

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHLAND PINES EDUCATION ASSOCIATION, Complainant,

vs.

NORTHLAND PINES SCHOOL DISTRICT, Respondent.

Case 54
No. 62113
MP-3899

Decision No. 30602-A

Appearances:

Steven M. Lucareli, Attorney, Lucareli Law Office, P.O. Box 1357, Eagle River, Wisconsin 54521, appearing on behalf of the Complainant.

Joel S. Aziere, Attorney, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

**ORDER DENYING RESPONDENT'S MOTION
FOR A PROTECTIVE ORDER TO QUASH THE SUBPOENAS ISSUED TO
MEMBERS OF THE NORTHLAND PINES SCHOOL DISTRICT BOARD OF
EDUCATION AND MOTION TO SUPPRESS TESTIMONY**

On April 30, 2003, Complainant filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the Respondent had violated Secs. 111.70(3)(a)1 and 5, Stats., by failing to reinstate Complainant to his teaching position on January 20, 2003, and continuing Complainant's suspension without pay. On April 17, 2003, Lauri A. Millot was appointed by the Commission to act as Examiner in this case. Hearing on the complaint was conducted on May 27, and May 28, 2003. At hearing on May 28, 2003, prior to Complainant taking the subpoenaed testimony of Board of Education

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members Amy Decker and Chuck Gilman, Respondent's counsel informed Decker and Gilman that they may be subject to criminal prosecution for their testimony. The May 28, 2003 hearing was continued to August 7, 2003, and Respondent was afforded until July 1, 2003, to file any formal motions on the matter. No motions were received by July 1, 2003. On July 31, 2003, Complainant filed a Motion for Telephonic Testimony to allow for Board of Education member Amy Decker's telephonic testimony. On August 6, 2003, Respondent filed an Objection to Telephonic Testimony and Motion for Protective Order to Quash the Subpoenas Issued to Members of the Northland Pines School District Board of Education and Motion to Suppress Testimony. In response to Respondent's motion, I continued the hearing scheduled for August 7, 2003, to September 9, 2003, and afforded Complainant until August 18, 2003, to file a reply to Respondent's motion. Complainant's Reply Brief to Respondent's Motion to Quash and to Suppress Testimony was received on August 22, 2003.

Having considered the argument of the parties, and the record as a whole, the Examiner makes and issues the following

ORDER

Respondent's Motion to Quash Subpoena and to Suppress Testimony is denied.

Dated at Rhinelander, Wisconsin, this 10th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

NORTHLAND PINES SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING
ORDER DENYING RESPONDENT'S MOTION
TO QUASH SUBPOENA AND MOTION TO SUPPRESS TESTIMONY**

POSTIONS OF THE PARTIES

Respondent

Respondent seeks a protective order quashing subpoenas issued by the Complainant to Board of Education members Amy Decker and Chuck Gilman. Respondent further moves for an order suppressing the testimony of Decker and Gilman.

Respondent objects to the testimony of Decker and Gilman on the basis that the information sought is protected by Section 905.03, Wis. Stats., the lawyer-client privilege. Complainant's Counsel indicated that Decker and Gilman would be questioned regarding closed session discussions of the Board of Education conducted during the Peter Bugni disciplinary hearing. Since this discussion was conducted in the presence of the Board's attorney, who was available for the purpose of providing legal advice, the discussion is a confidential communication between a client and its attorney and therefore protected by the lawyer-client privilege.

In addition, the privilege may not be waived by either Decker or Gilman. Consistent with the entity rule as articulated in *JESSE V. DANFORTH*, 169 WIS. 2D 229 (1992), the Board is the client and individual Board members may not pierce the privilege and testify regarding confidential communications. This is further supported by the Wisconsin Supreme Court's decision in *LANE V. SHARP PACKAGING SYSTEMS, INC.*, 251 WIS. 2D 68 (2002), wherein it was clarified that a director could not waive the lawyer-client privilege on behalf of the corporation. Respondent concludes that "the lawyer-client privilege pertaining to discussions held by the Board in closed session is held by the Board and may only be waived by its President, Mr. Tom Christensen."

Respondent next contends that the testimony sought relates to matters conducted in closed session during an open public hearing and therefore Decker and Gilman would be in violation of the Wisconsin Open Meetings Law, Section 19.81, et. sec. Wis. Stats., should they testify. Respondent notes that it has requested an opinion from the Wisconsin Attorney General's Office as to the legality and potential criminal liability of Decker and Gilman's testimony, but has yet to receive a response.

Complainant

Complainant urges denial of Respondent's motions.

The lawyer-client privilege does not apply because Board of Education member Tom Christensen waived the privilege by testifying about the very same subjects that Decker and Gilman will testify. Christensen testified and offered his opinion as to what the Board intended when it decided to suspend Bugni. The Complainant desires Decker and Gilman to offer their opinion as to the meaning of the suspension terms. The expectation of confidentiality was destroyed as a result of Christensen's testimony and the fact that the Board's decision was made public and thus there was no attempt or desire for it to be confidential. Moreover, the attorney-client privilege only protects communications intended to further legal advice to the client and since the Board's discussion during closed session was the "normal give and take between people trying to reach a decision" rather than the solicitation of legal advice from Board Attorney O'Brien, it is not protected.

Christensen does not have the right to waive the attorney-client privilege. The Respondent's reliance on *LANE V. SHARP PACKAGING SYSTEMS, SUPRA*, is misplaced because Decker and Gilman are current Board members and in *LANE*, the Wisconsin Supreme Court specifically stated the decision did not apply to situations involving current members of the Board. See *LANE* AT 102. Additionally, the right to waive attorney-client privilege is not unique to Christensen nor does he have a greater legal right to waive Board privilege than any other board member. As did Christensen, Decker and Gilman have the right to waive privilege.

Lastly, Complainant argues that that the corporate and business entity case law cited by the Respondent is not transferable to the politically constituted Northland Pines School Board. Christensen, Decker and Gilman were elected in a district-wide free election and are obligated to represent their constituency. To accept the Respondent's assertion that Christensen speaks for the Board is more consistent with a totalitarian form of government and effectively gags Decker and Gilman. Given that the attorney-client privilege has never been applied to a politically constituted board and doing so would be inconsistent with representative government and therefore would constitute bad public policy, the Respondents' motion should be denied.

DISCUSSION

At issue is whether the Complainant has access to the testimony of members of the Board of Education that participated in the open hearing and subsequent deliberations that resulted in his suspension from his teaching position. The Respondent asserts this testimony is inaccessible relying on the lawyer-client privilege and the open meetings law.

Lawyer-Client Privilege

Section 905.03, Wis. Stats., protects confidential communication between clients and their attorneys and defines confidential communication as that which is "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the

rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Ownership of the privilege is held by the client and can only be claimed by the client and his attorney at the time of the communication. Section 905.03(3), Wis. Stats. The policy rationale for the privilege is the desire for clients to fully disclose and confide in their attorney. *JAX V. JAX*, 73 WIS.2D 572, 579, 243 N.W.2D 831 (1976). Moreover, the privilege is “strictly confined to the narrowest possible limits consistent with the logic of the principle” since it creates an obstacle when in search of the truth. *Id* AT 579. The privilege is waived when the privilege holder attempts to prove a claim or defense by disclosing or describing an attorney-client communication. *STATE V. HYDRITE CHEMICAL CO.* 220 WIS.2D 51, 68, 582 N.W.2D 411 (CT. APP. 1998).

The Respondent’s motion requires a determination as to whether the lawyer-client privilege applies to the testimony sought to be excluded by the District, essentially, is the testimony confidential. Respondent asserts that the entirety of the discussion which commenced during deliberations with Attorney O’Brien present is confidential communication. I disagree. The presence of an attorney during deliberations does not invoke the privilege. 1/ Rather, the privilege only applies when the communication is between the client and the attorney and further, that it is the transmittal of “professional legal services.” Sec. 903.03, Wis. Stats. Although exactly what questions will be asked of Decker and Gilman is unknown, based on the record and the pleadings on this issue, it would appear that the questioning will address their opinions and their opinion as to the rationale for the Board decision at the time discipline was meted out to Bugni. I do not find that this meets the definition of privileged communication. Given that there is insufficient evidence to conclude that the information sought by the subpoena is confidential and recognizing the public policy considerations articulated in *JAX*, *SUPRA*, there is no reason at this time to quash the subpoenas.

1/ The record is void as to whether Attorney O’Brien was present during the Board deliberations.

Assuming *arguendo* that the type of questioning discussed above is privileged communication thus invoking the lawyer-client privilege, I reach the same result. Respondent, relying on *JESSE V. DANFORTH*, *SUPRA*, concludes that neither Decker or Gilman have the right to waive the lawyer-client privilege. This argument embraces two separate and distinct legal arguments, neither of which is addressed or supported by case law. First, Respondent contends that corporate entity law applies which recognizes the Board as the client and thus vests the Board with the right to waive the privilege. Since Decker and Gilman are not the client, they cannot waive the privilege. And second, that Christensen, in his role as Board President, has the authority to speak on behalf to the Board. 2/ Regardless of who the client is and who has the right to waive the privilege, the fact remains that there has already been testimony offered by Christensen to explain the Board’s decision and his opinion as to the

Board's expectations. Thus, consistent with HYDRITE CHEMICAL CORP, SUPRA, the communication is no longer privileged and there is no legal obstacle to enforcement of the subpoenas.

2/ Section 120.15, Wis. Stats., articulates the obligations of an elected school board president and does not so designate the official to speak on behalf of the Board.

Open Meetings Law

Section 19.81, Wis. Stats., provides that "the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Against this backdrop, governmental bodies may convene to closed session consistent with specifically enumerated exemptions to conduct its business. See Sec. 19.85, Wis. Stats. Although the record does not contain the specific exemption utilized by the Board on September 25, 2002, to convene to closed session, they did so and issued a decision of discipline. Respondent asserts that should Board members Decker and Gilman testify regarding what occurred during closed session, they would violate the open meetings laws and subject themselves to criminal liability. Respondent offers no case law for this proposition. Even if I were to accept that the testimony of public officials as to matters discussed during deliberations conducted in closed session after an open hearing is in conflict with the Open Meetings Law, it would be obscene for me suppress Decker and Gilman's testimony given that Christensen has already testified to the very same issues and thus effectively deny Complainant the opportunity to test the validity of the evidence.

Having considered the record and the materials filed in support of, and in opposition to, Respondent's Motion to Quash the Subpoena and Motion to Suppress Testimony, the Examiner is persuaded that Respondent's Motion to Quash Subpoena and to Suppress Testimony must be denied.

Dated at Rhinelander, Wisconsin, this 10th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

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