STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN LAW ENFORCEMENT ASSOCIATION, LOCAL 2, Complainant,

vs.

UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 32
No. 67203
PP(S)-384

Decision No. 32239-B

Appearances:

Sally A. Stix, Attorney at Law, Law Offices of Sally A. Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of Wisconsin Law Enforcement Association, Local 2.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of University of Wisconsin System.

ORDER ON REVIEW OF EXAMINER'S DECISION

On October 31, 2008, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, concluding that the Respondent University of Wisconsin System (University) had violated Sec. 111.84(1)(a), Stats., by requesting/directing that a steward representing the Complainant Wisconsin Law Enforcement Association, Local 2 (WLEA or Union) not talk to bargaining unit members who had witnessed an incident under investigation by the University. The Examiner dismissed certain other allegations, including that the University had refused to bargain in good faith with the WLEA by refusing to provide investigative files prior to pre-disciplinary hearings and/or had interfered with a unit member's rights by directing her not to talk with anyone other than her union or legal representative about an incident under investigation for misconduct.

On November 19, 2008, the WLEA filed a timely petition seeking review of the Examiner's decision pursuant to Sec. 111.07(5) and 111.84(4), Stats. Both parties filed written arguments in support of their respective positions, the last of which was received on

February 3, 2009. For the reasons explained in the Memorandum accompanying this Order, the Commission reverses the Examiner's conclusion that the University did not violate the law by withholding from WLEA all investigative materials relating to alleged misconduct in connection with the pre-disciplinary hearing on those charges. The Commission affirms the Examiner's decision in all other respects.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 13 are affirmed.

B. The Examiner's Conclusion of Law 1 is reversed and the following Conclusion of Law 1 is made:

> 1. The University refused to bargain in good faith with the WLEA, in violation of Secs. 111.84(1)(d) and (a), Stats. by refusing to provide to the WLEA the 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.

C. The Examiner's Conclusions of Law 2, 3, 4, and 5 are affirmed.

D. Paragraph 1.A. of the Examiner's Order is affirmed.

E. The Examiner's Order is modified by adding the following subparagraph 1.B.:

> Cease and desist from refusing to provide to the WLEA, upon request, the 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.

F. Paragraph 1.B. of the Examiner's Order is renumbered 1.C., is modified with the substitution of "Appendix A" as amended and attached to this Order, and as renumbered and modified is affirmed.

G. Paragraph 1.C. of the Examiner's Order is renumbered 1.D. and as renumbered is affirmed.

H. Paragraph 2 of the Examiner's Order is modified as follows and as modified is affirmed:

2. The allegations of the Complaint relating to Conclusions of Law 3, 4 and 5 are dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES IN BARGAINING UNITS REPRESENTED BY THE WISCONSIN LAW ENFORCEMENT ASSOCIATION (WLEA) LOCAL 2.

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the State Employment Labor Relations Act, we hereby notify our employees that:

WE WILL NOT INTERFERE with the right of WLEA members and their representatives to engage in lawful concerted activity for the purpose of mutual aid and protection by requesting or directing that WLEA stewards refrain from interviewing potential witnesses to possible misconduct by WLEA members until authorized to do so, except to the extent that such a request or directive may be allowed under protocols for the conduct of union business which the WLEA and the State of Wisconsin have mutually agreed to.

WE WILL NOT refuse to provide the WLEA, upon its request, with investigative files regarding alleged employee misconduct in connection with the pre-disciplinary hearing regarding those charges, subject to redaction or other limitation as reasonably necessary to accommodate demonstrable and specific confidentiality concerns that may arise in specific situations.

Dated this _____ day of _____, 2009

By _____
Susan Riseling
Chief of Police and Associate Vice Chancellor
University of Wisconsin - Madison

