STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NORTHWEST UNITED EDUCATORS and NORRIS RAWHOUSER,

Complainants,

vs.

COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 4 and the BOARD OF CONTROL OF COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 4; RICE LAKE JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF RICE LAKE JOINT DISTRICT NO. 1; TURTLE LAKE CONSOLIDATED JOINT DISTRICT NO. 3 and the BOARD OF EDUCATION OF TURTLE LAKE CONSOLIDATED JOINT DISTRICT NO. 3; CUMBERLAND COMMUNITY JOINT DISTRICT NO. 2 and the BOARD OF EDUCATION OF CUMBERLAND COMMUNITY JOINT DISTRICT NO. 2; AMERY JOINT DISTRICT NO. 5 and the BOARD OF EDUCATION OF AMERY JOINT DISTRICT NO. 5; BARRON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF BARRON JOINT DISTRICT NO. 1; BIRCHWOOD JOINT DISTRICT NO. 4 and the BOARD OF EDUCATION OF BIRCHWOOD JOINT DISTRICT NO. 4; BRUCE JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF BRUCE JOINT DISTRICT NO. 1; CAMERON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF CAMERON JOINT DISTRICT NO. 1; CHETEK AREA JOINT DISTRICT NO. 5 and the BOARD OF EDUCATION OF CHETEK AREA JOINT DISTRICT NO. 5; CLAYTON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF CLAYTON JOINT DISTRICT NO. 1; CLEAR LAKE JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF CLEAR LAKE JOINT DISTRICT NO. 1; FLAMBEAU JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF FLAMBEAU JOINT DISTRICT NO. 1; FREDERIC COMMON JOINT DISTRICT NO. 3 and the BOARD OF EDUCATION OF FREDERIC COMMON JOINT DISTRICT NO. 3; GRANTSBURG INTEGRATED SCHOOLS and the BOARD OF EDUCATION OF GRANTSBURG INTEGRATED SCHOOLS; LADYSMITH JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF LADYSMITH JOINT DISTRICT NO. 1; LUCK JOINT SCHOOL DISTRICT NO. 3 and the BOARD OF EDUCATION OF LUCK JOINT SCHOOL DISTRICT NO. 3; MINONG JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF MINONG JOINT DISTRICT NO. 1; OSCEOLA JOINT DISTRICT NO. 2 and the BOARD OF EDUCATION OF OSCEOLA JOINT DISTRICT NO. 2; PRAIRIE FARM JOINT DISTRICT NO. 5 and the BOARD OF EDUCATION OF PRAIRIE FARM JOINT DISTRICT NO. 5; ST. CROIX FALLS JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF ST. CROIX FALLS JOINT DISTRICT NO. 1; SHELL LAKE JOINT SCHOOL DISTRICT NO. 1 and the BOARD OF EDUCATION OF SHELL LAKE JOINT SCHOOL DISTRICT NO. 1; SIREN CONSOLIDATED SCHOOLS and the BOARD OF EDUCATION OF SIREN

Case II
No. 18382 MP-400
Decision No. 13100-D

CONSOLIDATED SCHOOLS, SPOONER JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF SPOONER JOINT DISTRICT NO. 1; UNITY JOINT DISTRICT NO. 4 and the BOARD OF EDUCATION OF UNITY JOINT DISTRICT NO. 4; WEBSTER JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF WEBSTER JOINT DISTRICT NO. 1; WEYERHAUSER JOINT DISTRICT NO. 3 and the BOARD OF EDUCATION OF WEYERHAUSER JOINT DISTRICT NO. 3; BARRON COUNTY BOARD OF SUPERVISORS; BARRON COUNTY HANDICAPPED CHILDREN'S BOARD; and JOINT EDUCATIONAL COOPERATIVE,	:
Respondents.	:

ORDER GRANTING MOTION TO QUASH SUBPOENA

On March 11, 1976, Mr. Edward Grosse was served a subpoena duces tecum by Mr. Steven J. Caulum, counsel for Respondents Rice Lake Joint District No. 1 and the Board of Education of Rice Lake Joint District No. 1; Turtle Lake Consolidated Joint District No. 3 and the Board of Education of Turtle Lake Consolidated Joint District No. 3; Cumberland Community Joint District No. 2 and the Board of Education of Cumberland Community Joint District No. 2; Amery Joint District No. 5 and the Board of Education of Amery Joint District No. 5; Clayton Joint District No. 1 and the Board of Education of Clayton Joint District No. 1; Frederic Common Joint District No. 3 and the Board of Education of Frederic Common Joint District No. 3; Luck Joint School District No. 3 and the Board of Education of Luck Joint School District No. 3; Osceola Joint District No. 2 and the Board of Education of Osceola Joint District No. 2; Shell Lake Joint School District No. 1 and the Board of Education of Shell Lake Joint School District No. 1; and Weyerhauser Joint District No. 3 and the Board of Education of Weyerhauser Joint District No. 3 to appear and produce at the next scheduled hearing in the above matter "all writings, notes, memoranda, lists or other documents or tangible things authored by you relative to investigation performed by you in November, 1974 relative to the non-renewal of Complainant Norris Rawhouser's contract with CESA #4."

Mr. Wayne Schwartzman on April 6, 1976, counsel for the Complainant, filed a motion with the Examiner to quash said subpoena with a brief in support of said motion. Pursuant to arrangements made at the hearing held on March 2, 1976, Mr. Caulum filed a brief in opposition to said motion on April 5, 1976.

The Examiner, after having considered the arguments and being fully advised in the premises, makes and files the following

ORDER

That the motion to quash the subpoena duces tecum served upon Mr. Edward Grosse on March 11, 1976, be and the same hereby is granted.

Dated at Madison, Wisconsin this 15th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

COOPERATIVE EDUCATIONAL SERVICE AGENCY #4, II, Decision No. 13100-D

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO QUASH SUBPOENA

BACKGROUND:

Mr. Edward Grosse, who is not an attorney, is employed by the law firm of Lawton & Cates as an investigator.

Said firm was retained by the Wisconsin Education Association Council to represent Norris Rawhouser in the instant dispute over the non-renewal of Rawhouser's individual employment contract with CESA #4. The initial complaint in the instant proceeding 1/ was filed by Mr. Bruce Ehlke, 2/ an attorney who is a member of said firm.

Mr. Ehlke, as counsel for the Complainant, directed Mr. Grosse to conduct an investigation of the matter by interviewing certain of the Respondent School Districts' employes. Mr. Grosse, in turn, conducted said interviews, recorded his recollections of said interviews, and turned over said materials to Mr. Ehlke. When the case was subsequently turned over to Mr. Schwartzman, said materials, along with the rest of Mr. Ehlke's files, were turned over to Mr. Schwartzman.

These materials are the object of the subpoena which has been served on Mr. Grosse.

At the March 2, 1976 hearing in the instant matter, Mr. Grosse testified relative to an interview he had with Mr. Louis Bethke, the CESA #4 Coordinator at the time Mr. Rawhouser was non-renewed. During this testimony, Mr. Grosse's notes, which recorded his recollections of the Bethke interview, were introduced and received into the record. Upon cross-examination, Mr. Grosse testified that he had interviewed other employes of the Respondent School Districts and that he had made written records of his recollections of said interviews. When Mr. Caulum expressed his intent to subpoena said materials, Mr. Schwartzman stated that said materials constituted his work product and thus should not be subject to subpoena. Furthermore, he argued that since he did not intend to adduce testimony from Mr. Grosse relative to any other interviews he conducted, the records of said interviews are not properly subject to Mr. Caulum's subpoena.

POSITION OF THE PARTIES:

Mr. Schwartzman argues that since the materials subpoenaed are his work product, they should be considered privileged and not subject to subpoena.

The fact that Mr. Grosse is not an attorney is not relevant, asserts Mr. Schwartzman, since his interviews were conducted at the direction of an attorney for the Complainant and have since been adopted and utilized by Mr. Schwartzman, as counsel for the Complainant. Mr. Schwartzman also argues that the exceptions to the work product privilege, i.e., frustration of pre-trial discovery or good cause based upon necessity, prejudice, injustice, or hardship, are not present in this instance

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1/ The complaint was subsequently amended on several occasions, one of which joined the School Districts represented by Mr. Caulum, among others, as parties respondent.

2/ Mr. Schwartzman was subsequently substituted for Mr. Ehlke as counsel for the Complainant in this proceeding.

since there is no pre-trial discovery available to the parties before the Commission to be frustrated, and since all of the individuals interviewed by Mr. Grosse are readily available to counsel for the Respondents.

On the other hand, Mr. Caulum argues that subpoenas in administrative proceedings must be obeyed if the information sought is reasonably relevant to the subject being inquired into by the agency and if the subpoenas are not unreasonable or fundamentally unfair.

Mr. Caulum argues that because the Commission is an inquisitorial as well as a trial type administrative agency, created to effectuate a public policy in the public interest, its subpoena power must be quite broad, limited only by the very broad concept of relevance.

Mr. Caulum contends further that because the rules of civil procedure do not apply to Commission proceedings, the work product rule, which has been developed as part of said procedure, also should not apply, particularly in light of the Commission's interest in full disclosure rather than diligence of preparation by the parties. The need for full disclosure is magnified, he argues, because of the lack of discovery procedures available to the parties in proceedings before the Commission.

Even if the work product rule is deemed to apply to Commission proceedings, Mr. Caulum argues that the burden of showing that the party seeking discovery has substantial need of the material and that he is unable without undue hardship to obtain the substantial equivalent by other means is substantially lessened where the documents sought are the product of a non-lawyer investigator.

Thus, Mr. Caulum argues that because Mr. Grosse's summaries of interviews might be admissible evidence as recorded recollections in this proceeding, they should be subject to discovery, (a) because there has been a substantial lapse of time since said interviews were conducted and (b) since the interviewees no longer remember the substance of their conversation with Mr. Grosse. Mr. Caulum also argues that said documents are needed additionally to possibly impeach prior testimony or to corroborate the Respondents' own evidence.

DISCUSSION:

Although the Commission is not bound by the rules of civil procedure and is therefore not obliged to apply the work product rule set forth in Chapter 804.01, Wisconsin Statutes, which provides:

> "(2) Scope of Discovery. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:
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> (a) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
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> . . .

(c) Trial preparation: materials. 1. Subject to par. (d) [Trial preparation: expert] a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

The Examiner is of the opinion that said rule should be applied to complaint proceedings before the Commission for the following reasons.

In the first place, complaint proceedings before the Commission are more akin to a civil trial than investigative administrative proceedings, and therefore, the rules of civil procedure are more applicable than they would be in said proceedings. In this regard it should be noted that the NLRB, unlike the Commission, has broad investigative and prosecutorial responsibilities which have resulted in court approval of a liberal subpoena power so long as the information sought is relevant to the inquiry. 3/ It could also be argued that the Commission's subpoena power may be broader in representation proceedings than it is in complaint proceedings since the former are non-adversary and investigative in nature while the latter are adversary hearings which are more similar to traditional civil litigation.

Secondly, the Examiner is of the opinion that the work product privilege should be applied since the Commission's rules provide that:

"Hearings, so far as practical, shall be conducted in accordance with the rules of evidence . . . as provided in chapter 227.10, Wisconsin Statutes." 4/

which in turn provides that:

"In contested cases:

(1) Agencies shall not be bound by common law or statutory rules of evidence.

. . .

They shall give effect to the rules of privilege recognized by law.

. . ."

Although the work product rule is not technically an evidentiary rule of privilege, in the Examiner's opinion, application of said rule in contested cases before the Commission serves an important legitimate purpose similar to that recognized in Chapter 227.10(1), Wisconsin Statutes.

3/ Oklahoma Press v. Walling 327 U.S. 186 (1946); Danville Detective Agency 330 F.2d 437, 440 (CA 4, 1964); U.S. v. Marshall Durbin & Co. 363 F.2d 1, 4 (CA 5, 1966).

4/ ERB 10.16(2).

Since the work product rule is deemed applicable to this proceeding, the next issue to be resolved requires definition of the standard which should be applied in deciding whether an exception to the work product privilege should be granted.

