support its claim, and the Hearing Officer opined that "it may well be that representatives of United Faculty are entitled to the information requested, as would be any other citizen, via an appropriate request" pursuant to Chapter 22 (Examination of Public Records).

18. Can the union get transcripts of a grievant's private Chapter 279 hearing for use in the grievance procedure?

Chapter 279 provides teachers with an alternative forum for resolving discipline/discharge cases, and the right to get transcripts of these private disciplinary hearings. If an aggrieved employee chooses to use the grievance procedure rather than a 279 appeal, must the employer provide the union with a transcript of the private disciplinary hearing?

Yes, said the PERB in 1977 in Waterloo Community School District, Hearing Officers Decision 77 HO 921. (03/30/77) and Decision of PERB, 77 PERB 921 (06/07/77).

Facts: The employee waived his statutory 279 right to be present at a private hearing where the board of directors discussed his suspension without pay.

When he was suspended, the employee chose to use the grievance procedure rather than a Chapter 279 appeal route, and the case went to arbitration. The union and the grievant requested a transcript of the hearing. The district denied the request on the grounds that 279 provisions, which allow affected employees copies of such transcripts, apply only to parties who choose the 279 appeals route, not the union grievance procedure. The Union asked the PERB for a ruling on this issue.

Very likely, given a Hearing Officer's ruling in a similar case in 1982. Akron-Westfield Community School District, Hearing Officer's Decision, 82 HO 2264 (09/03/82).

Facts: When a union requested a seniority listing of present certified staff for the purpose of contract maintenance, the employer responded that there was no such list which could be provided, and the contract did not define "seniority." The union filed charges with the PERB.

Ruling: Creation of seniority list. The employer must create a seniority list for the union, even if it takes time, effort and a large number of judgments in individual cases. "Indeed, the fact that the District must make these judgments is strong evidence supporting the Association's need for a 'seniority list' to intelligently administer the collective bargaining agreement."

17. Can a union get information to help a member through a non-contractually based complaint procedure? Are resumes considered confidential documents?

Our union is helping a member prepare a case to take to our agency's affirmative action office. When our chief steward asked for the resumes of all those who applied for the job, she was told that since we weren't using the grievance procedure negotiated into the collective agreement, we couldn't have the resumes. Don't we have the right to this information?

No, said the PERB to the Faculty Union at UNI in a 1982 case with similar facts. State of Iowa, Hearing Officer's Decision, 82 HO 1988 (03/29/82). Decision of PERB, 82 PERB 1988 (09/02/82).

Facts: A faculty member at UNI was denied reappointment to teach an art class she had been teaching the previous academic year. She filed an affirmative action grievance pursuant to the University's affirmative action policy in the Policies and Procedures Manual of the University. In order to help her with the grievance, UNI's United Faculty union requested the vitae (resumes) of all eight applicants for the position. When the University refused to provide the vitae, saying they were confidential, and that the complaint was not a grievance being processed pursuant to the collective bargaining agreement, the union filed a prohibited practice charge under sections 10.1, 10.2(a), 10.2(e), and 10.2(f) of the PERA.

II. INFORMATION FOR COLLECTIVE BARGAINING

9. Exactly what constitutes a claim of "inability to pay" during collective bargaining? Doesn't that claim give us rights to more kinds of information?

Our employer stated that it could meet only a small part of our wage demands because it could not afford to pay more. We want to see the employer's private papers which we believe will show that this claim is false. Is saying you "can't afford to pay" a genuine "inability to pay"? And do we have the right to see these papers?

Yes and maybe, said the PERB in a 1977 case, Sergeant Bluff-Luton Community School District, Hearing Officer's Decision, 77 HO 984 (07/18/77). Decision of PERB, 77 PERB 984 (09/14/77).

Facts: During collective bargaining, the School District's position was that although it could provide the teachers with increments on the current salary schedule it "could not afford" to make any increase in the base salary; that it was "having financial difficulties," was "not in a position to increase wages," was "having trouble coming up with funds."

The Education Association, regarding these assertions as a claim of "inability to pay," requested that the School District substantiate these claims, asking particularly for detailed information on how the District intended to spend its funds with respect to the various line items on the budget. The District provided the proposed budget only, saying that the detailed plans were contained only in the private working papers of the Superintendent. The union asked for the private papers and the School District refused, arguing that it had not raised a claim of inability to pay sufficient to warrant a higher degree of substantiating information, and that providing the information sought by the Education Association would reveal its final bargaining position and make any further genuine bargaining impossible.

The Education Association filed a prohibited practice charge under Sections 10.1, 10.2(a), 10.2(e), and 10.2(f) of the PERA.

Ruling: Information in "ability to pay" situation/access to private information. In its decision, the PERB upheld the hearing officer's conclusion that the employer had committed a prohibited practice by refusing information necessary to bargaining. The union had a right to the private papers owing to findings on these issues:

>Did the claim "can't afford" amount to a claim of "inability to pay"? Yes, said the Hearing Officer; despite the somewhat ambiguous wording, the School District's claims during bargaining did constitute a claim of "inability to pay" sufficient to create an obligation to reveal the detailed information requested by the union.