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY OTHER MATERIAL

UNIVERSITY OF WISCONSIN SYSTEM

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

The facts most germane to this review are summarized as follows. The WLEA represents a collective bargaining unit of campus police employed by the University. The record indicates that the disciplinary procedure for employees in this bargaining unit generally begins with an investigation by the employee's immediate supervisor, usually including an interview of the employee whose conduct is in question. This investigatory interview is often referred to as a "Weingarten meeting," named for the U. S. Supreme Court decision that established an employee's right under Section (7) of the National Labor Relations Act, 29 U.S.C. Sec. 157, to be accompanied by a representative at such investigatory meetings. NLRB v. J. WEINGARTEN, INC., 420 U. S. 251 (1975). The investigation usually also includes an interview with other individuals, including employees, who may have information about the incident. The practice in the instant bargaining unit is to memorialize these interviews in written statements signed by the interviewee. If the investigation suggests that discipline may be appropriate, department superiors will notify the employee of specific charges of misconduct and offer the employee an opportunity to meet to discuss and/or defend against the charges. The latter meeting is generally referred to as a "pre-disciplinary" or "Loudermill" meeting/hearing, named after the U. S. Supreme Court case establishing the right of non-probationary public employees to have such a pre-disciplinary due process hearing pursuant to the Fourteenth Amendment. CLEVELAND BOARD OF EDUCATION v. LOUDERMILL, 470 U. S. 532 (1985).

On June 11, 2007, an incident occurred on the University of Wisconsin campus involving Officer C.A.G., (hereafter "G"), a member of the WLEA's bargaining unit.[1] While off-duty and while socializing at a hotel in connection with a week-long conference that G had helped to organize, G became intoxicated and mishandled a situation involving guests in another hotel room who appeared to have been using marijuana in their room. Two other bargaining unit members witnessed the incident.

The next morning, Lt. Karen Soley, G's supervisor, met with G and learned that, owing to her intoxication, G could not recall some aspects of the incident. Soley also learned that G had already discussed the incident with at least one other officer. While Soley had authority to place G on immediate administrative leave pending the outcome of the investigation, Soley was aware of G's role in planning the conference and decided to allow G to continue to participate, which would also put G in frequent contact with other officers. These circumstances caused Soley to be concerned that G (intentionally or not) might have conversations that would fill in gaps in her memory with information from other officers. This in turn might distort G's own recollection and expand the investigation by requiring Soley to

[1] Like the Examiner, we have utilized Officer G's initials in order to protect her privacy.

interview everyone with whom G spoke. Therefore, Soley directed G not to speak about the incident "with anyone except UW Police managers, your union representative or other legal representative during the duration of the investigation." Soley also directed G not to consume any alcohol during the duration of the conference and the duration of the investigation. In response to protests from the Union that state law prohibited the State from regulating G's off-duty conduct in this manner, G's superiors offered G the opportunity to take paid administrative leave rather than accept the directive not to consume alcohol. G agreed that she would abide by the alcohol directive pending the completion of the investigation and that, if she wanted to consume alcohol, she would turn in her badge and ID (essentially placing herself on administrative leave).

On June 12, 2007, Lt. Soley also met with G's union representative, Officer Pearce, who asked for copies of the relevant police reports and informed Soley that he (Pearce) intended to conduct his own investigation into the matter. Soley asked Pearce not to speak with the other two bargaining unit members who were witnesses to the incident until after Soley had interviewed them. Soley obtained statements from those two witnesses on June 13 and 15, 2007, respectively, but did not inform Pearce that the interviews had been completed. For his part, Pearce did not follow up with Soley about the issue and did not interview the witnesses.

On July 23, 2007, the State officials conducted a pre-disciplinary ("Loudermill") hearing regarding G's alleged misconduct during the June 11 incident. By letter to G dated August 3, 2007, the State summarized its conclusions regarding the June 11 incident and ordered that G be disciplined by means of a one day suspension without pay. G did not grieve or otherwise challenge the one-day suspension.

The parties stipulated that, in the spring and summer of 2007, the State conducted four investigations into alleged incidences of misconduct by members of the WLEA bargaining unit. In each situation, once the State issued notice that a pre-disciplinary hearing was being scheduled regarding certain charges, the WLEA requested access to the information the State had gathered during its investigation in order to represent the employee at the pre-disciplinary hearing. The State did not comply with the Union's request.[2] The State's refusal was consistent with a 1997 guideline regarding a union's access to disciplinary documents. In relevant part, that guideline, which was not the result of collective bargaining, provides as follows:

> 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 employee 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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[2] It is not clear from the record whether the Soley incident was one of the four situations covered by the stipulation referred to in this portion of the text, above.

