

## **Canadian Union of Public Employees, Local 82 v. Windsor (City) (Tofilovski Grievance)**

In the Matter of an arbitration under Labour Relations Act, 1995, S.O. 1995, c. 1  
and in the Matter of an individual grievance of Alex Tofilovski, Gr. No. 05/09  
Between Canadian Union of Public Employees, Local 82,  
(the "union"), and The Corporation of the City of Windsor, (the "employer")

### **Ontario Labour Arbitration**

#### **B. Etherington (Chair), N. Sajatovich (Union Nominee) and M. Marcotte (Employer Nominee)**

Heard: February 6 and April 7, 2006.

Award: May 26, 2006.

Windsor, Ontario

File No. MPA/Y600440

For the union: James Renaud, Counsel, Alex Tofilovski, Grievor.

For the employer: Patrick Brode, Counsel, Jacquelyn Chan, Articling Student, John Lechicky, Human Resources Dept., Michael Duben, Gen. Mgr, Client Services.

The decision of the Board was given by B. Etherington (Chair), concurred in by N. Sajatovich (Union Nominee) and M. Marcotte (Employer Nominee).

### INTERIM AWARD

1 This arbitration concerns a grievance filed by the Grievor on March 22/05 (exh. 2), alleging that the Employer violated the just cause provisions of the collective agreement by issuing a two week suspension without pay to the Grievor on January 20, 2005 (exh. 3). The disciplinary letter imposing the two week suspension also imposed several conditions that had to be satisfied before the Grievor would be allowed to return to work. The Grievor had worked as a seasonal employee in the City's ice arenas since commencing his employment in September of 2004. The discipline was issued following an investigation by the Employer into allegations that the Grievor had made threatening statements on two occasions in December of 2004 after learning he had been unsuccessful on a job posting for a more secure, non-seasonal position.

2 At the outset of the hearing, the Union asked the arbitration board to rule on a preliminary issue concerning production of documents. On January 20/06 Union counsel submitted a letter to Employer counsel requesting pre-hearing production of the following documents:

1. All internal or other memos to file, correspondence, printouts of e-mails and/or other records in electronic form, interview notes, statements (signed or unsigned), witness lists, witness statements, investigative reports and other documentation relevant to the Employer's case in this matter, whether or not you intend to rely on same at the hearing and whether or not any particular item is supportive of the Employer's case;
2. The personnel file of the Grievor.

3 The production issue arises from the Employer's refusal to produce two types of documents that are encompassed by the Union's request for relevant documents. Upon learning of the allegations against the Grievor on January 11/05, the Employer suspended the Grievor without pay pending further investigation and commenced an investigation of the allegations pursuant to its recently adopted Workplace Violence Prevention Policy (exh 9) (hereinafter 'WVPP' or 'WVP policy'). In the course of the investigation several bargaining unit and non-unit employees were interviewed. The investigators took notes of those interviews and prepared a draft report summarizing what was said by the employees during the interviews. The final decision by Mr Michael Duben, General Manager of Client Services, to impose the two week suspension without pay on January 20/05, was taken after considering the report summarizing the witness interviews. The Employer objects to pre-hearing production of investigation interview notes and the portions of the investigation report that refer to certain witness interviews on the basis that the WVPP requires confidentiality concerning the information divulged by employees to investigators during an investigation into workplace violence and that the policy will be undermined and become ineffective if confidentiality is not maintained. It also takes the position that production should not be ordered because assurances of confidentiality were given by the investigators to the employees who were interviewed. The Union takes the position that the Employer's refusal to produce these documents makes it impossible for it to adequately prepare for the hearing in a manner that will ensure a fair hearing. Quite simply it argues that a refusal to produce the requested documents is inconsistent with general common law and arbitral principles concerning production requirements and fairness.

4 At the outset of the hearing the parties agreed that they would present opening statements, evidence and argument on the preliminary production issue in order to get the necessary ruling on the Union's motion for production before commencing with the hearing on the merits. The Employer introduced two witnesses to Provide a factual context for the recent introduction of its WVP Policy and to help the Board identify the interests at stake when ruling on the production issue. The witnesses also provided a brief overview of the Employer's investigation into the Grievor's alleged misconduct.

5 The first witness was John Murphy. Mr Murphy has worked for the City for over 28 years and prior to being appointed as City Safety Officer in 1992 he was a member of the bargaining unit. He is also a former union steward and chief steward for Local 82. During the period that is relevant to this arbitration, he was City Safety Officer with the responsibility of overseeing the health and safety of all employees of the Corporation. He dealt with ensuring the Employer's compliance with its statutory health and safety obligations and overseeing the operation of its Health and Safety Committee.

