

Selecting Impartial Hearing Officers

Gettin' Schooled from a Risk Management Perspective

School districts are complying with the grievance system requirement mandated by 2011 Wisconsin Act 10 by establishing a grievance procedure. Based on comments from districts with respect to impartial hearing officers (“IHOs”), a wide variety of arrangements are being used, such as:

- “I’ll be yours, if you’ll be mine” agreements;
- Wis. Stat. §66.03.01 cooperative deals;
- Using independent labor attorneys;
- Engaging other professionals who have hung out an IHO shingle; and
- Other arrangements.

The purpose of this article is to raise awareness about potential risk management and liability issues associated with IHOs, so as to incorporate that awareness and knowledge into districts’ arrangements.

1. Who can be an IHO?

The Wisconsin Statutes do not define the phrase “impartial hearing officer.” As such, literally anyone can be an IHO.

2. What individuals might be good choices to serve as IHOs?

As the title implies, and given the foundation on which the need for an IHO is based, it is recommended:

Districts go out of their way to ensure their IHOs are impartial, i.e., unbiased. This should decrease the pool of potential IHOs. By default, the district’s IHO selection process should not only be impartial, but also “pass the smell test.”

Prospective IHOs should have a solid background in personnel matters and/or employment law. This is the “if you need a heart transplant, don’t ask a podiatrist to do the surgery” mindset.

3. Will the IHO be a district employee?

That depends on the person selected as an IHO and the nature and scope of the engagement. Answering this question is a function of the answers to several other questions, including, but not limited to:

- **Is the IHO paid?** If so, by whom? Are they paid a professional fee, or merely reimbursed for expenses? Will they receive a W2, 1099 or nothing?
- **Does the IHO provide IHO services to more than just your district?**
- **Do you have a written document or contract with the IHO?** If yes, does it address the notion of the IHO being an employee versus an independent contractor?

4. If the IHO is named in a lawsuit as a result of participating in a grievance procedure, whose liability insurance will respond on the IHO’s behalf?

The answer depends on your district’s arrangement with the IHO, who serves as the IHO, and the facts and circumstances of the loss. Several insurance sources may be available, such as the district educator’s legal liability (“ELL”) insurance to which the IHO is providing the service, the IHO’s professional liability insurance, or the insurance carried by district for which the IHO usually works, etc.

5. Which insurance will respond if the IHO is hurt while driving to or from a hearing, while at the hearing or otherwise serving in the capacity of an IHO?

Like items #3 and #4 above, the answer depends on the IHO’s status. If deemed a district employee, then workers’ compensation insurance may apply; if a bona fide independent contractor (see §102.07 (8)), then the IHO’s own workers’ compensation or health insurance may respond.

Prospective IHOs should have a solid background in personnel matters and/or employment law.

6. Should our district have a written document memorializing the IHO arrangement?

Absolutely. Regardless of the arrangement, districts should commit to writing how it will comply with Act 10 as respect to IHOs. Examples include a:

- Board resolution;
- Contract with the IHO; and/or
- Wis. Stat. ss. 66.03.01 arrangements.

7. What risk management and insurance-related details should be addressed in the written document?

- Indemnification or hold harmless requirements, if appropriate.

- The individual's status when providing IHO services. Is he an employee? If so, whose? Or is he an independent contractor? Consider this status in the context of:
 - Income taxes;
 - Unemployment tax and insurance;
 - Workers' compensation insurance; and
 - Professional liability insurance.

8. Will the district's insurance respond to claims/losses submitted to the district due to the operation of indemnification agreements?

One more time: it depends. Claims arising out of employment-related matters are usually

This article may lead to additional questions about districts' relationships with IHOs from a risk management and liability perspective.

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the subject of ELL insurance, and most ELL policies specifically exclude coverage for losses arising out of liability assumed through a contract, i.e. indemnification agreements. On the other hand, general liability policies, which respond to bodily injury, property damage, personal and advertising injury claims, generally provide coverage for losses assumed by the district through a contract. ■

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