>Would the provision of private information on budget plans destroy the employer's ability to bargain by revealing its final bargaining position? Perhaps, said the Hearing Officer, following the leading private sector case NLRB v. Truitt Manufacturing Company (351 U.S. 149, 76 U.S. Supreme Court 753, 1956). That case holds, he noted, that "a claim of inability to pay carries with it a special burden, a burden to provide, upon request, proof of its accuracy", since that claim in effect marks an end to the bargaining process. The employer's refusal to reveal its proposed budget which in fact did anticipate an increase in the base wage rate was an effort to conceal a false argument. "Sham discussions" rather than genuine arguments and honest claims make good faith bargaining impossible. But this principle of full disclosure extends only to information based on an "inability to pay" argument, not to other confidential working papers of the employer.

>Can the union get the private papers? "... it is well settled that the alleged confidentiality of relevant economic data needed for informed bargaining is no defense," wrote the Hearing Officer. If the employer could provide the same information in another form, the union has no right to demand a particular form of information--in this case private papers. "This information must be provided, however, even if its derivation lies only in the Superintendent's papers."

10. Do unions have a right to get information on permissive subjects of bargaining and on non-bargaining unit members?

We want to take a strong position with our employer that its hiring and promotion practices should aim at increasing the diversity of our workforce. We have asked for the resumes of a group of applicants for a position which was recently filled. We want to prepare a good case for bargaining something on this in the next contract. Lots of private sector unions are doing this. Can we get these resumes?

No, said the PERB, in a case involving University affirmative action practices. State of Iowa, Hearing Officer's Decision, 82 HO 1988 (03/29/82). Decision of PERB, 82 PERB 1988 (09/02/82).

15. May the union get personnel information on members of the bargaining unit who are not directly involved in the grievance?

In preparing a grievance for arbitration, we have asked for documents which we think will show us how our employer treated other employees in situations similar to that of the grievant. Our employer has refused, saying these documents really wouldn't help us. We think they will. Can we see them?

Yes, said the PERB to the Union in a closely parallel case in Southwest Polk Community School District, Hearing Officer's Decision, 77 HO 1068 (12/30/77). Decision of PERB, 78 PERB 1068 (03/31/78). Decision of Iowa District Court (CE 9-4816) 78 District Court 1068 (1/01/78).

Facts: The union, in working on a grievance relating to a request for emergency leave, asked the School District to supply records on the disposition of previous requests for emergency leave by other employees over a considerable time period. The District refused, claiming this information was not relevant to the case at hand.

Ruling: Records of non-grievant members of bargaining unit.

>Did the union have a right to the records of other employees who were not involved in the grievance? The PERB agreed with the hearing officer that the union had a right to the information, and that the union did not have to obtain individual employee releases in order to obtain this information. The employer has a duty to release all material which "may be relevant" to the union in preparing its case; the arbitrator will ultimately render a decision on how helpful it is to the union's case during the hearing.

16. Must the employer create a seniority list for our use in contract enforcement?

We have signed our first contract, right at a time when it looks like we might be having some staff reductions. We have asked management for a seniority list so we can monitor any reductions under our contract, which provides that seniority will be considered in layoffs. Our employer has said no such list exists, it would take too long to create one, and anyway our contract doesn't say the list must be provided to us. How can we enforce the seniority clause without this list? Would the PERB support our request?

Facts: The faculty union at UNI had in every round of negotiations attempted to get agreement on its proposals to include various affirmative action and non-discrimination clauses in the contract. The employer had consistently refused, arguing that this was a permissive subject of bargaining. When a member was denied a position in seeming violation of the University's own affirmative action policies, the Union asked for the vitae (resumes) of all candidates for the position, arguing its intent to "document the need to put an affirmative action statement in the next master contract." The employer refused to provide them, arguing that the information did not relate to a mandatory subject of bargaining. The union filed charges.

>Ruling: Information on permissive subjects of bargaining. The limited scope of bargaining under the PERA was fatal to this request. Since the affirmative action language the union wanted would relate directly to the hiring practices of the employer, and since "PERB has consistently ruled permissive proposals dealing with criteria to be used in hiring and granting promotions," the Hearing Officer concluded (and the PERB agreed) that the employer did not have to provide the information requested.

>Ruling: Information on non-bargaining unit members. Relying on a private sector National Labor Relations Board case (Press Democrat, 629 F.2d. 1320, 1980), the Hearing Officer reasoned that when the information requested deals with non-bargaining unit members, the union has the burden of proof to "affirmatively demonstrate" how the information is relevant to bargainable issues. This can be done, as it was in the Press Democrat. However, it is especially difficult for lowa public sector unions, since "bargainable issues" gets into the area of permissive/mandatory. In this case, the union failed to persuade the PERB.

Related Ruling: Information on administrator's fringe benefits. The Education Association, in preparing its arguments for increased health insurance contributions for fact-finding, asked for the School District's contribution to insurance premiums for nine School District administrators. The District gave them information only on the administrator who was a member of the bargaining unit, arguing that information on the other eight was "pertinent only to bargaining between the administrators and the Board of Education." The Hearing Officer found the Association's request "sufficiently related to the bargaining subject at issue--the District's contribution to insurance premiums for bargaining unit members, so as to be within" the standard of relevance established by the PERB. Washington Community School District, Hearing Officer's Decision, 80 HO 1635 (05/09/80).

Ruling: Information to prepare for arbitration--"discovery rights". " ... the employer's duty to furnish information necessary for the union to process a grievance does not cease upon the union's invocation of the arbitration provision of the grievance procedure. Rather, that duty extends to include a request for material necessary for the union to prepare for arbitration."

14. Does a union still have rights to get information on possible contract violations if it lacks the right to file grievances under the contract?

The grievance procedure in our new contract provides that employees must file their own grievances--the union cannot file grievances. Does this limit our union's right to get information relevant to the grievance?

No, ruled the PERB Hearing Officer, in a similar case in 1984. Arrowhead Area Education Agency 5, Hearing Officer's Decision, 84 HO 2521 (12/31/84).

Facts: A speech clinician conveyed to her union representative that she feared she was going to be denied a "step" salary increase based on a provision in an expiring contract, which had been eliminated in the new contract about to take effect. The representative requested information on the possible action, but was denied on the grounds that, since the agreement did not authorize union grievances, the union did not represent the speech clinician, and the union would have to provide a showing of representation before getting the information.

Ruling: Information where union lacks rights to initiate grievances. The union must be given the information, ruled the Hearing Officer. Even though the contract did not provide for union-initiated grievances, the union is still "obliged to represent the employees in the bargaining unit." It needs information to police the agreement, "to review the manner by which its provisions function," "to determine whether the contract is being properly enforced and implemented," and "to assist an employee in assessing whether an action by the Agency followed the letter and intent of the agreement."

III. INFORMATION FOR GRIEVANCE HANDLING

11. *Can a union get information to allow it to determine if there is a need for mid-term bargaining?*

We're embarrassed to admit it, but during negotiations, we forgot to include in our contract an important definition relating to eligibility for transfer procedures. We want to avoid any problems for our members on this, and have asked management to give us a list of people who have put in for transfer so far this year, so we can tell if what we think might happen, might happen! The employer says we don't need this, since no problem has arisen. We think we need to bargain over this definition--and fast! Can we get that list under the PERA?

In all probability, yes, if the PERB follows the reasoning of earlier cases. Akron-Westfield Community School District, Hearing Officer's Decision, 82 HO 2264 (09/03/82).

Facts: A union requested a seniority listing of present certified staff. The employer refused to provide it, partially because the contract did not contain any definition of seniority. The union filed charges with PERB to get the information, stating that the Association needed the list for the purpose of resolving differences on the interpretation of seniority through mid-term negotiations.

Ruling: Information to ascertain need for mid-term bargaining. Since the contract does not explicitly define what constitutes "seniority," this definition may have to be resolved in discussions in the middle of the contract, if the union is to fulfill its duty to represent bargaining unit members. Since seniority is a mandatory subject of bargaining, this list "may be relevant" as a starting point for the union to determine the need for mid-term bargaining. "The only way to determine whether such negotiations are necessary is by the District furnishing a seniority list." The union gets the list.

Related Ruling: A union has the statutory right to request mid-term bargaining over items which are not contained in the collective bargaining agreement. A "zipper" clause may limit or eliminate that right in particular contracts. City of Dubuque, Decision of PERB, 80 PERB 1599 (09/05/80).

12. *May a union get information before a grievance is filed?*

Our stewards are trying to do a good job of investigating potential grievances, but our employer won't give us any information unless we have already filed a grievance at step 1. We argue that we might not file, or we might file differently, if we have all the facts we need. Who's right under the law?

You are, as the PERB has clearly expressed on more than one occasion. Akron-Westfield Community School District, Hearing Officer's Decision, 82 HO 2264 (09/03/82).

Facts: When the union in this case asked for a seniority list, one of the reasons the employer gave for refusing to provide it was that since there had been no teacher terminations and no grievances filed, nor expected, on this issue, it had no knowledge as to what was meant by "contract maintenance" and didn't have to give them the list.

Ruling: Right to information before a grievance is filed. "...the right of an employee organization to information required for it to intelligently administer the contract should not require a filed grievance," wrote the Hearing Officer, relying on the U.S. Supreme Court's landmark private sector case Acme Industrial (385 U.S. 432, U.S. Supreme Court 1967). "Accordingly, the employee organization is entitled, in the process of contract administration, to information which 'may be relevant' to policing the contract by ascertaining and preventing violations."

13. *Must unions collect all the information they need prior to the arbitration hearing?*

Our employer hired a new attorney who thinks he knows the fine points of the law. He has been saying that although our union has the right to get relevant information before and during the grievance steps, once we have made a demand for arbitration, we don't have rights of "discovery." Can this be true?

No, said a PERB Hearing Officer very clearly to one attorney who tried this argument. Waterloo Community School District, Hearing Officer's Decision, 83 HO 2542 (09/09/83).