State of Wisconsin

OFFICE OF STATE EMPLOYMENT RELATIONS

- COMPENSATION AND LABOR RELATIONS BULLETIN –

Date: August 16, 2010	**Subject:** Guidelines for Providing Union Representatives with Relevant Information Necessary to Administer Collective Bargaining Agreements
Locator No. CBB-41 **Amended**	

The Office of State Employment Relations, Bureau of Labor Relations, has frequently been contacted by agencies regarding requests from union representatives for information relating to grievances, particularly those involving discipline. This bulletin is being re-issued in order to provide continuing direction to agencies on this issue, to ensure consistency throughout state service, as required by sec. 111.815(1), Wis. Stats., and to provide updated information on agencies' duty to provide investigatory files relied upon prior to pre-disciplinary hearing. To the extent prior bulletins provided contrary advice, those bulletins are superseded by this bulletin.

APPLICABLE POLICY

The State receives its legal direction for employment relations for state employees from Ch. 111, Subch. V, the State Employment Labor Relations Act, commonly referred to as "SELRA," secs. 111.80, et. seq., Wis. Stats.

Sec. 111.80 (1)-(4), Wis. Stats., sets forth the public policy of the State concerning labor relations in state employment. It is public policy of the State:

(1) to protect and promote each of the three interests – the public, state employees and the State – with due regard to the situation and to the rights of others;

(2) to maintain fair, friendly and mutually satisfactory employee management relations and to make available suitable machinery for fair and peaceful adjustment of whatever controversies may arise;

(3) that negotiations of terms and conditions of state employment should result from voluntary agreement between the State and its agent as employer, and its employees; and

(4) to encourage the practices and procedures of collective bargaining in state employment by establishing standards of fair conduct and impartial tribunals in which these interests may have their respective rights determined.

In conducting its legitimate business interests, the State may find it necessary to discipline an employee for a violation of work rules. Agency employment relations and human resources personnel are aware of the process and procedures required by Loudermill prior to imposing discipline[1]. However, the law also creates obligations on the part of the State when a union seeks to represent the interests of one of its members once the decision to hold a pre-disciplinary meeting has been made, as well as after discipline has been imposed.

[1] Loudermill v. Cleveland Board of Education, 105 S. Ct. 1487 (1985); see CIB #64 (3/18/86).

APPLICABLE LAW

Duty to Provide Relevant and Reasonably Necessary Information

The Wisconsin Employment Relations Commission (WERC) has long held, in harmony with the laws and decisions under the National Labor Relations Act (NLRA), that the State has the duty to provide relevant and reasonably necessary information to a union in the context of collective bargaining. Council 24, WSEU Elgersma) v. State of Wisconsin, Case 250, No. 39446, PP(S)-141, Decision No. 25369-B (3/17/89). That case held that "... the duty extends to providing information that is relevant to the representative's policing of the administration of an existing agreement' and that the information need not relate to a pending dispute with the employer."

Elgersma provides guidance in several areas. First, the obligation to produce information is dependent on a request by the representative.[2] Second, if no document exists and the representative is so advised, the State has satisfied its duty. Third, the representative, upon request, is entitled to information as to whether a supervisor or another employee has been disciplined for conduct similar to that for which a represented employee was disciplined. If no supervisor or another employee has been disciplined and the representative is so advised, the State's duty to disclose has been met. Fourth, irrelevant information need not be provided to the representative. Relevant information allows a union to decide whether to process a grievance; it is information which has a *probability* of being relevant to a pending grievance.

A union representative's right to relevant and necessary information is not unlimited. The State's duty to provide the information and the type of disclosure are dependent upon the circumstances of each particular situation, that is, a case by case analysis. A union's need for relevant information must be balanced against legitimate and substantial confidentiality/privacy interests. The following considerations are important in balancing the competing interests:

a) When an employer can demonstrate that it made a clear and express pledge of confidentiality to a witness, that the potential for harassment or intimidation of witnesses exists, that there is a chilling effect on future informants or there will be a serious impact on continued operation, an employer may properly withhold the identity of a witness prior to arbitration;

b) Where an employer legitimately claims a confidentiality interest and the union is entitled to the information, the employer must find a reasonable accommodation for its presentation of the information to the union;

c) An appropriate accommodation may be to provide a written summary of the witness' statements (deleting the witness' names) and any information upon which the employer relied in making its disciplinary decision;

d) The employer has the burden to prove the confidentiality/privacy defense;

e) For each document the employer asserts the confidentiality/privacy exception, the employer must prove that confidentiality/privacy concerns exist;

f) A union representative's chance of compelling production of information can be increased significantly where the representative offers accommodations or guaranties which limit the exposure of information the employer claims is confidential; and

g) A union representative's chance to obtain allegedly confidential information is substantially reduced if it has previously taken any action which shows it might threaten or harass an employee or supervisor if the requested information is released.

[2] Agencies are reminded of sec. 103.13, Wis. Stats., which permits an employee and his/her representative to review that employee's personnel file under certain circumstances.

Duty To Provide Investigatory Files Relied Upon Prior To Pre-Disciplinary Hearing

Another consideration regarding an employer's duty to provide relevant and reasonably necessary information to a union arises in the disciplinary context and relates to *when* investigatory documents, which management relied upon in deciding to hold a pre-disciplinary hearing, must be provided to a union. The WERC addressed this question in Wisconsin Law Enforcement Association, Local 2 v. University of Wisconsin System, Case 32, No. 67203, PP(S)-384, Decision No. 32239-B (8/10/09), wherein it concluded that an employer must provide a union, upon request, its "investigative files regarding alleged employee misconduct in connection with the pre-disciplinary hearing regarding those charges, subject to redaction or limitation as reasonably necessary to accommodate demonstrable confidentiality concerns that may arise in specific cases."

OSER interprets this decision in the following manner. First, it does not apply to investigatory (Weingarten) meetings. Rather, it applies to pre-disciplinary (Loudermill) hearings. Second, it does *not* require disclosure of investigatory materials prior to the time the decision to hold a pre-disciplinary hearing is made. The premise of the WERC's decision is that the union has a concrete interest in knowing as much as possible about the evidence underlying the charges presented at the pre-disciplinary hearing. It does not entitle the union access to all documents collected by the employer while its investigation is ongoing, *prior* to the decision to hold a pre-disciplinary hearing.

Third, employers are not required to delay pre-disciplinary hearings except to the extent necessary to copy and provide the pertinent investigatory files to the union. In this regard, the WERC stated in its decision that "while the Supreme Court in Loudermill properly recognized a governmental body's legitimate interest in quick and efficient disciplinary procedures, we see no reason why disclosure of investigative materials to the Union at the point of the pre-disciplinary hearing would in any significant way elongate or disrupt the proceedings." Id. Consistent with this position, an employer is not required to delay pre-disciplinary hearings in order to gather and provide a union with requested documents that were not relied upon by the employer in making the decision to hold a pre-disciplinary hearing.

Finally, regarding confidentiality and privacy concerns, the WERC concluded that "the State's interests [in confidentiality] are adequately served by requiring that the State assert and demonstrate specific confidentiality concerns as and if they actually arise in particular situations. The State may redact or otherwise limit its disclosure of materials in response to the Union's request as is reasonably necessary to protect those concerns." Therefore, the State's longstanding policies regarding confidentiality and privacy concerns in response to union requests for information remain unchanged and should be dealt with appropriately on a case-by-case basis.

OSER reminds all agencies to continue to comply with the policy and law noted above. While most informational disputes arise in the disciplinary context, the policy and law applies to *all* grievances.

The following language provides an orderly way to address a union's request for documentary information. To ensure uniformity, OSER is requiring that all agencies adopt the following language and procedures, adapted to their own agencies.

> "Once the decision to hold a pre-disciplinary meeting has been made, if the employee or union submits a written request, investigatory documents which management used in determining that a pre-disciplinary meeting would be held must be provided to the employee and his/her representative prior to the start of the pre-disciplinary meeting.
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> In limited situations, legitimate and substantial interests of confidentiality and privacy may exist which require that informants or witnesses, whether employees, or the public must be protected. In those situations, management should seek the advice of Human Resources, which will consult with the agency's Office of Legal Counsel to determine what requested information should be redacted and how the redaction should be handled. If documents are redacted, the employee's representative shall be advised that the materials were redacted and why."

Both paragraphs apply to all disciplinary grievances. The second paragraph will govern the small percentage of cases which involve confidentiality and/or privacy. In non-disciplinary grievances, the procedures will be modified somewhat and the request for information should be made after the pre-filing step or after a grievance is filed, whichever is applicable. To the extent a mutually acceptable accommodation cannot be achieved, the union representative may contact OSER's Bureau of Labor Relations which, with the advice of OSER's Office of Legal Counsel, will review the area of disagreement in an attempt to resolve matters to avoid any proceeding before the WERC.

If there are any questions regarding this bulletin, please contact Jim Underhill, Bureau of Labor Relations, by phone at (608) 266-9564 or e-mail jim.underhill@wisconsin.gov, or Bill Ramsey, Office of Legal Counsel, by phone at (608) 266-0047 or e-mail william.ramsey@wisconsin.gov.

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