

**WISCONSIN ASSOCIATION OF SCHOOL  
SUPERINTENDENT ASSISTANTS**

Seventh Annual Spring Conference

**Understanding Union Representation**

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## **I. Introduction**

Every school district in Wisconsin has at least one group of employees represented by a labor organization. As a result, the Superintendent Assistant often receives questions regarding union representation, including rights of bargaining unit employees during an investigation, fair share and dues deduction issues, and the status of confidential, supervisory, and managerial employees. This presentation will provide insight into the processes and key terms that arise in the field of labor relations.

## **II. Duty of Fair Representation**

### **A. In General**

1. The “duty of fair representation” is a function of the exclusive representation of municipal employees by a labor organization concerning their wages, hours and conditions of employment. Accordingly, pursuant to Wis. Stat. § 111.70(4)(d)1., a labor organization owes a “duty of fair representation” to all employees within the bargaining unit they represent.
  - a. The duty of fair representation applies to both the negotiation of a collective bargaining agreement and the administration of a collective bargaining agreement by the processing of grievances. *Chippewa County*, Dec. No. 24922-A (Engmann, 5/88).
  - b. The scope of the duty of fair representation allows the labor organization a wide range of discretion, subject always to complete good faith and honesty of purpose, in the exercise of this discretion. The law recognizes that a labor organization is made up of many diverse interests, each of which has its own narrow perspective, and that, inevitably, the interest of one person or group will come into conflict with the interest of another. The labor organization has to reconcile conflicting views and, in doing so, it may adopt a position adverse to one person or group, but this does not by itself establish a breach of the duty. *Id.*
2. The duty of fair representation, and the liability for failing to comply with that duty, rests with the labor organization. “A breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171 (1967); *see also Mahnke v. WERC*, 66 Wis.2d 524, 225 N.W.2d 617 (1975).
3. If this duty is breached, an employee can sue the labor organization for damages. *Fray v. Amalgamated Meat Cutters*, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

4. Nonmembers are owed the same duty of fair representation based on their bargaining unit status. Thus, even if a nonmember does not pay labor organization dues, the same duty is owed to that nonmember.
5. “An attorney who is handling a labor grievance on behalf of a labor union as part of the collective bargaining process is not considered the attorney for each individual member of the union as a matter of law.” *See also Security Bank v. Klicker*, 142 Wis.2d 289, 418 N.W.2d 27 (Ct. App. 1987). As a result, there is no attorney-client relationship between the attorney for the labor organization and the employee. Such an attorney client relationship is a condition precedent to a viable claim of attorney malpractice. Without any such relationship, attorneys for labor organizations are immune from lawsuits brought by labor organization members alleging malpractice. *Peterson v. Kennedy*, 771 F.2d 1244 (9<sup>th</sup> Cir. 1985). Accordingly, any claim brought by an employee against an attorney representing the labor organization may be regarded as frivolous. *Nelson v. Haus, Roman, & Banks LLP*, 2006 WI App 223, 296 Wis. 2d 934, 724 N.W.2d 273.

## **B. Fair Representation in Various Contexts**

1. Grievance Processing
  - a. A labor organization’s duty to an individual, while created by statute, is defined and structured by the contractual meaning of “grievance” in the collective bargaining agreement. *Milwaukee Board of School Directors*, Dec. No. 11280-B (WERC, 12/72); *University of Wisconsin Hospital and Clinics*, Dec. No. 29784-D (WERC, 11/00).
  - b. As applied in grievances, the duty of fair representation requires, at a minimum, that the exclusive bargaining representative do the following:
    - i. Upon a request from a bargaining unit member for assistance, a labor organization must explain the steps of the contractual grievance procedure;
    - ii. The labor organization must discuss the facts of the potential grievance with the aggrieved employee;
    - iii. After meeting with the bargaining unit employee, the labor organization must undertake an initial investigation of the situation; and
    - iv. If requested to do so by the bargaining unit employee, the labor organization must represent the grievant at the initial

meetings provided for under the collective bargaining agreement.

*Bloomer Joint School District No. 1*, Dec. No. 16228-A (Rothstein, 8/80).

- c. Given the discretion associated with its duty, a labor organization is not under any absolute duty to pursue even a meritorious grievance and proof that an underlying grievance was meritorious is insufficient, in itself, to establish a violation of the duty of fair representation. *Wisconsin State Employees Union, Council 24*, Dec. No. 28735-A (Gallagher, 10/96).
- d. A labor organization's failure to provide legal counsel to the complainant for disciplinary meetings was not a violation of the duty of fair representation. *Milwaukee Public Schools*, Dec No. 32143-A (Jones, 2/08).
- e. In determining whether a labor organization violated its duty of fair representation, the Commission must determine whether: (1) a grievance existed; (2) the labor organization failed to pursue the grievance through the grievance procedure; (3) the labor organization's failure to process the grievance prejudiced the employee's rights; and (4) there is some reason to believe that the labor organization's failure to pursue the grievance was arbitrary or discriminatory or resulted from bad faith. *Wisconsin State Employees' Union, Council 24*, Dec. No. 21854-A (Nielsen, 9/84).
- f. The Commission concluded that the union violated its duty of fair representation by unlawfully handling a grievance related to the employee's claim that the employer discharged her without just cause. As a result, the Commission ordered the union to pay the employees' attorneys fees and costs in her claim against the employer. In her claim against the employer, the hearing examiner concluded that the employer had terminated the employer without just cause and ordered the employer to reinstate her with back pay to the date she was discharged. The employer argued that the union contributed significantly to any backpay that accrued and therefore some of the backpay should be assessed against the union. The Commission refused to assess any such damages against the union. *Milwaukee Public Schools*, Dec. No. 31602 (WERC, 8/08).

## 2. Collective Bargaining

- a. A labor organization has a broad range of discretion in negotiating with an employer. Absent some showing of arbitrariness, discrimination or bad faith, the mere fact that some employees,

who might logically be beneficiaries of an agreement, are excluded from the bargaining process does not constitute a breach of the duty of fair representation. *See, Ford Motor Co. v. Hoffman*, 345 U.S. 330 (1953); *City of Greenfield*, Dec. No. 24776-B (Crowley, 3/88) *aff'd* Dec. No. 24776-C (WERC, 2/89).