The Examiner's Decision and the Issues on Review

The Examiner's holdings in this matter and their disposition on this review are as follows:

First, the Examiner held that the State's request that WLEA steward Pearce refrain from speaking with bargaining unit members who witnessed the June 11 incident interfered with, retrained, and/or coerced Pearce in the exercise of his rights guaranteed under Sec. 111.82 , Stats., in violation of Sec. 111.84(1)(a), Stats. The State has not challenged this conclusion and we affirm it on the grounds stated by the Examiner without further discussion.

Second, the Examiner held that the State's directive to G that she not talk to anyone other than her WLEA or legal representatives during the investigation into the events of June 11, 2007, did not interfere with, restrain or coerce G in the exercise of her rights guaranteed under Sec. 111.82, Stats. WLEA did not challenge this conclusion in its petition for review. While the Examiner's reasoning on this issue was overly broad in light of the principles articulated in the Commission's recent decision in STATE OF WISCONSIN (PATROUILLE), DEC. NO. 32392-B (WERC, 5/09), the Examiner's conclusion as to G's situation is consistent with those principles. In the absence of any challenge by WLEA, and given PATROUILLE's extensive analysis of the pertinent principles, we affirm the Examiner's dismissal of this allegation without further elaboration.

Third, the Examiner dismissed two interrelated WLEA allegations that the State violated G's rights under Sec. 111.82, Stats., and/or the collective bargaining agreement by issuing a directive to G that she surrender her badge and identification before drinking while off-duty. WLEA has not challenged these conclusions in connection with this petition for review. We affirm both holdings for the reasons stated by the Examiner without further discussion.

Last, the Examiner concluded that the State did not have a duty to provide its investigatory documents to WLEA in connection with a pre-disciplinary hearing regarding a bargaining unit member charged with misconduct. WLEA has challenged this holding, arguing that the State's duty under SELRA to bargain in good faith includes a duty to furnish the requested information. WLEA also argues that constitutional due process, under LOUDERMILL, gives the employee (and therefore his/her union) at least a presumptive right to "confront all the evidence at the pre-disciplinary stage." The State counters that (1) LOUDERMILL does not require the disclosure of an employer's investigatory file and that no collective bargaining-related case law supports imposing such a requirement on the employer; (2) investigative documentation becomes "relevant and necessary" to a union only after discipline has been imposed, at which point the union has an opportunity to challenge the discipline via the grievance procedure; (3) access to such materials is prohibited by the state's public records law, viz., Sec. 19.36(10), Stats.; and (4) premature disclosure would compromise confidentiality and impede the State's ability to complete an accurate and untainted

investigation.[3] For the reasons explained below, we reverse the Examiner's conclusion and hold that the State should give the WLEA access to investigatory files in connection with a pre-disciplinary hearing relating to charges of misconduct by bargaining unit members, subject, however, to accommodating substantial employer confidentiality concerns that may arise in specific situations.

DISCUSSION

At issue is whether the State's duty to furnish information to the WLEA pursuant to the duty to bargain in good faith includes furnishing investigative materials relating to employee misconduct at the point where the State has decided there is enough evidence to require the employee to attend a pre-disciplinary due process hearing to respond to the charges, a hearing at which the Union will be representing/assisting the bargaining unit member.

Applicable Law

It is a long-standing tenet of labor relations that the duty to bargain in good faith requires an employer, including the State, to supply a union representing its employees with information that is "relevant and reasonably necessary" for carrying out those representational duties. STATE OF WISCONSIN, DEC. NO. 31271-B (WERC, 8/06), citing STATE OF WISCONSIN, DEC. NO. 17115-C (WERC, 3/82). See also, NLRB V. ACME INDUSTRIAL CO., 385 U. S. 432 (1967) (establishing the same doctrine under the National Labor Relations Act). The mutual duty to share information is part and parcel of the partnership between the union and the employer in establishing and overseeing bargaining unit members' wages, hours, and working conditions. Gorman and Finkin, *Basic Text on Labor Law* (2nd Ed. West, 2004) at 532. Although the Commission has not had occasion to consider how this doctrine applies to the precise type of information requested here, the Commission has long observed that the principles, while longstanding, are necessarily applied on a case by case basis given the myriad kinds of information and situations that may give rise to controversy. MADISON METROPOLITAN SCHOOL DISTRICT (hereafter "MMSD"), DEC. NO. 28832-B (WERC, 9/98), at 7, and cases cited therein. Thus, it is not surprising that, as the State points out, the Union has supplied no precedent squarely on point. Neither has the State. The Commission simply has not previously been asked to apply its well-established doctrine to this particular type of information.

