

# **WCPA LEGAL UPDATE**

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**LaCrosse, Wisconsin**

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**I. HEMPEL V. CITY OF BARABOO**

A. Facts of the case

1. Sex harassment investigation.
2. General promise of confidentiality found in anti-harassment policy.
3. Discipline letter issued—or was it?
4. Personnel record access denied.
5. Open records request made; partial denial.

B. Legal Background

1. Original Open Records Law and the Balancing Test.
2. *Village of Butler v. Cohen*
3. Woznicki
4. Open Records Law revisions

C. Application of the revised law

1. Considered request under both § 19.35(1)(a) and (1)(am).
2. Under (1)(am), no Balancing Test applied; statutory exceptions only.
3. Are complainants “confidential informants?” Court’s analysis of legislative history suggests the term should be construed broadly.
4. Under (1) statutory exceptions and the Balancing Test are still used.
5. Court approves of the *Cohen* list of reasons to deny access under (1), emphasizing the case-by-case approach; dissenters, including Abrahamson, derisively call them the “Exceptional Six.”

D. Understanding the limits of the decision.

**II. HANDLING POWER STRUGGLES WITH CITY HALL: A “TO DO” LIST**

- A. Is the Order in writing?
- B. Is it from the Mayor (proper delegations of mayoral power)?
- C. Is it a lawful Order (get opinion in writing from City attorney)?

- D. Is there a contrary written Order from the common council?
  - 1. Ask for a meeting.
  - 2. Explain merits of your position.
  - 3. If conflicting Orders given, use your professional judgment about which one to follow.
- E. Is the Rule or Order “reasonable” in the opinion of the PFC (Test 2 of the Seven Tests)?

### **III. OTHER INTERESTING CASES OF NOTE**

- A. *City of Antigo Fire Department*, Dec. No. 64035 (Emery, 2005). Key reminder to limit PFC involvement in appointment process.
- B. *Blise v. City of Kenosha*, Case No. 04-1908 (7<sup>th</sup> Cir., June 1, 2005). Seventh Circuit allows subjective hiring decisions, and does not require all applicants be asked the same questions.
- C. *Jackson v. City of Chicago*, Case No. 03-4266 (7<sup>th</sup> Cir., July 12, 2005). Police officer’s ability to use a gun is an essential function; employee’s duty to cooperate in reasonable accommodation process.
- D. *WSEU v. Corcoran and Dept. of Corrections*, Dec. No. 30340-B (7/04). How to handle investigations where the Union representative’s actions may violate Department rules.
- E. *Opsteen v. Keller*, 16 AD Cases 1281 (7<sup>th</sup> Cir., 5/18/05). Employee cannot have his ADA cake and eat his social security benefits too.
- F. *Callison v. Philadelphia*, Case No. 04-2941 (3<sup>rd</sup> Cir., 5/19/05). Order to call a supervisor when leaving home on sick leave not a violation of the FMLA.