- b. The selection of an eligibility date which excluded the complainant from the benefits of a settlement agreement was the result of good faith negotiations and was part of a logical, non-discriminatory administrative system for implementing the agreement. There was no evidence that the labor organization violated its duty of fair representation, nor that the labor organization or state in any way sought to discriminate against the Complainant individually or as a member of any discrete class of employees. *Department of Employee Relations*, Dec. No. 23486-A (Nielsen, 7/86), *aff'd* Dec. No. 23486-B (WERC, 12/86).
- c. The labor organization did not violate its duty to fairly represent nonmembers of the bargaining units by deciding to pursue fair share as a top priority bargaining demand without their knowledge or participation in that decision which affects only them. The labor organization is not duty bound to conduct its own pre-contract referendum on the fair share issue. The development of bargaining priorities and strategies or the delegation of such decision-making to agents is a matter for the members of the organization certified or recognized as the majority representative unless a broader voting enfranchisement is effected in the documents (e.g., constitution and bylaws) governing the organization's operations. *Waukesha County*, Dec. No. 16515 (WERC, 8/78).
- d. The labor organization, pursuant to its duty of fair representation, is required to ascertain the wishes of nonmembers and to take them into account. This may be done by a general familiarity with the working environment and there is no requirement of formal procedures for communication access for employees with a divergent view. The ratification of an agreement cannot be motivated solely by the self-interest of the labor organization members without regard to the views of nonmembers. This, however, did not mean that the bargaining representative cannot insist on a fair share agreement which impacts solely nonmembers. Nothing in this case indicated that the labor organization arbitrarily ignored nonmember wishes or that ratification by members was motivated solely by self-interest. *Sauk Prairie School District*, Dec. No. 19467-B (Crowley, 3/83).

### III. Labor Organization Representatives and Collective Bargaining

#### A. Collective Bargaining

1. The duty to bargain commences with the date the WERC certifies the election results. *Green County*, Dec. No. 26798-B (WERC, 7/92).
2. Pursuant to Wis. Stat. § 111.70(1)(a), an employer is obligated to bargain over wages, hours and conditions of employment with the representatives of the collective bargaining unit. Those matters that are “primarily related” to wages, hours or conditions of employment are termed as mandatory subjects of bargaining. Collective bargaining is required with regard to all mandatory subjects of bargaining. Whether a matter is primarily related to wages, hours or conditions of employment is determined on a case by case basis. *Unified School District No. 1 of Racine County v. WERC*, 81 Wis.2d 89, 259 N.W.2d 724 (1977).
3. Permissive subjects of bargaining are those matters that primarily relate to the management and direction of the governmental unit. In this respect, state statute provides that municipal employers “shall not be required to bargain on subjects reserved to management . . . except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employees in a collective bargaining unit.” Wis. Stat. § 111.70(1)(a) (emphasis added). An employer has no duty to bargain over permissive subjects of bargaining. Absent a written contractual provision, “an employer is free at any time to refuse to deal with the union and/or discontinue dealing with the union about non-mandatory subjects of bargaining. *Madison Metropolitan School District*, Dec. No. 31345-D (WERC, 5/06). In fact, it is a prohibited practice to insist on bargaining over a permissive subject of bargaining. *City of Lake Geneva*, Dec. No. 12208-B (WERC, 5/74).
4. The selection of representatives or the composition of either party’s bargaining team is a permissive subject of bargaining about which the parties may voluntarily agree to bargain. However, absent unusual circumstances, such as a conflict of interest or gross misconduct, it is a prohibited practice in violation of Wis. Stat. § 111.70(3)(a)4 for either party to refuse to meet with the other party’s duly authorized representative or representatives. *Racine Unified School District*, Dec. No. 13876-B (Fleischli, 4/78).

## **B. Bargaining the Impact**

1. When a particular issue is primarily related to a matter that falls squarely within the realm of management rights, the municipal employer may still be required to bargain over the impact of the proposal. For example, in *Dodgeland School District*, Dec. No. 29490 (WERC, 1/99), the WERC noted that the impact upon the wages, hours and conditions of employment of teachers who would not receive a specified amount of preparation time was a mandatory subject of bargaining, even though the determination of the amount of preparation time itself was a permissive subject of bargaining.
2. The labor organization cannot prohibit the employer from implementing the permissive subject of bargaining until the parties bargain and reach agreement on the impact because it “might well prevent the municipal employer from taking actions that are essential to the fulfillment of its basic government function.” *Milwaukee Sewerage Commission*, Dec. No. 17025 (WERC, 5/79).
3. However, the employer should notify the labor organization of its decision to implement a permissive subject of bargaining and, if requested, attempt to negotiate the impact with the labor organization as early as possible. In *Racine Unified School District*, Dec. No. 27972-C (WERC, 3/96), the WERC held that the employer did not act unlawfully by implementing a year round school program because on three occasions over the course of four years it sought negotiations with the labor organization, but received only one proposal. Thus, the WERC concluded that the District satisfied its obligation to bargain impact before implementation.
4. The WERC will look at various factors when determining whether the employer engaged in good faith bargaining by implementing its permissive decision in light of its obligation to bargain the impact of the decision. In *City of Milwaukee*, Dec. No. 32115 (WERC, 5/07), the WERC held that the employer was not required to reach an agreement over the impact of a permissive decision to adopt an early intervention or tracking program system, designed to identify performance problems, prior to its implementation. However, the WERC noted that, depending on the circumstances, though the employer may be within its right in implementing the permissive decision, the WERC will look at the circumstances surrounding the implementation, including (1) the extent to which good faith bargaining has or could have taken place prior to implementation, and (2) the urgency of the employer’s concerns.

### **C. Dues Deduction for Labor Organization Members**

1. The labor organization's constitution and bylaws determine matters relating to the payment of dues, fees and assessments, such as the obligation to pay them and the effect of nonpayment.
2. Employees in the bargaining unit who voluntarily choose to join the certified bargaining representative (labor organization) pay labor organization dues for the privilege of membership. Some employees pay labor organization dues directly to the labor organization in either a lump sum payment or on a periodic basis; however, most employees sign a dues deduction authorization thereby requesting the employer to make deductions from paychecks and transmit the monies deducted to the labor organization for the payment of dues.
3. The Wisconsin statutes state that it is a prohibited practice for a municipal employer to deduct labor organization dues from an employee's earnings unless the employer has been presented with an individual order, signed by the municipal employee personally, and terminable by at least the end of any year of its life or earlier by the municipal employee giving at least thirty days written notice of such termination to the municipal employer and to the representative organization. Wis. Stat. § 111.70(3)(a)6.
4. Many collective bargaining agreements provide for the deduction of dues by the employer from the pay of the employee. The employer then delivers the dues deduction to the labor organization.
5. It is highly advisable that municipal employers seek to negotiate a dues deduction indemnification agreement, whereby the labor organization indemnifies and holds the employer harmless against any and all claims, demands, suits or other form of liability, including the cost of litigation, that may arise out of any action taken or not taken by the employer for the purpose of complying with the provisions of the dues deduction agreement.

### **D. Fair Share for Nonmembers**

1. The rights of a municipal employee include "the right to refrain from any and all such [labor organization] activities except that employees may be required to pay dues in the manner provided in a fair-share agreement." Wis. Stat. § 111.70(2) (emphasis added). Thus, a municipal employee may choose not to be a member of the labor organization, but they are still obligated to pay "fair share."
2. The basis for determining what "fair share," nonmembers can be charged is set forth by Wis. Stat. § 111.70(1)(f), which defines a fair share agreement as:

An agreement between a municipal employer and a labor organization under which all or any of the employees in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by said agreement and to pay the amount so deducted to the labor organization.

3. The Wisconsin court of appeals has held that the statute is plain on its face: the employer is barred from making fair share deductions where there is no fair share agreement in effect with the labor organization in a collective bargaining agreement. *AFSCME v. WERC*, 148 Wis.2d 392, 434 N.W.2d 850 (Ct. App. 1988).
4. The United States Supreme Court has recognized that fair share provisions implicate nonmembers' First Amendment rights of freedom of association and freedom of expression. *Chicago Teachers Union, Local No. 1, AFT, AFT-CIO v. Hudson*, 475 U.S. 292 (1986). Consequently, fair share provisions must be accompanied by carefully tailored internal labor organization rebate procedures to ensure that nonmembers pay only for the costs of collective bargaining activities and not also for ideological activity such as political contributions.
5. The United States Constitution requires that labor organizations deducting security fees from nonmembers must avoid using the fees of objecting nonmember, even temporarily, for purposes unrelated to collective bargaining and contract administration. Therefore, if a labor organization does not have an independent audit of its expenditures, it must escrow all nonmember security fees, or the portion of the security fees that will be rebated on request and the portion that is reasonably in dispute as relating to collective bargaining and contract administration, during the period when nonmembers can request a rebate of security fees that are unrelated to collective bargaining and contract administration, and/or challenge the union's calculation of the amount related to those purposes. *Teachers Assistants' Association*, Dec. No. 32388 (WERC, 3/08).
6. It is highly recommended that municipal employers seek to negotiate a fair share indemnification agreement, whereby the labor organization indemnifies and holds the employer harmless against any and all claims, demands, suits or other form of liability, including the costs of litigation, that may arise out of any action taken or not taken by the employer for the purpose of complying with the provisions of the fair share agreement.

7. 2009 Wisconsin Act 21 provides that it is a prohibited practice under the Municipal Employment Relations Act (MERA) for a municipal employer, after a collective bargaining agreement expires and before another collective bargaining agreement takes effect, to fail to follow any grievance arbitration agreement or fair-share agreement in the expired collective bargaining agreement.

#### **E. Individual Bargaining**

1. Individual bargaining is defined as negotiations that occur between an employer and an employee. *St. Croix County*, Dec. No. 28791-A (Crowley, 5/97). It is a violation of Wis. Stat. § 111.70(1)(a) for a municipal employer to circumvent the bargaining unit representative and negotiate directly with an employee. *See* Wis. Stat. § 111.70(3)4.
2. If the employer wants to seek to modify the wages, hours and conditions of employment for the purposes of collective bargaining over these matters, the employer is obligated to make the offer only to the labor organization representative. It is then up to labor organization representative to decide how to respond to the offer. Thus, when employers bargain directly with the employees, they do so in violation of Wis. Stat. § 111.70(3)(a)4. *Random Lake School District*, Dec. No. 29998-C (WERC, 8/02).
3. When the employer ignores the collective bargaining representative and makes an offer directly to the employees, the authority and standing of the collective bargaining representative is clearly undermined and an employer thereby unquestionably has interfered with employees' Wis. Stat. § 111.70(2) right "to bargain collectively through representatives of their own choosing . . . ." *Random Lake School District, supra*.
4. Absent other indicia of bad faith, an employer does not engage in unlawful individual bargaining simply by telling "their employees what they have offered to their labor organization in the course of collective bargaining." *Ashwaubenon School District*, Dec. No. 14774-A (WERC, 10/77). However, this presupposes that the employer's communication with the labor organization preceded the employer's communication with the individuals, so as not to interfere with the labor organization's ability to provide a considered response to the employer's proposal. *Northcentral Technical College*, Dec. No. 31117-C (WERC, 2/06).
5. Discussions held between the district principal and the labor organization president concerning additional pay for three special education teachers who engaged in teaching activities during their designated prep time did not constitute individual bargaining because the bargaining included the labor organization president. *Prairie Du Chien School District*, Dec. No. 30301-A (Jones, 3/03) *aff'd by Prairie Du Chien School District*, Dec. No. 30301-C (WERC, 1/04).

6. Where it does not appear that a nonrepresented employee or minority group seeks to bargain or offer to enter into any bargaining with a Board of Education, or that the individual is authorized by any other employees to enter into any agreement on their behalf, there is no basis for concluding that statements to a Board by the individual/minority group constitute “negotiation” with the Board. Thus, the Board cannot be found to have violated state statute requiring that it bargain exclusively with the majority union when it allows an individual or minority group to express a position related to on-going negotiations with the majority union at a public meeting. *City of Madison Joint School District No. 8 et al. v, WERC*, 429 U.S. 167 (1976).

#### **IV. Grievances and the Labor Organization Representative**

##### **A. Overview**

1. Most collective bargaining agreements contain grievance procedures. Grievance procedures are creatures of contract and are an extension of the collective bargaining process. Elkouri & Elkouri, *How Arbitration Works*, pp. 198, 201 (6<sup>th</sup> ed. 2004).
2. Wis. Stat. §111.70(1)(a) defines “collective bargaining” as the performance of a mutual obligation of a municipal employer, through  

its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement with respect to wages, hours and conditions of employment . . .
3. A grievance procedure is a method for employees, labor organizations and the employer to process disputes through the chain of command without resorting to a work stoppage. *How Arbitration Works, supra*, p. 199.

##### **B. Typical Components of a Contractual Grievance Process**

1. The term “grievance” is generally defined in the collective bargaining agreement. The definition can be narrowly or broadly worded. For example, a “grievance” may be defined as “any complaint arising out of the employment relationship.” Alternatively, a “grievance” may be only defined as “any question concerning the interpretation or application of the labor agreement.”
2. “Grievant” is also typically defined in the collective bargaining agreement. Again, the definition can be narrowly or broadly worded. For example, the term “grievant” may be defined as “one or more teachers of the labor

organization.” Alternatively, a “grievant” may be defined as “as a teacher, a group of teachers or the Association on behalf of the group of teachers.”

3. Typically, grievances also involve steps or levels that are taken within a certain time frame. *How Arbitration Works, supra*, pp. 213-16. Such levels may include: (1) immediate supervisor; (2) district administrator; (3) board of education; and (4) grievance arbitrator. An immediate supervisor’s resolution of a grievance can be binding on the entire district even without the consent of the district administrator or the board. *Id.*
4. A grievance procedure may also provide for time limits for filing and processing each step of the grievance. *How Arbitration Works, supra*, pp. 217-227. Under a good grievance procedure, the union’s failure to process results in the grievance being dismissed and the employer’s failure to respond to the grievance constitutes a denial of the grievance. Typically, grievance procedure time limits are expressed in days. It is important to determine whether the days are calendar days, week days or work days.

### **C. Role of the Labor Organization Representative**

1. Inherent to the labor organization representative’s role as collective bargaining representative is the duty to protect the integrity of the negotiated agreement by resolving any questions or disputes arising under that agreement. Thus, the labor organization representative may reject the grievance outright, attempt to settle the grievance, and/or pursue the grievance to arbitration.
2. The labor organization has a duty of fair representation to process grievances on behalf of employees in the bargaining unit, but the labor organization representative has considerable latitude in deciding whether to pursue a grievance through arbitration. Thus, even if an employee claim has merit, a labor organization representative may properly reject it unless its action is arbitrary or taken in bad faith. *Mahnke v. WERC*, 66 Wis.2d 524, 225 N.W.2d 617 (1975). The employee has no absolute right to arbitration and the mere fact that a labor organization, through its representative, settles a grievance short of arbitration does not, without more, mean that it has breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 194 (1967).
3. Generally, only the labor organization, not the employee, may decide to pursue a grievance to arbitration.
4. Again, as mentioned above, 2009 Wisconsin Act 21 provides that it is a prohibited practice under the Municipal Employment Relations Act (MERA) for a municipal employer, after a collective bargaining agreement expires and before another collective bargaining agreement

takes effect, to fail to follow any grievance arbitration agreement or fair-share agreement in the expired collective bargaining agreement.

#### **D. Settlements**

1. An oral grievance settlement is a “collective bargaining agreement.” *See, e.g., Kenosha County*, Dec. No. 17384-A (Lynch, 10/80) and *City of Prairie du Chien*, Dec. No. 21619-A (Schiavoni, 7/84). Oral grievance settlement agreements are enforceable, but difficult, because the terms are not committed to writing.
2. A written grievance settlement agreement is negotiated and then committed to writing. It may contain different labels, such as a Memorandum of Understanding, a Side Bar Agreement, or a Grievance Settlement Agreement. Written grievance settlement agreements are easier to enforce than oral grievance settlement agreements.
3. The parties are obligated by Wis. Stat. § 111.70 (MERA) to abide by grievance settlement agreements. The parties may include a waiver of all claims in a grievance settlement agreement. The parties must decide whether the grievance settlement will occur on a precedential or a non-precedential basis.
4. While an individual employee may waive his or her right to bring a cause of action under state and/or federal statutes as part of an agreement settling a grievance filed under the grievance procedure of a collective bargaining agreement, such waiver is an agreement only between the individual and the employer, is not a “collective bargaining agreement” within the meaning of Wis. Stat. § 111.70(3)(b)4., and therefore, it cannot be enforced by the WERC under Wis. Stat. § 111.70(3)(b)4. *Thomsen v. WERC*, 2000 WI App 90, 234 Wis.2d 494, 610 N.W. 2d 155.
5. A labor organization representative’s settlement efforts on behalf of an employee demonstrates an ongoing effort by the labor organization to provide the employee with fair representation. That effort alone, however, even if proven successful, cannot be the basis for determining that the labor organization fulfilled its duty of fair representation when it previously decided to drop the grievance. *Marathon County*, Dec. Nos. 25757-C and 25908-C (WERC, 3/91)

#### **V. Role of Labor Organization Representative During Investigations**

##### **A. Right to Representation**

1. Under MERA, an employee has a right to labor organization representation where (1) the employee reasonably believes that disciplinary action could result from a mandatory meeting with management; (2) the employee requests labor organization representation

for the meeting; and (3) the exercise of the employee's right would not unreasonably interfere with legitimate employer prerogatives. *Thorp School District*, Dec. No. 29146-B (WERC, 5/98).

2. The WERC has adopted the standard set forth under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) for interpreting the requirements of MERA. *City of Milwaukee*, Dec. Nos. 14973-B, 14875-B, 14899-B (WERC, 10/80). Under *Weingarten*, an employee has a right to labor organization representation when (1) the employee reasonably believes that disciplinary action may be the result of an investigatory interview with the employer's representative and (2) the employee requests representation. In this respect, the WERC has also stated as follows:
  - a. The reasonableness of an employee's belief that disciplinary action could result from a meeting is measured objectively given the specific circumstances surrounding each meeting, and not against the subjective views of the employee;
  - b. A labor organization-represented employee may participate in an investigatory interview without a labor organization representative if the employee fails to request one; and
  - c. An employer has no obligation to continue with an investigative interview once labor organization representation is requested. The employer does not have to justify its refusal and can continue its investigation without questioning the employee. The employee then foregoes any benefits that may be derived from participating in an interview. *Thorp School District*, Dec. No. 29146-B (WERC, 5/98).
3. Under MERA, an employee is entitled to labor organization representation at any meeting that could lead to discipline. *City of Milwaukee*, Dec. Nos. 14973-B, 14875-B, 14899-B (WERC, 10/80).
  - a. Whether a right to representation exists depends on the purpose of the employer-employee interaction and whether protected rights could reasonably be impaired by denying representation in such circumstances. *Waukesha County*, Dec. No. 14662-A (Gratz, 1/78), *aff'd* Dec. No. 14662-B (WERC, 3/78).
  - b. An employer's refusal to permit representation is considered interference with protected employee rights if an employee has requested representation and the scheduled interaction could reasonably affect a decision to discipline or discharge. *City of Milwaukee*, Dec. Nos. 14973-B, 14875-B, 14899-B (WERC, 10/80).

- c. An employee is also entitled to labor organization representation if a meeting's purpose is to determine whether an employee should be retained. *Boscobel Area School District*, Dec. No. 18891-B (WERC, 12/83).
  - d. A teacher has a right to labor organization representation at a private conference requested by the teacher pursuant to the non-renewal statute. *Waterloo Joint School District No. 1*, Dec. No. 10946-A (Fleischli, 8/73), *aff'd* Dec. No. 10946-B (WERC, 9/73).
  - e. The private conference in the teacher nonrenewal process set for in Wis. Stat. § 118.22 is an extension of the collective bargaining process and the duty in that regard is to meet at reasonable times and places. *Horicon Joint School District No. 10*, Dec. No. 13765-B (WERC, 1/78)
  - f. By limiting the number of representatives a teacher could have to assist him in the presentation of his case at a private conference and at a grievance meeting, the school district did not commit a prohibited practice within the meaning of Wis. Stat. § 111.70(3)(a)1., 4., and 5. *Boscobel Area School District*, Dec. No. 18891-B (WERC, 12/83).
4. An employee does not have a right to representation, when:
- a. The employee is directed to attend a meeting involving a review of merit evaluation. Although the review may directly affect wages, the value of labor organization representation is outweighed by the interference such representation would have on the efficiency of the employer's employee evaluation and motivation process. *Waukesha County*, Dec. No. 14662-A (Gratz, 1/78), *aff'd* Dec. No. 14662-B (WERC, 3/78).
  - b. The employee is directed to attend a meeting with administrative personnel to discuss criticism of job performance, especially where the right is waived by not being timely requested by the employee. *Id.*
  - c. The employee is directed to attend a meeting called to impose previously determined discipline because the value of representation to the employee is outweighed by an employer's right to maintain employee discipline and operational efficiency. *Id.*
  - d. A supervisor contacts an employee merely to seek information for administrative purposes (such as payroll or accounting). *Id.*

## **B. The Role of the Labor Organization Representative**

1. Each employee has the right to effective labor organization representation. At investigatory meetings, labor organization representatives have the right to actively participate in order to provide employees with the concerted protection to which they are entitled. *City of Appleton*, Dec. No. 27135-A (Greco, 7/92), *aff'd* Dec. No. 27135-B (WERC, 7/92).
2. Employees have the right to confer with their union representative prior to the investigatory meeting. Thus, the employer violated Wis. Stat. § 111.70(3)(a)(1) when it denied the labor organization representative's request to confer with the employee prior to an investigatory meeting that was conducted approximately two hours after the employee was involved in an altercation with another employee. *Columbia County*, Dec. No. 32415-A (Jones, 9/08).
3. The role of the representative, the representative's specific level of participation, and the protection afforded to the employee during the investigatory meeting will be determined by the specific circumstances surrounding each meeting. However, the collective bargaining agreement may require representation in other contexts as well.
4. To determine the extent of representation and the proper role of a labor organization representative in a meeting with an employee, the WERC has suggested that several questions be asked:
  - a. What is the purpose of the meeting?
  - b. What participation is expected of the employee during the meeting?
  - c. Is it reasonable to expect a representative to undertake the task contemplated by the meeting procedure given the reason for the meeting?
  - d. What level of representation is required to ensure an employee adequate representation, while at the same time preserving the investigatory setting and the procedures used by the employer to conduct the investigation or interview? *City of Milwaukee*, Dec. Nos. 14873-B, 14875-B, 14899-B (WERC, 10/80).
5. A labor organization representative does not have a right to answer factual inquiries on behalf of an employee being interviewed or to instruct an employee not to answer a specific question. A labor organization representative may clarify employer questions, but may not obstruct the investigatory process. *City of Milwaukee, supra*.

6. An employer may not instruct labor organization representatives that they may not interrupt or interject during the meeting, or threaten to remove the representatives from the room if they speak. This interferes with the employee's right to effective labor organization representation. A labor organization representative has the right to actively participate in order to provide employees with the concerted protection to which they are entitled. *City of Appleton*, Dec. No. 27135-A (Greco, 7/92), *aff'd by operation of law*, Dec. No. 27135-B (WERC, 1992).
  - a. An employer told a labor organization representative that he was not to interrupt, interject, or provide responses on behalf of the employee. The employer also stated that there would be no interruptions of any kind.
  - b. The WERC found that the employer's instructions to the representative not to interject or respond on behalf of the employee impaired the representative's right to participate in the interview to the extent necessary to represent the employee. Despite the employer's assertion that he would have permitted the employee to stop the interview and consult with the representative, the WERC also found that the employer's statement that there would be no interruptions also prevented the employee from obtaining effective representation.
  - c. The WERC concluded that the representatives functioned only as observers and the employee did not receive the active representation she was entitled to. The WERC ordered the employer to cease and desist making similar statements at future interviews.
  
7. WEAC publishes a bulletin advising union representatives as to the role they may play during the investigatory interview. The bulletin acknowledges that "the law only requires the employer to permit the union representative to take notes, witness the meeting, and state the employee's position at the end of the meeting." However, the bulletin also suggests that the representative should take certain steps to serve as the employees advocate, by:
  - a. Asking clarifying questions;
  - b. Bringing out mitigating circumstances or exculpatory facts; or
  - c. Raising any issues relating to unequal treatment.

Employers are NOT required to permit the labor organization representative to engage in such tactics.

### C. *Garrity* Warnings

1. Generally, when a public employee's conduct is in question, the employee can be compelled to testify about his or her job performance and can be disciplined or discharged for refusing to respond. *Oddsens v. Board of Fire & Police Commissioners*, 108 Wis. 2d 143, 321 N.W.2d 161 (1982).
2. However, under the Fifth Amendment to the U.S. Constitution, an employee has the right not to make potentially incriminating statements. Therefore, a conflict is created when an employer asks an employee to make statements about his or her job performance pursuant to an internal investigation that could also be incriminating.
3. The U.S. Supreme Court resolved this conflict by holding that an employee's statements, made pursuant to an internal investigation and under threat of termination for refusal to cooperate, are not admissible in any subsequent criminal proceedings against the employee. *Garrity v. New Jersey*, 385 U.S. 493 (1967).
4. The Wisconsin Supreme Court adopted *Garrity* in Wisconsin, holding that where an employee is forced to choose between making potentially criminally incriminating statements and being terminated, those statements cannot be used in a subsequent criminal prosecution. *Oddsens, supra*.
5. The Wisconsin Supreme Court adopted a two-pronged subjective/objective test for determining whether statements made during an employer's investigation are coerced and involuntary, and therefore subject to suppression under *Garrity*. Under this test, an employee must:
  - a. Subjectively believe that he or she will be terminated for asserting the privilege against self-incrimination, and
  - b. The belief must be objectively reasonable.
6. An express threat of job termination or a statute, regulation, rule or policy in effect at the time of the questioning which provides for the employee's termination for failure to answer the questions posed will nearly always form the basis for an objectively reasonable belief. *State v. Brockdorf*, 2006 WI 76, 291 Wis. 2d 635, 717 N.W.2d 657.
7. The Seventh Circuit Court of Appeals has held that an employer that wants to ask a public employee potentially incriminating questions must first inform the employee of his or her immunity under *Garrity*. *Atwell v. Lisle Park District*, 286 F.3d 987 (7<sup>th</sup> Cir. 2002).
8. Whether an investigation is considered to be in the criminal context depends on the underlying conduct. If an employee is being questioned

about potentially criminal conduct for which criminal proceedings have been or may be brought, the employer must provide a *Garrity* warning. *Baxter v. Palmagiano*, 425 U.S. 308, 316 (1976); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 389 (7<sup>th</sup> Cir. 1995).

#### **D. Requests for Specific Representatives**

1. The employer has a duty to schedule meetings with employees at a reasonable place and time to allow a labor organization representative to be present. *Horicon Joint School District No. 10*, Dec. No. 13765-B (WERC, 1/78).
2. The employee does not have the right to have a specific representative present, but an employee's stated preference for a particular representative should be honored when possible. *City of Beloit (Fire Department)*, Dec. No. 27990-B (Shaw, 1995) *aff'd* Dec. No. 27990-C (WERC, 7/96).
3. An employer may preclude use of a particular labor organization representative for valid business purposes. *Department of Corrections*, Dec. No. 30340-A (Nielsen, 8/03).
4. An employer does not commit a prohibited practice by refusing to meet with an individual employee if the employer conditions the meeting on requiring the union representative to be present at the meeting. *Milwaukee Bd. of Sch. Directors*, Dec. No. 30980 (WERC, 3/09).

### **VI. Labor Organization Representatives and Concerted Activity**

#### **A. The Right to Engage in Lawful Concerted Activity**

1. The rights of municipal employees in Wisconsin are set forth under Wis. Stat. § 111.70(2), which provides:

Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement.

2. It is a prohibited practice under Wis. Stat. § 111.70(3)(a)1., for a municipal employer to interfere with, restrain, or coerce municipal employees in the exercise of their rights guaranteed in Wis. Stat. § 111.70(2), as stated above.

3. It is a prohibited practice under Wis. Stat. § 111.70(3)(a)3., for a municipal employer to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment.

## **B. The Parameters of Lawful Concerted Activities**

1. As long as communications are not deceptive, misleading, or threatening, do not directly disparage the labor organization, are limited to the factual content of offers already made to the Association, and do not explicitly or implicitly offer a better deal to the individual employees, they are within an employer's legitimate sphere of communication. Further, the employer is entitled to state the results of a prospective settlement, as long as the statement is based upon demonstrable realities and is not pretextual for or reflective of unlawful animus. *School District of Kettle Moraine*, Dec. No. 30904-D (WERC, 4/07).
2. An employer committed a prohibited practice when it stated that things would improve if the Association chose a different professional representative, coupled with an explicit offer of assistance in making that happen. This unsolicited offer of assistance in selecting a different representative pushed the conversation beyond what the parties might take with a grain of salt and into an area where a reasonable labor organization representative would feel unease and coercion. *School District of New Berlin*, Dec. No. 31243-B (WERC, 4/06).
3. Although an employee's conduct may be vocal, and perhaps even condescending and disrespectful, it nevertheless can still fall within the protection of the law. Although violent and threatening behavior are examples of activities that will likely lose their protection, employees' rights to engage in lawful, concerted activity are often exercised in tense, chilly or hostile atmospheres, because by its very nature, such activity involves challenging the employer's authority. *Clark County*, Dec. No. 30361-B (WERC, 11/03).
4. A labor organization president engaged in lawful concerted activity when he contacted an employee about her allegations that a co-worker had sexually harassed her during an employer investigation into the matter. Consequently the employer could not lawfully prohibit that communication. However, if the union president attempted to coerce the employee into recanting her allegations, then the concerted activity loses its protection under the law, and the employer may discipline the labor organization president for that conduct. The employer may warn the labor organization president not to attempt to coerce employees and may interrogate the labor organization president about his contacts and conversations with the employees at issue, but only if the employer has a substantial and reliable basis for believing that coercion or some other

misconduct occurred. *Department of Corrections*, Dec. No. 30340-B (WERC, 7/04).

### **C. Labor Organization's Use of Electronic Devices**

1. Policies that regulate concerted activities on the employer's time and premises are presumed to be valid so long as they are facially non-discriminatory and applied uniformly.
2. The University of Wisconsin Hospital and Clinics Authority (Hospital) began blocking the non-employee labor organization representative's email communications in the midst of heated contract negotiations. The Hospital never informed the labor organization that its messages were being blocked. The only other external addresses that were blocked came in response to complaints of harassment and pornographic solicitation. The labor organization argued that the Hospital's action constituted an unlawful interference with protected labor organization activity. The Hospital argued that its decision was promulgated by concerns over work efficiency, employee productivity and the potential for computer viruses. The WERC concluded that because the record demonstrated that the Hospital had singled out labor organization communications as a target, the hospital had no "objective basis for its concern" and its policy was "aimed largely at protected activity." Accordingly, the WERC concluded that the Hospital did not have a sufficient business justification to interfere with protected labor organization activity. *University of Wisconsin Hospital and Clinics Authority*, Dec. No. 30202-C (WERC, 4/04).

### **D. Labor Organization's Use of Mailboxes**

1. A collective bargaining agreement may exclude a minority union's access to an interschool mail system and to teacher mailboxes without violating the First Amendment or the Equal Protection Clause. The U.S. Supreme Court emphasized that the use of school mail facilities enables a majority union to perform effectively its statutory obligations as exclusive representative of all teachers. However, because minority unions have no official responsibility in connection with a school district, the Court reasoned that they do not need to be entitled to the same rights of access to school mailboxes and mail systems. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).
2. Employers are not required to carry within its mail system communications to and from the labor organization regarding the administration and enforcement of the collective bargaining agreement, education workshops and seminars, and other non-educational matters. The Seventh Circuit Court of Appeals ruled that such communications are not exempt from the postage requirements because they do not qualify as the "current business" of the school district. *Fort Wayne Community*

*Schools v. Fort Wayne Education Association, Inc.*, 977 F.2d 358 (7<sup>th</sup> Cir. 1993).

**E. Labor Organization’s Use of Employer Facilities and Property**

1. A school district’s policy restricting the employee’s use of the district’s phone and fax machine to district business and emergencies, thereby prohibiting employees from using the devices to conduct labor organization business, was permissible because the district had a valid business reason for its actions. *Racine Unified School District*, Dec. No. 29074-B (Gratz, 4/98) *aff’d* Dec. No. 29074-C (WERC, 7/98).
2. If a collective bargaining agreement provision granting the labor organization access to the school district’s property has a significant relationship to the Association’s ability to serve as the exclusive bargaining representative, and prohibits a significant detrimental impact on educational policy and/or the district’s ability to manage and control its facilities, then the provision is a mandatory subject of bargaining. *Janesville School District*, Dec. No. 21466 (WERC, 4/84).
3. If the collective bargaining agreement provision granting the labor organization access to the district’s property fails to guarantee that the labor organization’s use of the district’s building or equipment will not interfere with school functions or activities, or previously scheduled community activities, then the provision is a permissive subject of bargaining. *Shullsburg School District*, Dec. No. 20120-A (WERC, 1984).

**VII. Prohibited Practices and Enforcement**

**A. Interference, Restraint or Coercion under Wis. Stat. § 111.70(3)(a)1.**

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to interfere with, restrain or coerce municipal employees in the exercise of their rights. Wis. Stat. § 111.70(3)(a)1.
2. The standard for determining an independent violation of Wis. Stat. § 111.70(3)(a)1. demands that the complainant demonstrate, by a clear and satisfactory preponderance of the evidence, that the employer’s conduct had a reasonable tendency to interfere with employees’ exercise of rights granted under Wis. Stat. § 111.70(2). It is not necessary for the complainant to prove that the employer intended to interfere with the exercise of such rights, or that there was actual interference. *Waupaca County (Highway Department)*, Dec. No. 24764-A (McLaughlin, 7/88).
3. The clear and satisfactory preponderance of the evidence established that the district administrator, by email, made statements indicating that a decision by the labor organization to have its executive director attend the contract negotiation sessions between the labor organization and the

district would have an adverse impact upon contract negotiations, including a lower monetary settlement. Such statements contained a threat of reprisal which would tend to interfere with, restrain or coerce employees in the exercise of their Wis. Stat. § 111.70(2) rights. The district had no legitimate operational basis or valid business reason for the administrator's statement that the cost of the district's negotiator would be taken from the amount of money that the district had set aside for this contract settlement. Thus the district's conduct violated Wis. Stat. § 111.70(3)(a)1. *Clear Lake School District*, Dec. No. 31627-B (Burns, 10/06) *aff'd by operation of law* Dec. No 31627-C (WERC, 11/06).

4. A school district did not coerce, intimidate or restrain municipal employees in the exercise of their rights by having the car driven by the executive director of a labor organization ticketed and towed away during a mediation session involving the district and the labor organization after the executive director had parked the car in a space reserved for the district's board of education. *Racine Unified School District*, Dec. No. 20736-A (Shaw, 7/84) *aff'd by operation of law*, Dec. No. 20736-B (WERC, 10/84).

**B. Interference with Formation or Administration under Wis. Stat. § 111.70(3)(a)2.**

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it. Wis. Stat. § 111.70(3)(a)2.
  - a. "Domination" involves the actual subjugation of the labor organization to the employer's will. A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employee interests. *Barron County*, Dec. No. 26706-A (Jones, 8/91) *aff'd by operation of law* Dec. No. 26706-B (WERC, 9/91).
  - b. "Interference" is conduct of such magnitude that it threatens the independence of a labor organization as the representative of employee interests. An example of interference would be negotiating with a rival labor organization during the pendency of an election petition. *Waukesha County*, Dec. No. 30799-B (WERC 11/04)
2. By stating to a labor organization official that the school district could resolve more disputes if the labor organization obtained a different representative, and by offering to assist the labor organization in obtaining a different representative, the school district interfered with the internal administration of the association in violation of Wis. Stat. § 111.70(3)(a)2. *School District of New Berlin*, Dec. No. 31243-B (WERC, 4/06).

3. A school district did not interfere with the administration of the labor organization by refusing to grant a teacher a leave day to confer with her labor organization representatives. The refusal, did, however, violate the express terms of the collective bargaining agreement in violation of Wis. Stat. § 111.70(3)(a)5. *Turtle Lake School District*, Dec. No. 22219-B (McLaughlin, 6/85) *aff'd by operation of law*, Dec. No. 22219-C (WERC, 7/85).

**C. Discrimination Under Wis. Stat. § 111.70(3)(a)3.**

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. Wis. Stat. § 111.70(3)(a)3.
2. To prevail on a retaliation/discrimination claim under Wis. Stat. § 111.70(3)(a)3., the labor organization must establish, by a clear and satisfactory preponderance of the evidence, the following four elements: (1) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (2) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (3) that the employer bore animus toward the activity; and (4) that the employer's adverse action against the employee was motivated at least in part by that animus, even if other legitimate factors contributed to the employer's adverse action. *Wisconsin Rapids School District*, Dec. No. 30965-A (Gratz, 1/08).
3. Although the nonrenewed teacher had been the president of the labor organization and had pressed a successful grievance against the Board, the complainant offered no proof that any agent of the district bore any animus toward the teacher for engaging in either of those activities. Moreover, even if it was assumed that the district violated the terms of the staff cut procedure, the reasons given for the teacher's nonrenewal and the other evidence taken together, did not support a finding of animus. *Mineral Point Unified School District*, Dec. No. 14970-C (WERC, 10/78).
4. A middle school principal's refusal to meet with the school's representative council prior to a teacher's transfer from the school and the principal's conduct to force two teachers to transfer from the school, including his summoning the police to the school, were based in part on his hostility toward the exercise of lawful, concerted activity and thus violated Wis. Stat. § 111.70(3)(a)3. *Milwaukee Board of School Directors*, Dec. No. 30720-A (McLaughlin, 7/06) *aff'd by operation of law* Dec. No. 30720-B (WERC, 8/06).

**D. Refuse To Bargain Under Wis. Stat. § 111.70(3)(a)4.**

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to refuse to bargain collectively with a representative of a majority of its employees. Wis. Stat. § 111.70(3)(a)4.
2. The county violated the agreement and its statutory duty to bargain with the exclusive representative of the labor organization by failing to afford the labor organization the opportunity to be present at the step three meeting that the county had with an employee to discuss the employee's grievance, where it could not reasonably be inferred that the labor organization's chief steward knew of the meeting, or that the chief steward acquiesced in having that meeting conducted in the absence of a labor organization representative. *Columbia County*, Dec. No. 22683-B (WERC, 1/87)
3. A meeting between the school district superintendent, the high school principal and a teacher, in the absence of a labor organization representative, during which the teacher was offered a one-year assignment as head wrestling coach for the upcoming school year in exchange for a letter of resignation as head wrestling coach at the close of that year, constituted individual bargaining in violation of Wis. Stat. § 111.70(3)(a)4. *Amery School District*, Dec. No. 26138-A (McLaughlin, 2/90) *aff'd by operation of law* Dec. No. 26138-B (WERC, 3/90).

**E. Violation of the Collective Bargaining Agreement Under Wis. Stat. § 111.70(3)(a)5.**

1. It is prohibited practice for a municipal employer, individually, or in concert with others to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment. Wis. Stat. § 111.70(3)(a)5.
2. The failure of the district to process a grievance, unless other procedures are provided in a collective bargaining agreement, does not constitute a refusal to bargain, but rather involves a possible violation of the agreement in violation of Wis. Stat. § 111.70(3)(a)5. *Sheboygan Joint School District*, Dec. No. 11990-B (WERC, 1/76).

## **VIII. Union Representation and Confidential Employees**

### **A. Rights of Municipal Employees To Join A Labor Organization**

1. The rights of municipal employees are set forth under Wis. Stat. § 111.70(2). This statute states:

Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement.

2. “Municipal employee” is defined under Wis. Stat. § 111.70(1)(i), which states as follows:

“Municipal employee” means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee.

3. Given this definition, if an administrative assistant is a confidential employee, the position is not eligible for inclusion in the bargaining unit.

### **B. Confidential Employees**

1. For an employee to be considered confidential there must be a showing that the employee has sufficient access to, knowledge of, or participation in confidential matters relating to labor relations.
2. In order for such information to be considered confidential for such purposes, it must be of the type that (a) deals with the employer's strategy or position in collective bargaining, contract administration, litigation or other matters pertaining to labor relations; and (b) is not available to the bargaining representative or its agents. *Northwood School District*, Dec. No. 20022 (WERC, 10/82).
3. The confidential exclusion protects a municipal employer's right to conduct its labor relations through employees whose interests are aligned with those of management, rather than risk having confidential information handled by people with conflicting loyalties who may be subjected to pressure from fellow bargaining unit members. *Cooperative Education Service Agency No. 9*, Dec. No. 23863A (WERC, 12/86).

4. An employer clearly cannot be allowed to exclude an inordinately large number of employees by spreading the work of a confidential nature among such employees or giving them occasional tasks of a confidential nature. *Marshfield Joint School District No. 1*, Dec. No. 14575A (WERC, 7/76).
5. Where a management employee has significant labor relations responsibility, the clerical employee assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, unless the confidential work can be assigned to another employee without undue disruption of the employer's organization. *Village of Saukville*, Dec. No. 26170 (WERC, 9/89).
6. Access to personnel files alone is not sufficient to warrant the conclusion that an employee is confidential for purposes of Wis. Stat. §111.70. *Door County (Highway Dept.)*, Dec. No. 7859A (WERC, 5/85).
7. A position was confidential where the individual occupying that position directly assisted another person responsible for the negotiation and administration of collective bargaining contracts and was involved in employee discipline, non-renewals and layoffs and the grievance process. That assistant was asked to type bargaining proposals and counterproposals, grievance responses, and possible disciplinary actions. That individual also handled email sent directly to the director, which often contained information of a confidential nature. *Eau Claire Sch. Dist.*, Dec. No. 17124-B (WERC, 6/95).
8. The occupant of the position of Payroll Secretary was not a confidential employee. The payroll and filing functions associated with the position were not confidential in the labor relations sense. The Payroll Secretary did not have significant involvement with the district's handling of grievances, development of bargaining positions or strategy, or typing minutes of district strategy sessions. The *de minimis* amount of confidential work performed by the Payroll Secretary could be reassigned to the other two office employees who have been excluded from the unit without undue disruption to the district's operation. *Barron Sch. Dist.*, Dec. No. 26987 (WERC, 8/91).

## **IX. Union's Access To Information**

### **A. Duty To Provide Information Under The Public Records Law.**

1. Except as otherwise provided by law, any requester has the right to inspect any record. Wis. Stat. § 19.35(1)(a).
2. In addition to any right under Wis. Stat. § 19.35(1)(a), any requester who is an individual or person authorized by the individual, has a right to inspect any record containing personally identifiable information pertaining to the individual that is maintained by an authority and to make or receive a copy of any such information. Wis. Stat. § 19.35(1)(am).

### **B. Duty to Provide Information Under Wis. Stat. § 111.70(3)(a)(4).**

1. A municipal employer's duty to bargain in good faith includes the obligation to furnish, once a good faith demand has been made, information which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer or the administration of an existing agreement. *Madison Teachers, Inc.*, 28832-B (WERC, 9/98).
2. This duty to provide information is not without limitation. For example, some requested information may raise confidentiality concerns with the District. The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees. *Madison Teachers, Inc.*, 28832-B (WERC, 9/98). Where a party has a legitimate interest in maintaining the confidentiality of requested information, it must be balanced against the other party's need for the information.
3. Information related to wages and fringe benefits are presumptively relevant. Where the request is for information that does not relate to wages and fringe benefits, the burden is on the exclusive representative, in the first instance, to demonstrate the relevance and necessity of this information to its duty to represent unit employees. *Madison Teachers, Inc.*, 28832-B (WERC, 9/98).
4. The Employer is not required to furnish information in the exact form requested by the exclusive bargaining representative. *Milwaukee Public Schools*, 27807-A (Crowley, 1/94). It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining. *Id.*
5. The absence of a specific grievance currently under consideration between the parties does not detract from the potential value of the information requested as pertinent data which the Association should be supplied in order to assist in its task of representing unit employee with respect to

their conditions of employment. *Village of Menominee Falls*, Dec. No. 15650-C (Pieroni, 2/79).

6. An employer is required to make a diligent effort to provide the information in a reasonably prompt manner. *Proell Plumbing Co., Inc.*, 28887-A (Shaw, 3/97), aff'd by operation of law, 28887-B (WERC, 5/97).
7. Where the employer claims that compilation would be unduly burdensome, it must assert that claim promptly at the time of the request so that the parties may bargain to lessen the burden. *Racine Unified School District*, Dec. No. 23094-A (Crowley, 5/86).
8. In some cases, the conditioning of supplying relevant information on the union's incurring reasonable costs of gathering and compiling said information is permissible. *Racine Unified School District*, Dec. No. 23094-A (Crowley, 5/86); *see also Outagamie County*, Dec. No. 17393-B (Yaeger, 4/80) (employer supplied information and sent invoice for \$70 for service charge; union filed another request seeking information; employer refused and required \$70 payment for earlier and costs for current request; no refusal to bargain found).
9. The employer violated its duty to bargain when it failed to provide information to the union for the employer's investigative file prior to the pre-disciplinary due process Loudermill hearing. The employer could have limited the required disclosure if it had demonstrated confidentiality concerns specific to the particular situation. *State of Wisconsin*, Dec. No. 32239-B (WERC, 8/09). The employer has appealed this decision to the circuit court.

**C. Requests For Personnel Records Under Wis. Stat. § 103.13.**

1. Upon the request of the employee, an employer shall permit an employee to inspect any personnel documents which are used or which have been used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records, except as provided in Wis. Stat § 103.13(5) and (6). Wis. Stat. § 103.13(2). The employer shall provide the employee with the opportunity to inspect the employee's personnel records within 7 working days after the employee makes the request for inspection.
2. "Personnel Documents" is not defined and it is unclear whether such term is synonymous with or broader than personnel records.
3. An employee who is involved in a current grievance against the employer may designate in writing a representative of the employee's union, collective bargaining unit or other designated representative to inspect the employee's personnel records which may have a bearing on the resolution

of the grievance, except as provided in Wis. Stat. § 103.13(6). Wis. Stat. § 103.13(3). The employer shall allow such a designated representative to inspect that employee's personnel records in the same manner as provided under Wis. Stat. § 103.13(2).

4. The right of the employee or the employee's designated representative to inspect his or her personnel records does not apply to:
  - a. Records relating to the investigation of possible criminal offenses committed by that employee.
  - b. Letters of reference for that employee.
  - c. Any portion of a test document, except that the employee may see a cumulative total test score for either a section of the test document or for the entire test document.
  - d. Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes.
  - e. Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
  - f. An employer who does not maintain any personnel records.
  - g. Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding.