STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL BIERNACKI, Complainant, vs. CITY OF WAUKESHA, COUNCIL 40, AFSCME, LOCAL 97, Respondents.	Case 87 No. 45376 MP-2457 Decision No. 26870-A

Appearances:
Mr. and Mrs. Daniel Biernacki, 2008 Kathy Court, Waukesha, Wisconsin, appear
Ms. Karen Macherey, Assistant City Attorney, 201 Delafield Street, Waukesha, Wi
Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin, appearing on behalf of the Respondent Council 40, AFSCME, Local 97.

ORDER GRANTING MOTION TO STRIKE

On February 20, 1991, Daniel Biernacki ("the Complainant") filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Waukesha and AFSCME Council 40, Local 97, ("the Respondents") had committed prohibited practices contrary to the provisions of Chapter 111, Wis. Stats. The Commission appointed Stuart Levitan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Wis. Stats. Hearing in the matter was held on October 15 and 16, 1992, in Waukesha, Wisconsin. A stenographic transcript of the proceedings on both dates was prepared. On October 15, Complainant offered testimony to which the Respondent City objected, on the grounds that the subject matter was covered by a non-disclosure agreement reached in another forum. On October 31, 1991, the Respondent City filed with the Commission a Motion to Seal that portion of the transcript which encompassed the allegedly confidential material. Respondent AFSCME took no position on the Motion to Seal. The Complainant objected to the motion. After review and consideration by Commission General Counsel Peter G. Davis, and further correspondence between Attorney Davis and the parties, it was determined on March 25, 1992 that the Motion to Seal was essentially a motion to strike, and thus within the jurisdiction of the examiner. It was further determined that, in the event the examiner denied the motion to strike, the motion to seal could then properly be taken to the Commission. Upon review and consideration, the Examiner issues the following

ORDER

1. That the Motion to Strike page 158, line 16 to page 174, line 1, inclusive, in the Transcript of the October 15, 1992 hearing in WERC Case 87, No. 45376, MP-2457, is granted.

2. That any party currently in possession of a transcript which includes the stricken testimony shall promptly return to the Examiner any and all originals and/or copies of the transcript of the stricken testimony, and file with the Examiner an affidavit attesting to such action.

Dated at Madison, Wisconsin this 10th day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, Examiner

CITY OF WAUKESHA

MEMORANDUM ACCOMPANYING ORDER
GRANTING MOTION TO STRIKE

Pursuant to the Administrative Procedures Act and the Administrative Code of the Wisconsin Employment Relations Commission, WERC Hearing Examiners enjoy considerable discretion in the way they conduct their hearings. Authorized by Sec. 227.46, Wis. Stats., to rule on offers of proof and receive relevant evidence, regulate the course of the hearing, and dispose of procedural requests or similar matters, agency examiners are not bound by common law or statutory rules of evidence. Sec. 227.45(1), Wis. Stats. Our Supreme Court has noted that the WERC has "broad discretion as to what evidence it can consider," Beloit Education Association v. WERC, 73 Wis. 2d 43, 69 (1976), and that "proceedings before an administrative agency are not required to be conducted with all the formality of a trial in a court." Dairy Employees Ind. Union v. Wis. E.R.Board. 262 Wis. 280, 284 (1952). "Rigid adherence to evidentiary rules is completely contrary to established rules of administrative agency procedure." Pieper Elec. Inc. v. Labor and Industry Review Com'n., 118 Wis. 2d 92, 96 (Ct. App. 1984).

The prohibited practices proceeding before me concerned allegations that the Respondent City and Respondent Union had committed a series of offenses against Complainant Biernacki. During his testimony, the Complainant was asked by his representative about medical care he had received, and the nature of his infirmity. Respondent City objected to this line of questioning, contending that it violated an explicit agreement of non-disclosure reached as part of a settlement of a Worker's Compensation claim brought by the Complainant. Assistant City Attorney Karen Macherey, in support of her objection to the line of testimony, stated, "I have been informed that that has been sealed by the State and therefore we should not bring up this information." Trans., page 158, line 21. City Personnel Director Tom Wisniewski added, "There was a hearing before DILHR on that issue, and in settlement of that, all the facts surrounding that were sealed with that case. There is to be no discussion of that case." Tr. page 158, line 24.

At hearing before me, the Respondent City did not have in its immediate possession a copy of the Order or transcript from the Worker's Compensation proceeding. Thus, the parties and I spent a fair amount of time (the better part of 16 pages of transcript) discussing the purported pledge of non-disclosure somewhat in the abstract. Ultimately, I sustained the objection, but not before substantial testimony and/or discussion was in the transcript.

Subsequently, the City provided me with a copy of the transcript of the proceedings before Administrative Law Judge Mary Lynn Endter of the Worker's Compensation Division of the Department of Industry, Labor and Human Relations on May 16, 1990. Starting at page 7, line 13, there is the following colloquy between Mr. Biernacki and Respondent's attorney:

> Q. You've heard the terms of the compromise agreement including nondisclosure between the parties and people present in this room, correct?
>
> A. Yes.
>
> Q. And you realize that pursuant to that agreement you are not allowed to discuss how this case resolved with any third persons; do you realize that?

A. I do realize that.

Q. And you agree to be bound by that?

A. I do.

Clearly, the complainant agreed to keep confidential those matters related to the settlement of his worker's compensation claim, which agreement was incorporated by reference in the Order which ALJ Endter issued. Although it is normally not the business of a hearing examiner for one agency to enforce the terms of an agreement reached before an examiner from a separate agency, it is the business of hearing examiners of this agency to promote labor peace. In this instance, labor peace would be aided by a recognition by the parties that they must honor their commitments, and impeded by continuing litigation over the motions to strike and/or seal.

Further, while it is not the role of an Examiner to enforce an agreement reached in a separate forum, neither should Examiners cavalierly let their hearings be used to abrogate such an agreement. I do not believe that the Complainant mischievously sought to offer testimony about the confidential agreement for the purpose of voiding the agreement on confidentiality; however, that is what the result would be were I to deny the City's motion.

Finally, I note that I did ultimately sustain the City's motion objecting to the line of questioning at hearing. Had I placed off-the-record the discussion which ensued between the time the City made its initial objection, and the time I sustained that objection, this matter would be moot. As it is, by granting the motion to strike, I am deleting from the record material that I should not properly have allowed therein.

Dated at Madison, Wisconsin this 10th day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, Examiner