

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE SUPERVISORS' ORGANIZATION, Complainant,

vs.

CITY OF MILWAUKEE, Respondent.

Case ID: 251.0037
Case Type: COMP_MP
Decision No. 37964-A

Appearances:

Frederick Perillo, The Previant Law Firm, S.C., 310 West Wisconsin Avenue, Suite 100 MW, Milwaukee, Wisconsin, appearing on behalf of the Milwaukee Police Supervisors' Organization

Benjamin J. Roovers, Assistant City Attorney, City of Milwaukee, 200 East Wells Street, Room 800, Milwaukee, Wisconsin, appearing on behalf of the City of Milwaukee.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 30, 2019, the Milwaukee Police Supervisors' Organization (MPSO) filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Milwaukee had committed prohibited practices within the meaning of Wis. Stat. §§ 111.70(3)(a) 1., 3., 4. and 5. by refusing to provide certain information to the MPSO. I was assigned by the Commission to serve as hearing examiner.

A hearing was held on July 19, 2019 in Milwaukee, Wisconsin. A stenographic transcript was received August 9, 2019 and the parties thereafter filed written argument until November 21, 2019.

Having considered the matter, I make and issue the following:

FINDINGS OF FACT

1. The City of Milwaukee, herein the City, is a municipal employer that provides public safety services thru a police department, herein the Department.
2. The Milwaukee Police Supervisors' Organization, herein the MPSO, is a labor organization that serves as the collective bargaining representative of certain employees of the Department including those with a rank of Police Sergeant.
3. On May 1, 2019, a police sergeant received written notice from the Department that he would be interviewed on May 14, 2019 as part of a Department internal investigation

concerning his alleged negligent driving. The notice advised the employee that “Disciplinary action may result.” A criminal investigation as to the same alleged conduct had previously been conducted and closed in November 2018 with no criminal charges filed. The criminal investigation file was part of the Department’s internal investigation.

4. On May 1, 2019, the MPSO asked the City for a copy of the criminal investigation file “in order to represent and prepare for the interview of the employee.” On May 9, 2019, the City denied the MPSO request because its internal investigation had not been completed.

5. On May 14, 2019, the interview of the sergeant occurred as scheduled. The sergeant was accompanied by an MPSO representative. The interview was recorded, and the sergeant was entitled to receive a copy of the recording. Later that same day, a seven-page summary of the investigation (including the interview with the sergeant) was received by the commanding officer of the Department’s Internal Affairs Division (IAD). The summary detailed all of the information collected as part of the investigation but did not make any determination as to whether any misconduct occurred. A majority of the summary relied on information from the criminal investigation.

6. On June 17, 2019, the IAD commanding officer issued a document entitled “Charges”, which concluded that the sergeant had violated the Department’s code of conduct. The sergeant received the “Charges” document on July 2, 2019 along with the seven-page summary of the Department’s internal investigation. The sergeant then had seven days to provide the Department with any written response. The sergeant had the opportunity to seek MPSO assistance when preparing the written response. The sergeant submitted an apology as his response. After the issuance of “Charges”, the matter proceeded to the Chief of Police for a decision on what, if any, discipline should be imposed. As of July 19, 2019, the Chief had not acted.

Based on the above and foregoing Findings of Fact, I make and issue the following:

CONCLUSIONS OF LAW

1. The City of Milwaukee did not violate its duty to bargain with the Milwaukee Police Supervisors’ Organization by its refusal to provide an investigation file prior to May 14, 2019 and thus did not commit a prohibited practice within the meaning of Wis. Stat. § 111.70(3)(a)4.

2. The City of Milwaukee did not commit prohibited practices within the meaning of Wis. Stat. §§ 111.70(3)(a)1., 3. or 5.

Based on the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following:

ORDER

The complaint is dismissed.

Issued at Madison, Wisconsin this 11th day of August, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

In *University of Wisconsin System*, Dec. No. 32239-B (WERC, 8/09), the Commission concluded that the statutory duty to bargain obligated the employer to honor a union request for investigative materials prior to a constitutionally required due process meeting with an employee.¹ At that meeting, the employee would be advised of the basis upon which the employer had made a preliminary determination to impose discipline and given an opportunity to respond as to why discipline should not be imposed. The Commission first determined the information request met the “relevant and reasonably necessary” standard applicable to union duty to bargain requests for information. The Commission then concluded that the union’s interest in having the employee avoid discipline and in the overall fairness and equity of the employer’s investigatory and disciplinary procedures outweighed the employer’s interest in the confidentiality of the investigative files.