It is also well-settled that the "relevant and reasonably necessary" criteria are construed liberally, akin to a discovery standard. See generally MMSD, SUPRA. In practice it has come

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[3] The State also suggests that the fact that its unilaterally-implemented 1997 guideline (set forth in the Summary of the Facts, above) has not been the subject of litigation prior to this case indicates general union acquiescence in the State's view of its obligations regarding furnishing information in connection with disciplinary proceedings. Whatever view other unions may have about the State's guideline, WLEA itself has represented a state bargaining unit (the law enforcement unit) only since July 1, 2005. The stipulated record on the issue under review does not indicate that WLEA was aware of the 1997 guideline at any point prior to the events giving rise to the instant case. In any event, we are obligated to apply the law to the facts litigated herein, which we have done.

to mean information that will be "useful" to the union in representing its members. See Gorman and Finkin at 550. In particular, it has already been established, contrary to the State's argument here, that a union's entitlement to information is not tied to the ripening of a grievance or grievable event. See, e.g., MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-A (Gratz, 5/88), AFF'D, DEC. NO. 24729-B (9/88), citing J.I. CASE CO. V. NLRB, 253 F.2D 149 (7TH CIR. 1958).[4] In MILWAUKEE BOARD OF SCHOOL DIRECTORS, the employer had tried to impose a policy whereby information responding to individual employee inquiries about their wages, seniority status, sick leave accrual, etc., would be provided to the union only if the union could establish that a "complaint" on the part of the employee about the employer's response to the employee's inquiry. Examiner Gratz held, with the approval of the Commission, "As noted above, it has long been held that it is not necessary that the information requested relate to a particular grievance, dispute, complaint or a previously expressed employe dissatisfaction." ID. at 10.

On the other hand, the Commission has also long acknowledged that the right to information is not absolute. MMSD, SUPRA, at 7. "The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employes." ID. at 7-8. That case sets forth the basic paradigm for analyzing cases like the instant one. The first inquiry is whether the union has met its burden to establish that the requested information meets the liberal contours of the "relevant and reasonably necessary" standard. If the union meets this prima facie standard, the Commission will then consider whether the employer has established legitimate and actual privacy or confidentiality concerns. At that point, the Commission looks more closely at the degree of the union's need for the information to determine whether it outweighs the employer's demonstrated legitimate concerns. As in any balancing test, access to the information will be limited only to the extent necessary to protect the employer's interests.

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[4] The State has cited STATE OF WISCONSIN (ELGERSMA), DEC. NO. 25369-B (Shaw, 3/89), AFF'D BY OPERATION OF LAW, DEC. NO. 25369-C (WERC, 4/89) as indicating that the Commission's prior case law requires disclosure only where a decision has been made to impose discipline. First we note that, as an examiner decision that was not reviewed substantively by the Commission, ELGERSMA has no binding precedential effect. MADISON METROPOLITAL SCHOOL DISTRICT, DEC. NO. 31345-D (WERC, 3/07); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). In addition, in ELGERSMA, among other factors not pertinent here, the Examiner based his conclusion that disclosure was not required on the ground that the information was requested after the employer had already decided not to impose discipline. This sheds no light on the question presented in the instant case as to what must be disclosed at the point where the employer has largely completed its investigation and has decided to hold a predisciplinary meeting, but, unlike ELGERSMA, has not decided whether or not to discipline. Similarly, the State argues that MMSD's reference to disclosure in "nonrenewal or discipline situations" shows that the Commission requires that the employer must have already made a final decision before a situation would be sufficiently ripe to require disclosure of information to the union. However, the MMSD case involved no issues relating to the ripeness of a dispute before the information could be disclosed. To the contrary, in full context – particularly the paragraphs preceding the use of that phrase in the MMSD decision – the reference to "nonrenewal proceedings" seems to indicate that the Commission viewed those proceedings to include situations in which a teacher has been notified that he or she was being "considered for nonrenewal" within the meaning of Sec. 118.22(3), Stats. After such statutory notice, the teacher is entitled to a "private conference" analogous to the pre-disciplinary meeting at issue here before the school board may issue final notice of nonrenewal. Thus, if anything, MMSD suggests that information related to the non-renewal should be provided for purposes of the private conference preceding the final non-renewal decision – akin to the LOUDERMILL meeting here.

Thus, in MMSD, the issue was whether a union representing teachers should have access to certain forms the school district used to evaluate its administrators' supervisory skills. The examiner had concluded that the materials were not "relevant and reasonably necessary" because the most pertinent information on those forms (identities of teachers with performance deficiencies) was also available to the union in a different manner and because the forms were not actually used for purposes of nonrenewal or discipline of teachers. The Commission corrected the examiner's analysis, pointing out that the factors mitigating the union's "need" for the information were not appropriately considered in the first part of the inquiry; rather, under the applicable liberal standard, the materials bore a sufficient relationship to wages, hours, and working conditions of bargaining unit members to be "relevant and reasonably necessary." If the employer did not have substantial countervailing confidentiality/privacy concerns, the Commission would have ordered them released to the union. As it happens, the school district had demonstrated that "if the confidentiality of the forms (including the names of the employes) is not maintained, the supervisors' ability to utilize various informal supervisory techniques to improve employe performance will ... be negatively affected." ID. at 9. At that point, the Commission employed a balancing test. Balancing the fact that the materials were not actually used to discipline or nonrenew teachers and that the union had other ways to obtain the same information, the Commission concluded that the school district's demonstrated confidentiality concerns outweighed the union's actual need and held that the materials need not be disclosed.

Are the Requested Materials "Relevant and Reasonably Necessary"?

We believe the Examiner in the instant case, like the examiner in MMSD, applied an overly rigorous standard at the initial stage of the duty-to-furnish-information inquiry. Instead of the liberal "discovery" standard, in which a union is entitled to information that will be *useful,* if, as here, it relates on its face to bargaining unit members' working conditions, the Examiner required the WLEA to show a degree of "need" that is inconsistent with that long-established standard.

Here the WLEA sought access to materials the State had collected during its investigation of bargaining unit member G's alleged misconduct. At the time the WLEA sought this information, the State had already determined, based on the results of its investigation, that G should have to answer to a set of charges at a due process pre-disciplinary hearing. As G's collective bargaining representative, the WLEA would be assisting G in preparing and presenting a response to the charges at that hearing. In our view, the employer's investigative files, on which it has based its charges, easily meet the test of being relevant and useful to the Union for purposes of assisting G in disputing the employer's evidence and avoiding discipline. Instead, utilizing an inappropriately demanding standard, the Examiner concluded that the Union's "need" for this information would not ripen until the Employer decided, after the due process hearing, to impose discipline. The State strikes the same note, arguing that "[i]t is axiomatic that investigative documentation becomes 'relevant and necessary' only after discipline has been imposed." (State Br. At 17). On this point, the Examiner and the State depart from the Commission's longstanding principles in two ways:

first, by positing that a particular dispute must have ripened to the point of a grievable event (discipline), and, second, by requiring an unduly heightened demonstration of "need" at the initial stage of the inquiry. See MILWAUKEE BOARD OF SCHOOL DIRECTORS decisions, *supra,* and cases cited therein; MMSD, *supra*.

As to the State's assertion that "Petitioner could not seriously challenge the proposition that investigative information would not be 'relevant and necessary' if no discipline was imposed" (State Br. at 18), this simply ignores the very real interest an employee has in avoiding discipline in the first place. As we see it, a Loudermill/pre-disciplinary hearing is premised upon the State having made a preliminary determination, based upon its prior investigation, that the employee has engaged in misconduct. An employee like G, who is summoned to a meeting to respond to such preliminary charges clearly has a concrete, not speculative, interest in knowing as much as possible about the evidence underlying those charges. Her interest is obvious: pointing out any flaws in the State's view of events and thereby avoiding discipline. The WLEA, G's statutory agent in dealing with the State over her working conditions, has an interest that not only matches that of the employee in any particular situation, but transcends that interest. Consonant with its legal duty to represent the interests of the entire bargaining unit, the WLEA has an interest in the overall fairness and equity of the State's investigatory and disciplinary procedures. Overseeing the equitable administration of discipline is clearly related to the Union's duties in "contract administration." The WLEA's interest in this respect is implicated even if the State decides, after the pre-disciplinary hearing, not to impose discipline on the particular employee.

In approaching the "relevant and reasonably necessary" portion of the inquiry, the State and the Examiner have placed mistaken emphasis on the constitutional due process requirements of LOUDERMILL. There the Supreme Court held that an employee in G's situation would be entitled to notice of the charges and "an explanation of the employer's evidence," 470 U.S. 532, 546 (1985). However, the issue is this proceeding is determining the scope of SELRA's requirements regarding the *union*'s access to information pursuant to the State's duty to bargain -- not what LOUDERMILL requires as a matter of *individual* employee due process. Contrary to the State's contention that, "If the right Petitioner urges is not found in LOUDERMILL, then it does not exist," (State Br. at 13), SELRA's purpose in mandating the sharing of information is designed to promote a completely different set of policies, those having to do with enhancing the union's ability to work in partnership with the employer in dealing with employee working conditions. The duty to share information in a collective bargaining relationship long pre-dated the 1985 LOUDERMILL decision. See, e.g., BOYNSTON CAB CO., DEC. NO. 5001 (WERC, 11/58); NLRB V. ACME INDUSTRIAL CO., 385 U. S. 432 (1967). While the State's interest in efficient disciplinary procedures limits the degree of due process the State is required to give individual employees, that State interest is not itself constitutionally protected, as the State seems to suggest. For example, some state public records laws might require disclosure of certain information relating to employee discipline. A public employer in such states could not refuse public disclosure on the ground that a different law, that of LOUDERMILL, does not mandate such disclosure. Nor is there any reason to conclude, *ipso facto,* that the competing interests of the State and the Union are parallel to

those of an individual employee and employer in a LOUDERMILL situation. Indeed, many WLEA bargaining unit members, such as probationary employees, may not even have a constitutionally-protected property interest in their jobs and therefore generally would lack LOUDERMILL rights. This would not diminish WLEA's collective bargaining responsibilities toward such employees or its concomitant right to information relating to their working conditions. Finally, 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.

The State's arguments based upon the so-called "WEINGARTEN" doctrine are similarly misplaced. WEINGARTEN sets forth certain rights that employees have under Sec. 111.82, Stats., to call upon other employees and/or the union for assistance during initial "investigatory" questioning by an employer about possible misconduct. SEE STATE OF WISCONSIN (UWM), DEC. NO. 31527-B (WERC, 2/08) at 9. Unlike the duty to furnish information, WEINGARTEN rights do not arise out of the State's duty to bargain with the union, but rather arise out of *individual* rights to engage in mutual protection. ID. Whether or not the individual WEINGARTEN right includes access to information is not at issue here. Nor does this case concern a union request for information for purposes of accompanying an individual to a WEINGARTEN meeting. As WLEA acknowledges (Union Reply Brief at 2), the competing interests of the State and the individual or the union in a WEINGARTEN situation might very well differ -- or carry different weight -- than is true, as here, in a connection with a pre-disciplinary hearing.

In sum, we conclude that information pertaining to the charges of misconduct against a unit member, which the union seeks in order to assist the unit member in countering/mitigating those charges at a pre-disciplinary hearing, is "relevant and reasonably necessary" for the WLEA to carry out its duties as the employee's representative.

We turn, then, to whether the State has established a substantial confidentiality or other interest in non-disclosure of its investigative materials in connection with a predisciplinary hearing. The State advances two primary interests/defenses: first, that it would undermine the integrity of the State's investigative procedure to disclose witness statements and other investigatory information before discipline has actually been imposed; second, that the Wisconsin public records law, Sec. 19.36(10), stats., forbids the State from disclosing the requested information. We address each of these arguments in turn.

Confidentiality and Balancing of Interests

The State asserts that disclosure of investigatory materials prior to the final disciplinary decision would be premature, in that a final disciplinary decision as not yet been made, and could impair the integrity of the fact-finding process and be disruptive in the work place. The Examiner summarized those concerns as follows:

> Such reports may very well contain uncorroborated information from the employee's co-workers which the employer has not had the opportunity to verify; the dissemination of such information can only have a deleterious effect within the workplace. There may also be commentary of a highly personal nature, which could do serious damage to individual reputations. Although there is certainly the presumption that a pre-disciplinary hearing will lead to discipline, such an outcome cannot be absolutely assured – after all, if discipline is absolutely inevitable, the pre-disciplinary hearing has no due process function. That is, it must be assumed that certain pre-disciplinary hearings will *not* result in discipline, and that the files for such hearings will not be released to the Association. The knowledge that investigative files will become available to the Association upon imposition of discipline can be a significant factor in the employer's decision whether or not to impose discipline. As the moving party in discipline, the employer is entitled to consider this aspect, among others, in determining whether or not to impose discipline.

Examiner's Decision at 24. The State also argues that revealing witness statements to the Union may undermine the integrity of the investigation, by discouraging witnesses from offering truthful information that may be unpalatable to the Union once revealed or by giving employees the opportunity to fabricate facts after learning what other witnesses have said.

Some of these concerns are less compelling than others. For example, it is dubious that the State would decide, after but not before holding a disciplinary hearing, that the materials on which it relied in advancing the charges are so sensitive that, ultimately, the State would rather keep them secret than impose discipline that would result in their disclosure. The underlying premise is questionable, i.e., that the State, in such situations, would charge an employee with misconduct and hold a hearing without any intention of actually imposing discipline. We are not inclined to base a general rule on the possibility of such an unlikely occurrence.[5]

We are also unpersuaded that the truth-seeking process will be impaired if witnesses know that their statements may be revealed to the Union. As we noted in responding to a similar argument in PATROUILLE, DEC. NO. 32392-B at 10, we are unwilling to presume that witnesses will be less forthcoming or truthful simply because their statements may find their way into hands of the Union or will fabricate facts after the statements become available. To the contrary, it is more likely that witnesses will be truthful because they are aware from the outset that their statements may become grist for an eventual disciplinary procedure and consequent grievance.

More persuasive is the State's concern about potential "premature" conflict among employees or retaliation against witnesses over the content of statements upon which the State has based its preliminary disciplinary decision. While such concerns may be unavoidable if the

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[5] If a situation like that did arise, however, consonant with the principles discussed later in this memorandum, the State might be able to lawfully decline to disclose any demonstrably sensitive materials.

State decides to impose discipline (as the State acknowledges, it generally must release such materials to the Union for purposes of pursuing a grievance), they may be avoidable at the pre-disciplinary phase in those situations in which the State decides not to impose discipline. This concern could be substantial in some cases, depending upon the nature of the misconduct, 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).

Without discounting the potential significance of the foregoing State concerns, their most salient feature is that they are not implicated in every situation nor, even if they applied to some of the investigative materials in a particular case, would they necessarily apply to *all* the materials. In STATE OF WISCONSIN (PATROUILLE), *supra*, the State relied upon nearly the same confidentiality arguments that it proffers here as a basis for a broad prohibition against employees discussing misconduct charges with each other. We stated:

> To weigh against [the employees' statutory right to communicate with each other], the State offers its own general interest in maintaining the integrity of the investigatory process. We agree with the State that this is a legitimate and important interest. However, unlike the State, we are unwilling to assume that this general interest is implicated in each and every disciplinary situation so as to warrant a total abrogation of employees' statutory right to communicate during the period of the investigation.

ID., at 10. The legal principles in PATROUILLE, like those in the instant case, required the Commission to balance the competing interests to determine whether the State's concerns outweighed the employees' statutory rights. The Commission, while "mindful of the possibility that the State may have an actual basis for concern in specific scenarios," held that the "State can and lawfully must tailor its directives to whatever genuine concerns are realistically implicated." ID. at 11.

Balancing the competing interests here yields a similar result. We have already articulated the legitimate interest and need the WLEA has in disclosure of materials that the State has relied upon in charging a bargaining unit member with misconduct and calling that employee in to respond to those charges at a pre-disciplinary hearing. Since the State could have legitimate confidentiality concerns regarding the investigatory files even at the pre-disciplinary stage, MMSD instructs us to look more closely at the Union's actual interests in weighing the competing concerns. Here, unlike in MMSD, we see little to mitigate the WLEA's actual need for the information it requested. While the WLEA can also question witnesses independently of the State's investigation, and the Union might thereby obtain information similar to that contained in the State's investigative files, the Union may not know which witnesses the State questioned, it is possible that witnesses would not provide the same information to the Union that they have provided to the employer, the Union would not have

access to other information that the employer may have obtained other than witness statements, and the Union would not necessarily know what information (witness statements or other material) the State actually has relied upon in pressing forward to a pre-disciplinary hearing. Unlike MMSD, where it was clear that the employer would not be relying upon the requested materials in "nonrenewal or discipline situations," ID. at 5, the materials in the instant case are being requested precisely because they *are* being relied upon for disciplinary purposes.

Since the Union's interests are important, are undiluted by other factors, and apply generally in all disciplinary situations, we conclude that they outweigh the State's interests in a blanket refusal to disclose the materials. Instead, as in PATROUILLE, we think the State's interests 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.

Public Records Law Issue

As to the State's public records argument, Section 19.36(10) states in pertinent part:

> (10) EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35(1) to records containing the following information, except ... to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:
>
> (b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

The State interprets this language to forbid disclosure of materials related to investigations of employee misconduct even to a collective bargaining representative, until the investigation has been completed. While the State acknowledges that the law specifically permits disclosure to the union if the union needs the information "to fulfill a duty to bargain" or "pursuant to a collective bargaining agreement, the State urges that the term "fulfill a duty to bargain" be narrowly construed to refer only to actual across-the-table negotiations between a union and an employer.

At the time the Legislature enacted Sec. 19.36(10), Stats., the term "duty to bargain" had a longstanding and well-developed technical meaning under SELRA that was considerably more expansive than the interpretation the State urges us to adopt. That long-standing interpretation included the duty to furnish information under the liberal discovery-type standard discussed above. The general rule of statutory construction provides that words and phrases

"that have a peculiar meaning in the law shall be construed according to such meaning." Sec. 990.01(1), Stats. The Legislature is presumed to be aware of existing interpretations of the law when enacting statutes. BLAZEKOVIC V. CITY OF MILWAUKEE, 225 WIS. 2D 837, 844 (CT. APP. 1999). Nothing in Sec. 19.36(10) suggests that the Legislature intended a more restrictive interpretation of the "duty to bargain" than the prevailing meaning of that term under Chapter 111, including SELRA. If, indeed, Sec. 19.36(10) were interpreted to forbid the State from providing the WLEA access to materials that SELRA required the State to provide to WLEA, a conflict would arise between the statutes; another rule of statutory construction discourages interpretations that give rise to such conflicts. PROVIDENCE CATHOLIC SCHOOL V. BRISTOL SCHOOL DISTRICT NO. 1, 231 WIS. 2D 159 (CT. AP. 1990). This Commission has already interpreted Sec. 19.36(10) to harmonize with the duty-to-furnish information provisions of collective bargaining laws. See CITY OF MILWAUKEE, DEC. NO. 31936 (WERC, 11/06), holding that the statutory duty to bargain was "left intact by Sec. 19.36(10), Stats., and that the reference to the bargaining obligation in Sec. 19.36(10) was co-extensive with the duty to bargain as defined in the collective bargaining laws, including the duty to furnish information." ID. at 25.

In this connection the State also cites LOCAL 2489 AFSCME V. ROCK COUNTY, 277 WIS.2D 208 (APP. CT. 2004) as indicating that an investigation does not reach its legal "disposition" until the employer has reached a final decision as to discipline. In that case a union had sought to prevent disclosure of certain materials after discipline had been imposed but before the conclusion of a grievance procedure challenging the discipline. The court held that, for purpose of public disclosure, the "disposition" occurred at the time the employer made its final decision, regardless of any available procedures to challenge the employer's decision. The point at which disclosure to the public is required under the public records law, however, has no necessary bearing upon question presented here, which concerns the point at which good faith bargaining under SELRA requires disclosure to a union representing an employee who is under threat of discipline. The language and purposes of the two statutes are completely different Thus while ROCK COUNTY precludes public disclosure prior to a final disciplinary decision, it does not prevent disclosure to a union, particularly in light of the specific statutory authorization for such disclosure, as discussed above.

Accordingly, we do not accept the State's argument that Sec. 19.36(10) categorically forbids disclosure to a collective bargaining representative of materials relating to an investigation of misconduct by bargaining unit members. Instead, we conclude, consonant with CITY OF MILWAUKEE, *supra*, that that provision specifically permits the State to furnish information to the union under the longstanding parameters of Commission law in this area.

For the foregoing reasons the Examiner's decision is reversed. We hold that the State generally must supply requested investigatory files for purposes of a pre-disciplinary hearing, subject to appropriate redaction or modification in those situations

Dated at Madison, Wisconsin, this 10th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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