Chapter 804.01(2)(c), Wisconsin Statutes, provides that a party may obtain discovery of an attorney's work product "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

While it is true, as pointed out by counsel for the Respondent, that when statements sought are the product of non-lawyer investigators, even at an attorney's instance, the demonstration of need is less strong than if the statement is taken by a lawyer, 5/ a demonstration of good cause still must be shown. 6/ In Dudek, the court succinctly set forth the dispositive issue:

> "The question then is what constitutes good cause for discovery. Generally, if a witness is available to the party seeking discovery of his statement to opposing counsel, such discovery should not be allowed. However, if the seeker of discovery can show he has made a diligent search for the witness, discovery may be permitted of the statement of a witness who is dead, hostile, out of the jurisdiction or of unknown whereabouts. The court may also consider pecuniary hardship of requiring independent investigation by an impecunious party. There should be some positive showing that non-production would prejudice preparation for trial. All these factors, and others as they may appear, should be considered by the trial court within its sound discretion." 7/

In the instant matter, counsel for the Respondent has not made a sufficient showing of necessity or good cause to justify making an exception to the work product rule, assuming arguendo that Mr. Grosse's recorded recollections of interviews conducted are discoverable as admissible exceptions to the hearsay rule.

Counsel for the Respondent has not demonstrated that the subpoenaed documents are relevant or material to any evidence which was established at the hearing during Mr. Grosse's testimony. On the contrary, counsel for the Complainant did not introduce evidence, either through Mr. Grosse or through any other witness, which was derived from the subpoenaed documents.

The mere allegation that requested materials might disclose relevant evidence has not been considered sufficient for discovery of the statements of witnesses in NLRB proceedings 8/ and will not be so considered here. Similarly, the NLRB has not allowed discovery of such statements

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5/ State Ex Rel Dudek, v. Circuit Court 34 Wis 2d 559 at 595; 150 N.W. 2d 387 (1967).

6/ Ibid.

7/ Ibid at p. 594.

8/ International Broadcasting Corp. 102 NLRB 1434.

where the request is considered a "fishing expedition"; 9/ where the request is for exploratory purposes; 10/ where there has been no showing of materiality or relevancy; 11/ or of contradictions or inconsistent statements. 12/

Thus, without a showing of relevance, or necessity, neither of which have been demonstrated herein, it seems well settled that discovery has not been allowed of otherwise privileged materials, even before administrative agencies such as the NLRB, which has much broader investigative and prosecutorial functions than does the Commission.

In effect, the subpoena in question constitutes a demand for all of the evidence gathered by Mr. Grosse which may be inconsistent with the evidence presented by him, even though no reference was made to any of the materials sought during Mr. Grosse's testimony. An NLRB administrative law judge disposed of a similar issue in North American Rockwell Corp. 13/ when he refused to compel disclosure of "all evidence inconsistent with the evidence presented [by the General Counsel]." The ruling was upheld on the ground that the General Counsel is not required to "comb his file for bits and pieces of evidence which conceivably could be favorable to the defense." 14/

The Examiner views the subpoena in question similarly, since it has not been demonstrated that the information sought is not otherwise available to Respondents' counsel, since there is no showing that the materials sought are in any way relevant or material to any evidence introduced in the Complainant's case, and since there has been no showing that the materials sought would in any way contradict the evidence introduced during the Complainant's case. What counsel for the Respondents might find in the subpoenaed documents amounts to a "fishing expedition" and does not justify discovery of what the Examiner considers to be the legitimate work product of counsel for the Complainant.

On the last point, the Examiner notes that the materials subpoenaed were produced at the direction of counsel for the Complainant who filed the original complaint in this proceeding. The materials were prepared in anticipation of this litigation at the direction of and for the use of the attorney who initiated the complaint on behalf of the Complainant. It is also apparent that at least the portion of said materials which have already been introduced into evidence have been used by counsel for the Complainant in the development of his "conclusions, opinions, and legal theories" in the litigation. Thus, the Examiner concludes that the subpoenaed materials fall within the definition of "trial preparation: materials" set forth in Chapter

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9/ Standard Coil Products, Inc. 99 NLRB 899 (Cf Hiekman v. Taylor 329 U.S. 495, 507).

10/ U.S. v. Rosenfeld 57 F.2d 74 (CA 2).

11/ Columbia Products Corp. 48 NLRB 1452.

12/ U.S. v. Rosenfeld, supra; Jamestown Sterling Corp. 196 NLRB 466.

13/ 67 LRRM 2603 (10 CA 1968).

14/ Ibid.

804.01(2)(c), Wisconsin Statutes, and are thus entitled to the privilege set forth in said section of the Statutes.

Dated at Madison, Wisconsin this 15th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner