

Hold Your Horses: WERC Did Not Hold That All Internal Investigation Records Must Be Turned Over To The Union Prior To Employee Questioning During An Internal Investigation

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WERC recently ordered the release of the employer's internal investigation records to the Police Union for purposes of conducting a pre-disciplinary hearing in its decision in *WLEA Local 2 v. University of Wisconsin System*, Dec. No. 32239-B (WERC 2009). WERC found the employer had to disclose this information after the employer had already conducted its internal investigation, which included questioning of the accused officer, and after the employer decided the officer subject to the misconduct investigation should have to answer to charges against her at a pre-disciplinary hearing. WERC acknowledged that this case had nothing to do with the Union's request for information during the "initial 'investigatory' questioning by an employer about possible misconduct." WERC even recognized that the Police Union, in its brief, acknowledged that a request for information for use at an internal investigation meeting would likely be treated differently by WERC due to different competing interests of the State and the individual or the union.

A lot of confusion has resulted from WERC's decision. But after careful analysis, the following points are clear:

- WERC's decision only dealt with the employer's obligation to furnish certain investigative materials relating to employee misconduct at the point where the employer has decided there is enough evidence to require an employee to attend a pre-disciplinary due process hearing to respond to the charges against the employee.
- WERC's decision did not address any requirement that the employer furnish the employer's internal investigation materials during the pendency of the investigation or prior to employee questioning.

WERC also found there may be instances where an employer could withhold certain investigatory information from the union during the pre-disciplinary hearing. While the union and the employer have an obligation to furnish information that is "relevant and reasonably necessary" for carrying out responsibilities regarding wages, hours and working conditions, the union is not entitled to receive information where the employer can demonstrate reasonable good faith confidentiality concerns. In the context of misconduct cases, these reasonable good faith confidentiality concerns may include, but are not limited to, the following:

- The extent to which the investigation contains significant factual discrepancies between accounts of the incident,
- The extent to which the witnesses' accounts were obtained covertly (as in a drug sting), and
- The likelihood that exposure may lead to conflict or violence (such as a history of acrimony between the witnesses or a history of instability or violence in the accused employee).

It is up to the employer to assert and demonstrate these specific confidentiality concerns as and if they actually arise in particular situations, and only limit its disclosure of materials in response to the union's request as is reasonably necessary to protect those concerns.

The decision by WERC does little to change how many public-sector employers, and especially Police and Fire Departments, currently manage internal affairs investigations and pre-disciplinary hearings. Often, minor acts of discipline are managed by imposition of discipline by supervisors without a pre-disciplinary hearing. When more serious acts of misconduct arise, then an assigned investigator conducts an investigation, including interviews of the accused. A separate meeting then occurs wherein the decision maker, whether it is the Chief, a high-ranking official, or governmental body, would then hold a pre-disciplinary hearing. Often, the union and employer share investigation information prior to this pre-disciplinary hearing. For those employers, it appears nothing has changed.

In light of this decision though, employers must be prepared to respond for union demands for information during the pendency of the investigation prior to the decision to move forward with a pre-disciplinary hearing. It is helpful to remember that WERC acknowledged that it was not holding there is an obligation to share information at that stage of the investigation. Moreover, employers should know that WERC considers request for information cases on a case-by-case basis, as each case has its own unique facts. Therefore, employers should give careful attention to the merits of when and what information it chooses to disclose to the union.

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