Here, the MPSO requested and the City refused to provide the City’s investigative file prior to the City’s initial interview with the employee whose conduct was being investigated for possible discipline.² The City denied the request “since the internal investigation is ongoing . . .”

The MPSO, contrary to the City, asserts that the holding in the *University of Wisconsin System* decision regarding a pre-Loudermill meeting information request is controlling here and thus that the City was obligated to provide the requested information. However, because the request at hand occurs in a pre-Weingarten meeting context and the *University of Wisconsin System* decision explicitly states that a pre-Weingarten request was not being ruled upon, it is clear that *University of Wisconsin System* is not controlling. As the Commission noted in that decision, the differences between a pre-Loudermill meeting and a pre-Weingarten meeting may bring into play additional interests and/or alter the strengths of already identified interests to be balanced.

As set forth in *University of Wisconsin System*, the applicable duty to bargain analysis to be applied here is one of determining under a broad discovery type standard if the information requested is relevant and reasonably necessary to the union’s role representing employees and, if so, whether the employer has established any confidentiality/privacy concerns. If the employer

¹Often referred to as a Loudermill meeting named after the U.S. Supreme Court decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

²Pursuant to Wis. Stats. §§111.70(2) and 164.02, a law enforcement employee has a statutory right to request that a representative be present during an interview that the employee reasonably believes might result in discipline. Here, the City had provided notice to the employee that he could face disciplinary action based on information derived from the interview. The employee requested that an MPSO representative be present and that request was honored. Such an interview is often referred to as a Weingarten meeting named after the U.S. Supreme Court decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975) interpreting an employee’s rights under Section (7) of the National Labor Relations Act. The Commission has followed the Weingarten precedent under both the State Employment Labor Relations Act and the Municipal Employment Relations Act provisions at issue in this matter.

establishes such concerns, the degree of the union's need for the information is then weighed against the employer concerns to determine if the requested information must be provided.³

Here, using a broad discovery type standard, the requested information was relevant and reasonably necessary as to the MPSO's interest in protecting the employee from discipline. However, contrary to the MPSO's contention, the strength of that interest is not as strong as that present in *University of Wisconsin System*. In that matter, the investigation was complete, the Employer had made a preliminary determination to impose discipline, and Union was seeking information that would allow it to assist the employee's effort to avoid discipline through presentation of mitigating information. Here, the investigation was not complete, a preliminary determination to impose discipline had not been made, and the MPSO role in the meeting was limited to assisting the employee as he responded to questioning. The MPSO opportunity to assist the employee's efforts to present mitigating information or concerns occurred after the investigation was completed and a summary thereof provided to the employee.

When denying the information request, the City broadly identified its concern as the ongoing status of the investigation.⁴ As more specifically reflected in witness testimony at hearing, release of the criminal investigation file would have had the potential to negatively impact the truthfulness/accuracy of the employee's responses during the investigatory interview.

Balancing the strength of the MPSO's interests against those of the City, I conclude that the City's interests predominate and thus that the City did not violate its duty to bargain by refusing to provide the criminal investigative file. Therefore, the complaint has been dismissed.⁵

Issued at the City of Madison, Wisconsin this 11th day of August 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis

³Although *University of Wisconsin System* decision interpreted provisions of the State Employment Labor Relations Act and it is the Municipal Employment Relations Act that is at issue in this dispute, the applicable analysis is the same. See *Madison Metropolitan School District*, Dec. No. 28832-B (WERC, 9/98).

⁴ MPSO asserts that I cannot consider the City's concerns because they were not pled in the Answer to the Complaint. However, the MPSO complaint itself pled this basis for the denial and thus it is more than appropriate for me to consider the hearing testimony explaining why the ongoing status of investigation mattered to the City.

⁵ The MPSO complaint also alleged violations of Wis. Stat. §§ 111.70 (3)(a)1., 3. and 5. No specific argument was made as to these allegations and the record does not provide any significant evidentiary support. Thus, these allegations have also been dismissed.