State of Wisconsin

DEPARTMENT OF EMPLOYMENT RELATIONS

-- *COLLECTIVE BARGAINING BULLETIN* --

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Subject: Guidelines for Providing Union Representatives with Relevant Information Necessary to Administer Collective Bargaining Agreements

The Department of Employment Relations, Division of Collective Bargaining, has frequently been contacted by agencies regarding requests from union representatives for information relating to grievances, particularly those involving discipline. In order to provide direction to agencies on this issue and to ensure consistency throughout state service, as required by sec. 111.815(1), Wis. Stats., the Division of Collective Bargaining issues this Bulletin. To the extent prior bulletins provided contrary advice, those bulletins are being superseded by this Bulletin.

APPLICABLE POLICY

The State receives its legal direction for employment relations for state employes 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 employes and the State--with due regard to the situation and to the rights of others;
(2) to maintain fair, friendly and mutually satisfactory employe 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 employes; 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 employe for a violation of work rules. Agency employment relations and human resource personnel are aware of the process and procedures required by Loudermill prior to imposing discipline[1]. But the law also

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

creates obligations on the part of the State when a union seeks to represent the interests of one of its members after discipline has been imposed.

APPLICABLE LAW

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 employe has been disciplined for conduct similar to that for which a represented employe was disciplined. If no supervisor or another employe 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 employe or supervisor if the requested information is released.

DER 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.

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

DER and another agency have developed the following language to deal with grievances involving discipline which now appears in that agency's Supervisory Manual. This language provides an orderly way to address a union's request for documentary information. To ensure uniformity, DER is requiring that all agencies adopt the following language and procedures adapted to their own agencies.

> "Upon completion of the pre-disciplinary hearing and after disciplinary action has been imposed, investigatory documents which management used in determining the disciplinary action must be provided to the employe and his/her representative within 20 work days of receipt of a written request, unless an extension is obtained through mutual agreement.
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> In limited situations, legitimate and substantial interests of confidentiality and privacy may exist which require that informants or witnesses, whether employes, or the public must be protected. In those situations, management should seek the advice of [Personnel or 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 employe's representative shall be advised that the materials were redacted and why, and the redacted documents shall be provided to the representative between the first and second step of the grievance procedure."

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 DER's Division of Collective Bargaining which, with the advice of DER'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 Allen Cottrell of the Division of Collective Bargaining at (608) 267-7240 or David Vergeront of the Office of Legal Counsel at (608) 266-0047.

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