6 Mr Murphy explained that the inspiration for the WVPP arose from a directive issued by Ontario Ministry of Labour in June of 2004 following its investigation of a work refusal by a City employee. The Ministry investigation revealed that the City did not have a policy in place to deal with violence in the workplace. The Ministry's June 14/04 directive (exh 7) required the City to develop and implement a policy to deal with violence in the workplace by August 11/04 and also required it to provide training on the new policy to its employees by no later than October 29/04. As a result of the order the WVPP was developed by a group which included Murphy and union representatives from both Local 82 and 543 of C.U.P.E. The policy development group was comprised of three members of management and two union representatives. The group also developed a training program for the 2400 employees of the City. All employees of the City, including the Grievor, had received training on the new policy by November of 2004. Murphy testified that the content of the policy was influenced by various factors including a general growing awareness of the need for employers to deal with violence in the workplace following several recent notorious cases in Ontario of workplace harassment and violence resulting in the death of several workers. In particular he pointed to the deaths of two workers at a Sears store in Chatham after a lengthy period of harassment and stalking that was observed by co-workers but not addressed by anyone until it was too late. Murphy noted that his working group actually

considered the report of a coroner's inquest into the deaths of the two workers in Chatham (exh 8). He also referred to the tragic killings of several workers at Ottawa Carleton Transit by a co-worker. A survey done by the Employer on the scope and types of violence observed by City workers was also taken into account. Following the circulation of a draft policy to City Council and administrators and minor revisions, the policy was finally adopted in its present form sometime in the late summer or fall of 2004 and was presented to all staff during the training sessions that were completed by November of 2004.

7 Under the WVPP, all employees of the City are responsible for reporting all instances of workplace violence or threats to their supervisor or the Corporate Health and Safety Officer. If a supervisor is contacted they are supposed to notify the Corporate Safety Officer. In all cases the Safety Officer is then required to notify the Critical Incident Response Team (CIRT) which would then investigate and provide support to the supervisor to deal with the threat. The CIRT is comprised of the Safety Officer or a safety advisor, representatives of the two C.U.P.E. locals, and a member of the City administration.

8 The WVPP makes several references to 'maintaining confidentiality' or handling employee reports of violence or threats in a 'confidential manner'. At page four of the policy, under the heading Reporting, it states "All reports of violence shall be handled in a confidential manner, with information released only on a "need to know' basis. Management shall be sensitive and responsive to the reporting employees' fear of reprisal". At page eight, under the heading Critical Incident Response Team it states that "The Corporate Health and Safety Officer will ensure that team members are properly trained, maintain confidentiality and good written records of all incidents and interventions ..." At page eight there is a paragraph entitled Confidentiality that reads as follows:

The City of Windsor treats all information received as confidential information. Investigation results will not be disclosed or discussed with anyone other than those who have a legitimate right to know. All employees submitting information have the right to have their privacy and confidentiality protected by the Corporation in accordance with the Municipal Freedom of Information and the Protection of Privacy Act. Employees submitting information in good faith are also provided protection under the City's Concerned Employee Policy.

9 Mr Murphy testified that in his view the references to maintaining confidentiality in the policy meant that a commitment is made to anyone coming forward to report violence, or threats of violence, that information provided will remain confidential and any witnesses that are interviewed are given a commitment to confidentiality. He said that in his view this language on confidentiality was included in the policy because it was clear from the Sears case or the Ottawa Carleton case that in order for victims to be comfortable in coming forward with complaints it was important to have a confidentiality commitment. He further testified that while the survey on workplace violence was being completed by City employees he received approximately seven phone calls from employees to tell him that they were intimidated and afraid to complete the survey. Murphy said that this process made it clear to him that if they wanted to ensure a safe workplace they had to create an environment in which employees felt safe in coming forward to talk about situations in the workplace in confidence.

10 In terms of the investigation of the Grievor's misconduct, Murphy testified that he and Paul Lauzon were contacted by Mr Duben, Corporate Manager of Client Services, and asked to conduct an investigation after the Grievor had been removed from the workplace. He said that the interviews were conducted by either Paul Lauzon or Kim Brown who were both Safety Advisors with the City and were members of the CIRT. Murphy testified that he attended some of interviews as a support person and at each interview the lead investigator, Lauzon or Brown, would introduce the concept of confidentiality by explaining the role of the CIRT and the fact it

was conducting the interview as part of a policy of violence prevention and as such the interview was to be of a confidential nature and any information they gave to the investigators would be held in confidence. Mr Murphy could not recall if any of the interviewees made any comment on confidentiality. He also indicated that all witnesses that the Employer was aware of were interviewed and the information that was collected was summarized and included with recommendations in a report that was submitted to Mr Duben.

11 In cross-examination Murphy testified that confidentiality was not a controversial issue when the working group was developing the WVPP. He also admitted that the union representatives in the group had never stated that the concept of confidentiality meant excluding union representatives from access to information when a grievance came up. He also admitted that when the Grievor was interviewed by the investigators of the incident without union representation he was given assurances of confidentiality, but then his statements were given to members of management to decide how to deal with him and the Grievor was not informed that the information he provided to the CRT could be used in this way. Murphy also acknowledged that when they interviewed the Grievor he was already removed from the workplace and they knew he was the target of the investigation, although they did not know then whether he would be disciplined. Murphy also stated that when witnesses were told about the confidential nature of the process none of them asked any questions about that or expressed any concerns about it. When asked about the reference on page 4 to release of information on a 'need to know basis' Murphy said he felt that referred to cases where they had to call the police in to assist but admitted that there was no discussion of whether the union's access to information to deal with a grievance could be covered by the 'need to know' reference.

12 Murphy admitted that not one witness stated they would not answer questions if they were not guaranteed confidentiality in the sense of assurance they would never have to testify about it in a later proceeding and no one indicated that they had a fear of reprisal if their statements were disclosed. None of them said do not call me as a witness in any subsequent hearing. He further testified that he did not feel that disclosure to the Union was encompassed by the reference on page 8 of the policy to the disclosure to those who "have a legitimate right to know". In his view this was meant to refer to police and management but not the Union, however he admitted this was never discussed during the development of the policy. Murphy also admitted that the initial response to the situation in the case of the Grievor to remove him from the workplace was taken by Mr Duben without any reference to him as the Corporate Safety Officer or any involvement of the Critical Response Team. He stated he was unsure why it was done this way and admitted it was not in accordance with WVPP provisions concerning the process that should be followed when an employee reports a threat of violence. However, he admitted that after the CIRT gives its report to a supervisor or a manager it has no control over who that supervisor shares the CIRT information with.

13 Mr Duben, the General Manager of Client Services for the City also testified. He said that this matter first came to his attention on January 11/05 when the Executive Director of Parks and Recreation and the Manager of Arenas, Mr Carl Fama and Mr Steve Price, asked to meet with him on an urgent matter and told him about allegations of threats being made by the Grievor in December of 2004. After meeting with Fama and Price, Mr Duben then took steps within a few hours to remove the Grievor from the workplace and place him on unpaid suspension pending the outcome of his investigation. Duben then contacted Lauzon and Murphy and asked them to conduct an investigation into the allegations. Mr Duben testified that he did not recall giving much attention to confidentiality when he gave his initial instructions to Lauzon and Murphy, but later he had a discussion with Mr Lauzon in which Lauzon told him that during his interviews with witnesses he told them the information they gave him would be kept confidential. Sometime after that Duben had a discussion with officials from the Union in which they asked him to disclose the information he had gained from his investigation. Mr Duben told them he could not provide it on the basis that Mr Lauzon had promised people during the investigation that he would not disclose the information they provided to Lauzon.

14 In cross-examination Mr Duben testified that he based his final decision on discipline on several considerations: the report of the investigation done by Lauzon and Murphy; a meeting and phone conversation with the Grievor; discussions about the incident with Fama and Price; notes given to him by Mr Price concerning the allegations against the Grievor; discussions he had just before issuing discipline with other senior administrators at the City; and the zero tolerance policy of the City toward violence or threats of violence. The report of Lauzon and Murphy was comprised of summaries of the witness interviews and recommendations of the investigators. Duben admitted that he discussed the contents of the investigation report with the other senior managers although he did not give them copies of the report. Duben also admitted that he was not present during any of the interviews conducted by Lauzon and does not have personal knowledge of what Lauzon actually promised the witnesses concerning confidentiality. He further confirmed that he was not aware of any discussions or agreement between the Union and the Employer concerning the relationship between the WVPP and the Employer's obligations and employee rights under the Collective Agreement provisions governing the discipline process.

#### Argument

15 The Union began by noting that the entire premise of the Employer's refusal to produce the requested documents is the need to protect confidentiality to comply with its WVPP policy and ensure that this policy is effective. It argued that the evidence presented through Murphy and Duben simply did not support a claim of privilege on the basis of confidentiality under the traditional Wigmore criteria that have been accepted in arbitral precedent. It submitted that there was insufficient evidence of a clear undertaking by a person with sufficient authority in an appropriate relationship to create a cloak of confidentiality or privilege under the accepted criteria. It noted that there was only hearsay evidence from Mr Duben about the promise made by Lauzon to witnesses and the evidence of Murphy on what was said by Lauzon in interviews concerning confidentiality was simply too vague and lacking in detail concerning what was meant by maintaining confidentiality to create a privilege that could override general arbitral principles requiring production to ensure fairness in the process. In addition, it said that Lauzon, as a safety advisor conducting an investigation into alleged threats, simply was not in a position analogous to a legal counsel or priest or medical professional in terms of creating a privileged relationship. Union counsel also questioned why Lauzon was not called to testify when he was purported to be the one person who gave assurances of confidentiality to witnesses and asked me to draw inferences from the Employer's failure to call Lauzon during the two day hearing on production issues.

16 The Union also submitted that we should not confuse the fact that some official undertakes to assist another person in confidence with the situation where there is a cloak of confidentiality or privilege that cannot be penetrated when the Employer takes action against a bargaining unit member based on information acquired during an investigation. In this respect, it contended that the City may be able to maintain that information acquired in confidence must remain confidential if it decided not to take any action, but this board should make it clear that it cannot be bound by any such promise if the information acquired ends up being used to support action being taken against a bargaining unit member. The Union contended that it should be made clear that employees can expect information to be revealed if action is taken against the person being investigated as this must be required under general common law principles of fairness to persons who are accused of wrongdoing and their right to be able to meet their accuser and make full answer and defence against the allegations of their accuser. It noted that the general principles of judicial fairness and natural justice apply equally to discipline situations. It further contended that these principles should require disclosure even earlier during the grievance process to facilitate fairness and early resolution and settlement. However, Union counsel agreed that the only issue before this board was whether the Employer was required to comply with the Union's request for production of arguably relevant investigation documents at a reasonable time prior to the hearing sufficient to enable the Union to prepare to meet the Employer's case at arbitration.

17 To support its contention that the Employer had not established the traditional common law criteria for privilege the Union relied on two cases: West Park Hospital and ONA (1993), 37 L.A.C. (4th) 160 (Knopf) and Children's Aid Society of City of Belleville et. al. and C.U.P.E., Local 2197 (1994), 42 L.A.C. (4th) 259 (Briggs). It relied on the West Park Hospital decision for the four Wigmore criteria for privilege:

1. That communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The Union argued that on the evidence the Employer had failed to prove that any of the Wigmore conditions for privilege had been met. As noted earlier, it contended that the evidence on what exactly was promised in terms of confidentiality was quite unclear and non-specific and insufficient to create an expectation that the witnesses statements would remain confidential and could not be the subject of disclosure where disciplinary action resulted and the issue was taken to arbitration. On the second condition, it contended the personal opinions of Mr Murphy on the need for confidentiality for witnesses to come forward fell far short of proof that maintaining confidentiality when the matter went to arbitration was essential to operation of the WVPP and maintaining the relationship between investigator and witnesses. On condition number three, the Union said there was simply a paucity of evidence on the issue and no evidence that people would not come forward in the absence of a promise of confidentiality. The fourth condition requires a balancing of harm and benefit to the competing interests of the relationship that would be injured by disclosure and the fairness and justice interests protected by disclosure. The Union contends it is not possible to do this kind of balancing of interests analysis in the context of this new policy on violence and the absence of evidence of any injury that would result to people who came forward because of the disclosure of the communication.

18 The Union also relied on West Park Hospital for some additional arbitral principles concerning when production should be ordered by an arbitration board: the information requested must be arguably relevant; the requested information must be particularized sufficiently that there is no dispute as to what is desired; the board of arbitration should be satisfied the information is not being requested as a 'fishing expedition'; there must be a clear nexus between the information requested and the positions in dispute at the hearing; and the board should be satisfied that disclosure will not cause undue prejudice under the Wigmore criteria (at p. 167). The Union contends that all of these principles are met in this case thereby justifying an order for production.

19 The Union relies on the C.A.S. of City of Belleville case to support the proposition that an employer policy manual creating a policy of non-disclosure of personal information to a third party cannot be a legal bar to an order for production of arguably relevant documents that an arbitrator may make in the exercise of her discretion to ensure a fair process, even where it may require the disclosure of very personal information that is "not pretty" (at 265-266).

20 Finally, the Union noted that they do not know what is in the witness statements or the report of the investigation at this point and therefore are simply unable to prepare in advance of

the hearing to meet the Employer's case. It notes that there may be very beneficial information for the Union's case in the requested documents to assist in its cross examination or to generate its own evidence to combat unjust discipline. In this respect it notes that this may be the case both for witnesses the Employer does intend to call at the hearing, but perhaps even more importantly for witnesses the Employer does not intend to call at the hearing. The Union submits that it would be unfair to the Grievor, the Union and the arbitration process to require it to wait until the hearing to learn the case it has to meet and to have an opportunity to prepare and it would lead to unnecessary delay and cost and the potential for unfair surprise. It contends that this will be harmful to the arbitration process as a speedy and inexpensive dispute resolution process which can foster good relations between the parties. It asks that the board order production as requested in its letter of January 20/06, without limitation.

21 The Employer began its submission by noting the Union's request for production was very wide and suggested it went beyond what was necessary for this case. It submitted that the Employer has an obligation under the Occupational Health and Safety Act to take reasonable precautions to protect its employees and in the event a violent incident took place in the workplace it would be called to account and that is the reason for the WVPP. In short, it has an obligation to act in a proactive manner to prevent violence. The Employer pointed out the references to confidentiality in the WVPP and argued that the evidence of Murphy supported the view that the policy will not work effectively unless investigators can assure people that the information they reveal will be held in some confidence. It also argued that although the policy was not negotiated as part of the collective agreement the Union did play a role in its development.

22 Employer counsel also submitted that Murphy gave evidence that Lauzon made a promise of confidentiality at the outset of witness interviews and further testified that in his view this was necessary for people to feel comfortable coming forward because he had received seven phone calls from employees during a survey of employees expressing concern that they were too intimidated and fearful to complete the survey. He submitted that Murphy's testimony on Lauzon's promise of confidentiality to witnesses was confirmed by Duben's testimony. The Employer also contended that nothing could be drawn from the fact that witnesses did not express concerns about confidentiality during the interviews because the assurance on confidentiality was given by Lauzon near the beginning of each interview so there was no reason for them to be concerned.

23 The Employer also argued that if the board did feel it was necessary to order production of some of the requested documents, it should only order production of documents related to information provided by the two management witnesses that the Employer intends to call as witnesses and should not order production of interview notes arising from the interview of a bargaining unit witness who the Employer does not intend to call as a witness at the hearing. It similarly contended that if the board did order the production of the investigation report it should not require production of the portions of the report that make reference to the information provided by the bargaining unit witness who the Employer does not intend to call to testify.

24 In terms of application of the arbitral case law on production, Employer counsel argued that the Wigmore criteria are proven by the evidence, and in particular argued that disclosure of the contested documents would cause serious prejudice and detriment to the Employer by causing employees to refuse to cooperate with investigations under the WVPP if they know that what they reveal to investigators may become the subject of orders to disclose. He suggested this could frustrate the entire policy and leave employees open to threats in the future. In light of this concern he asked us to make exceptions to any order for production to create an appropriate balance between those security concerns and fairness concerns.

25 The Employer submitted the following authorities in support of its submission: Brown and Beatty, Canadian Labour Arbitration, 3d. ed. (1988 - looseleaf) para. 3:1422 (ordering production); CBC v. C.U.P.E. (Broadcast Council) (1991), 23 L.A.C. (4th) 63 (Thorne); and Central Park

Lodges (Versa Care Windsor Place) and S.E.I.U., Local 210 (2001), 95 L.A.C. (4th) 192 (Etherington). It noted that although the Brown and Beatty excerpt states that the test for pre-hearing production is "arguably relevant" or "potentially relevant" and the Wigmore criteria are generally used to deal with claims of confidentiality, the passage goes on to state that where a party claims confidentiality as the basis for non-disclosure the general question for the arbitrator is whether the probative value of the documents is outweighed by the prejudice likely to result from disclosure. The Employer relied on the CBC case as authority for the proposition that an arbitrator can refuse to order production of internal investigative reports prepared by one member of management for another where they believed they would not be disclosed and disclosure could affect adversely the willingness of management to commit opinions and advice to writing. It also relied on that decision for the proposition that even where the other Wigmore criteria are met an arbitrator has to address the need to strike a balance of interests under the fourth criteria by asking whether the need for correct disposal of the litigation overrides the labour relations importance of maintaining the confidentiality of the communications. Here the Employer submits it does not, particularly as it relates to the disclosure of communications with the employee who will not form part of the Employer's case at the hearing. The Employer relied on the Central Park Lodges decision as an example, of an award where restrictions were placed on timing and procedures for production of documents to protect the privacy interests of nursing home residents and it was suggested this Board could place similar restrictions on any order made herein.

26 In summary, the Employer argues there are important labour relations policy concerns at stake that are not outweighed by the need for disclosure, and that at a minimum this should cause the Board to find that the documentation concerning the bargaining unit employee should not be produced.

27 In a brief reply the Union addressed the following points. First, there is no statutory impediment under the Occupational Health and Safety Act or elsewhere to limit the discretion of this board of arbitration to order production of arguably relevant documents when it is dealing with the discipline that results from the application of the Employer's WVP policy. Second there was no commitment expressly given by the Employer to witnesses that the information they provided would not be disclosed if the process resulted in discipline and that discipline was contested at arbitration pursuant to the collective agreement. Further, just as witnesses to a crime are aware they may be called upon to testify in court if they report a crime and that results in criminal charges and a trial to determine guilt or innocence, any reasonable employee can only expect that the information he or she provides will be subject to review in an arbitration hearing process if the investigation process leads to discipline being imposed on a fellow employee.

28 Third, this reasonable expectation is actually provided for in the WVPP itself by the reference on page 4 to the release of information on a "need to know" basis, and the reference on page 8 to the fact that investigation results will be discussed with "those who have a legitimate right to know". Fourth, there was no credible evidence of prejudice to the Employer in the form of concrete testimony from employees that they would not have disclosed the information if they had known it could be the subject of a production order. Fifth, the fact that the Employer may choose not to call one of the witnesses interviewed should not provide a basis for non-disclosure of the information gained from that witness as the reason for not calling that witness may well be that they would not be helpful to the Employer's case. If that is the reason then the information provided by the employee may be helpful to the Union's case and there are even stronger reasons for requiring production.

## Decision

29 Having considered the evidence, submissions and authorities presented by the parties and the language of the collective agreement, we have decided that an order requiring the Employer to produce the documents requested by Union counsel in his letter of January 20/06 should issue. Our reasons are as follows.

30 First, we find that the documents requested are clearly of "arguable" or "potential" relevance to the issues to be addressed at arbitration. When one is dealing with a grievance alleging that the Employer has violated the just cause provisions of the agreement by issuing a suspension for making threats of violence in the workplace it is hard to imagine documents that could have greater "potential" relevance in the normal case than the notes of interviews and summaries of interviews with possible witnesses to the alleged threatening statements that were considered by the Employer in its decision to issue a disciplinary suspension. Similarly there is no doubt that the request is sufficiently particularized and there is no dispute over what is being requested. Likewise there is no concern here that the Union is on a fishing expedition nor is there any doubt that there is a clear nexus between the information being requested and the positions of the parties in dispute.

31 The issue then becomes whether the Employer has proven that the four Wigmore criteria have been met, justifying a refusal to order production of arguably relevant documents on the basis that the balancing of interests that is undertaken through application of those criteria favour protection of the confidentiality interests identified by the Employer over the fairness interests identified by the Union. We accept that the Employer acted purely out of genuine concern for the impact that pre-hearing disclosure of witness interview notes and the investigation report itself may have on the willingness of employees to report threats of violence and cooperate in investigations under the policy in the future. However, we are unable to find that the Employer has proven that the Wigmore criteria are satisfied to a degree that would warrant overriding the Union's right to pre-hearing production to ensure a fair hearing process that will protect the Union's right to know the case it has to meet and to make full answer and defence in a case involving serious disciplinary consequences resulting from allegations of serious wrongdoing.

32 We share some of the concerns expressed by the Union on the issues of whether there was a clear enough undertaking of confidentiality to satisfy the first Wigmore criteria, or whether the element of confidentiality was actually proven to be sufficiently essential to satisfactory maintenance of the relationship between the parties or the operation of the WVPP policy to satisfy the second criteria. However, without focussing unnecessarily on whether those specific criteria have been proven on the evidence, we find that even if they have been met the Employer has not proven that the injury that would result to the relationship or the WVP policy by disclosure of the documents would be greater than the benefit gained by the correct disposal of the litigation in accordance with general principles of fairness. To put it another way, we feel that the potential prejudice and detrimental impact to the rights of the Union and the Grievor to a fair hearing and the right to make full answer and defence that would result from a failure to provide pre-hearing disclosure outweighs the potential injury to the operation of the WVP policy and the interests it protects that could result from production. In this regard we note that although this case involves a penalty of a two week suspension without pay, it is not uncommon in recent arbitral case reports to find cases of employees who have been discharged for uttering threats of violence in the workplace. Acceptance of the Employer's position on refusing to provide pre-hearing production of witness interview notes and investigative summaries of witness interviews would mean that employees who had been discharged or given lengthy suspensions for threatening violence (and their unions) would be unable to have access to the very documents that would be at the heart of the preparation that is necessary to have a fair opportunity to meet and challenge the allegations of misconduct that led to the significant penalties imposed. To use the analogy frequently employed by Union counsel, it would be similar to denying a person accused of serious criminal charges that could result in the issuance of a lengthy prison sentence or life imprisonment the opportunity for pre-hearing disclosure of witness statements concerning allegations of criminal wrongdoing. Without taking the analogy any further, I note that discharge is often referred to in discussions of progressive discipline as the disciplinary equivalent of capital punishment. Just as it is difficult to contemplate a criminal accused as having the right to a fair trial without having pre-hearing disclosure of what his accusers are saying against him so that he can prepare to refute those allegations at trial, we find it difficult to accept that a grievor accused of serious wrongdoing and subjected to serious disciplinary measures of suspension or discipline

can be viewed as having the right to a fair hearing if he is denied the pre-hearing production of documents that reveal what witnesses have alleged about his conduct that has resulted in the discipline.

33 Given the importance of the fairness interests at stake in the right to pre-hearing production of documents of the type at issue herein, we find that this right should only be overridden in the interests of confidentiality interests where there is a clear statutory basis for such an override or the common law Wigmore criteria are clearly met, and in particular where the fourth Wigmore criteria is met by demonstrable proof of an injury to the relationship that would result from production that clearly outweighs the harm to fairness interests that would result from non-disclosure. In our view, this threshold for overriding the fairness interests in pre-hearing production has not been met in this case.

34 We also agree with the Union's submission that production is not necessarily inconsistent with the Employer's WVP policy. In this respect we find that a union involved in defending an employee against disciplinary measures imposed as a result of an investigation under the WVP policy can reasonably be said to come within the references on page 4 of the policy to releases of information on a "need to know basis" and on page 8 of the policy to disclosure to those who have a "legitimate right to know". In any event, we agree with the submissions of the Union and the findings of Arbitrator Briggs in C.A.S. of City of Belleville, supra, that the WVP policy as developed cannot create a legal bar to an order for production of documents by an arbitration board in the exercise of its discretion under the Labour Relations Act, 1995.

35 In addition, we find that it would not be consistent with general arbitral principles concerning pre-hearing production in the interests of a fair and efficient hearing process to attempt to restrict our order for production to exclude witness interview notes and investigation report segments that arise from communications with a bargaining unit witness that the Employer does not intend to call to testify. These documents are of arguable relevance. The Employer decision to not rely on a witness for testimony may indicate that the witness has nothing to offer to assist it in proving its case, it may indicate the witness would be harmful to proving its case, or it may indicate that the witness will simply repeat what two other witnesses will say and thus it is decided he or she is not necessary to the proceeding. The problem created by non-production is that the Union will not have the opportunity of making its own assessment of the potential relevance and potential usefulness of that witness for refuting the Employer's case or supporting the Union's case. In the final analysis therefore, non-production of the documents arising from this witness's interview presents similar, and potentially greater, dangers in terms of ensuring a fair hearing process that gives the Union a fair opportunity of learning the case it has to meet and making full answer and defence. The dangers to fairness arising from not requiring production of documents related to this witness are potentially greater in that there is a risk that the Union may never find out about this witness or what they have to offer because they will not appear to testify at the hearing. Thus, to be consistent with the principles of fairness that underlay the requirement for pre-hearing production, the documents arising from the interviews with witnesses that will not be called must also be produced.

36 The final point to be considered is whether, as suggested by the Employer, an order for production can be tailored or structured in terms of timing and manner of production to provide for a better balancing of the competing interests at stake while still following general principles requiring pre-hearing production of potentially relevant documents. In this respect the Employer pointed us to the award in Central Park Lodges, supra, where concerns about protecting the privacy interests of nursing home residents were balanced with fairness interests by requiring the production of the patient's medical records initially only to union counsel in the employer's record storage area. After Union counsel had gone through the files and identified the medical records that were required to prepare for the hearing, the employer was required to comply with his or her request for photocopies of those records for use in the arbitration process. The resident whose

medical information was at issue was to be referred to by initials only in any award resulting from the proceeding.

37 Although the Employer interests at stake in this case differ somewhat from the privacy interests at stake in Central Park Lodges, we think it is possible to structure the order for production to provide some protection for the confidentiality interest which the Employer seeks to protect while still providing counsel for the Union or his designate with the pre-hearing access necessary to ensure a fair hearing. This can be done by providing Union counsel or his designate, at a reasonable time interval prior to the hearing, with access to the documents arising from the investigation of the alleged misconduct of the Grievor, in particular the notes of interviews with potential witnesses and the report or summaries of the investigation that were prepared by the investigators and given to Mr Duben. After reviewing these documents, the Union counsel or his designate shall determine the notes of interviews, witness statements, and the portions of the investigation reports or summaries that have sufficient relevance and probative value to require pre-hearing production to assist in the preparation of the Union's case. Union counsel or his or her designate shall request copies of these documents or portions of documents and the Employer shall provide copies of the requested documents or portions of documents forthwith. To the extent Union counsel or his designate determines that notes of interviews with some witnesses are not required, the portions of the investigation reports or summaries that make reference to these non-relevant interview documents should be excluded from the version of the investigative report or summary that is reproduced for the Union pursuant to this order. To the extent that witness interview notes, statements or portions of reports or summaries are determined not to be required for production, those documents will be returned to the investigation files and Union counsel or his designate shall not disclose the contents of those documents or portions of reports or summaries. However, all investigation documents or portions of investigation reports or summaries that are requested for production by Union counsel may be disclosed to the Grievor and such other Union advisors as Union counsel deems appropriate to assist in the preparation of its case.

38 In effect this order creates a two stage process for the production of interview statements, notes and investigative reports created by the operation of the WVP policy. The Board recognizes that this process will create an extra burden on Union counsel and Employer counsel, in terms of time and case preparation in advance of the hearing. It also recognizes that this burden may ultimately lead to relatively few documents or references to witness interviews being 'kept confidential' after review by Union counsel. Nevertheless, it provides a better balancing of the interests at stake by ensuring that witness interviews and summaries of interviews that have no relevance or probative value to preparation of the case for arbitration by either party are not subjected to public disclosure unnecessarily. It is hoped that it will assist the Employer in meeting the objectives of its WVP policy if employees know that the information they agree to share with the Employer under the policy will not be disclosed unnecessarily. At the same time however, they should also be made aware that to the extent the information they provide may be relevant to a subsequent arbitration proceeding that could arise from Employer action in response to the WVP investigation, the information they provide may be subject to the Employer's obligation to provide pre-hearing production of potentially relevant documents.

39 For all the above noted reasons, the Employer is hereby ordered to comply with the request for production of documents made by Union counsel in his letter of January 20/06 (exh. 6) as reproduced at page 1 of this award. To the extent the documents requested were created or developed by the operation of the Employer's investigation into the Grievor's alleged misconduct pursuant to the Employer's WVP policy the documents shall be produced under the following procedure:

The Employer shall provide Union counsel or his designate, at a reasonable time interval prior to the hearing, with access to the documents arising from the

investigation of the alleged misconduct of the Grievor, in particular the notes of interviews with potential witnesses and the reports or summaries of the investigation that were prepared by the investigators and given to Mr Duben. After reviewing these documents, the Union counsel or his designate shall determine the notes of interviews, witness statements, and the portions of the investigation report or summaries that have sufficient relevance and probative value to require pre-hearing production to assist in the preparation of the Union's case. Union counsel or his or her designate shall request copies of these documents or portions of documents and the Employer shall provide copies of the requested documents or portions of documents forthwith. To the extent Union counsel or his designate determines that witness statements or notes of interviews with some witnesses are not required, the portions of the investigation reports or summaries that make reference to these non-relevant interview documents should be excluded from the version of the investigative report or summary that is reproduced for the Union pursuant to this order. To the extent that witness interview notes, statements or portions of reports or summaries are determined not to be required for production, those documents will be returned to the Employer investigation files and Union counsel or his designate shall not disclose the contents of those documents or portions of the report or summaries. However, all investigation documents or portions of investigation reports or summaries that are requested for production by Union counsel may be disclosed to the Grievor and such other Union advisors as Union counsel deems appropriate to assist in the preparation of its case.

40 Pursuant to arrangements made at the close of the hearing on this preliminary matter, the hearing on the merits of this grievance is scheduled to continue on June 19/06.