

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY  
LABOR ASSOCIATION, Complainant,**

vs.

**BROWN COUNTY, Respondent.**

Case 708  
No. 64521  
MP-4133

**Decision No. 31367-A**

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**ORDER DENYING MOTIONS TO QUASH SUBPOENAS**

On July 13, 2005 a hearing was conducted in the captioned matter in Green Bay, Wisconsin, which was continued to July 28, 2005. On July 20, 2005, the Respondent issued subpoenas *duces tecum* to Attorneys Laurie Eggert and Rachel Pings, both of whom are associated with the law firm representing the Complainant herein. On July 22, 2005, Complainant's counsel filed motions to quash the subpoenas with the Examiner, along with supporting affidavits and briefs. Having reviewed the motions, the supporting documents and the applicable law, and upon the record as a whole, the Examiner makes and issues the following

**ORDER**

Complainant's motions to quash the subpoenas *duces tecum* are denied.

Dated at Fond du Lac, Wisconsin, this 26th day of July, 2005

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

**BROWN COUNTY**

**MEMORANDUM ACCOMPANYING ORDER DENYING  
MOTIONS TO QUASH SUBPOENAS DUCES TECUM**

At the July 13, 2005 hearing in this matter, testimony was offered on behalf of the Complainant Union by Attorney Rachel Pings with respect to events that occurred at two bargaining sessions between the parties on January 17, 2005 and February 11, 2005, which she attended on behalf of the Complainant Union, along with Attorney Laurie Eggert. During her testimony, Attorney Pings testified that subsequent to the January 17 meeting she had typed up notes regarding the bargaining session for her own use. She further testified that prior to the hearing she had referred to the notes to refresh her recollection, but that she had not brought them to the hearing and they remained in her office in Milwaukee. Respondent's counsel requested production of the notes under a subpoena *duces tecum*, which had been issued to the Union's Records Custodian, covering all documents regarding the bargaining sessions in his possession, or to which he had access. Complainant's counsel objected and the Examiner sustained the objection on the basis that Attorney Pings' personal notes were not encompassed by the subpoena.

On July 20, 2005, Respondent's counsel issued subpoenas *duces tecum* to Attorneys Eggert and Pings, seeking their attendance to testify when the hearing reconvened on July 28, as well as the production of all "...documents, in written, electronic or audio form, within your possession, custody and/or control that recount or summarize any of the discussions between Respondent's representatives and the Complainant's representatives in any bargaining session or in the course of collective bargaining, including but not limited to the January 17, 2005 and February 11, 2005 collective bargaining sessions between the Respondents and the Complainant." Complainant's counsel responded on July 22 by filing motions to quash as to each subpoena on the grounds that any such documents are subject to attorney-client privilege and also constitute attorney work product. It is these motions that are the subject of this order.

A prohibited practice complaint or unfair labor practice complaint, brought under Chapter 111, Stats., is a class 3 administrative proceeding under Chapter 227, Stats. Section 227.45(1), Stats., provides, in pertinent part:

Except as provided in ss. 19.52(3) and 901.05, an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05. The agency or hearing examiner shall give effect to the rules of privilege recognized by law.

The attorney-client privilege is codified in Sec. 905.03(2), Stats., which states, in pertinent part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of facilitating the

rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

The subpoenas in question seek documents "...that recount or summarize any of the discussions between Respondent's representatives and the Complainant's representatives..." at the bargaining sessions between the parties. Communications that are protected by attorney-client privilege, however, are by definition confidential communications that occur between counsel and client. These subpoenas seek documents setting forth recollections or recapitulations of discussions that occurred between the parties or their representatives in open meetings. I cannot conceive of how such recapitulations of public discussions between the parties could be considered subject to any claim of privilege on the basis of attorney-client confidentiality. Were any such to occur, however, the Examiner could, pursuant to an *in camera* review, make a determination as to whether any information contained therein was subject to privilege.

The "attorney work product" doctrine seeks to protect materials prepared by an attorney for or in anticipation of litigation. It is codified in Sec. 804.01(2)(c)1., Stats., which states, in pertinent part:

...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 an 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 the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

It is unclear, however, whether this rule applies to proceedings under Chapter 227 and no authority has been cited to indicate that it does, although arguably it could be encompassed by the language in Sec. 227.45(1) requiring a hearing examiner to give effect to "...the rules of privilege recognized by law." However, technically the attorney work product exception is a discovery rule, covered by Chapter 804, not an evidentiary privilege as set forth in Chapter 905, and neither Chapter 227 nor WERC rules address pre-hearing discovery, except to allow for depositions to preserve testimony in extraordinary circumstances. Both, however, provide for the issuance of subpoenas *duces tecum* to compel production of evidence at hearings. Assuming, *arguendo*, however, that such a privilege is recognized under Chapter 227, nevertheless, what is being sought here, again, are notes concerning conversations occurring at bargaining sessions, which pertained to contract negotiations, not pending or anticipated litigation. Arguably, any document created by an attorney may at some point be of material use in litigation, but the rule is

circumscribed to encompass only those documents and materials specifically created with litigation in mind. This doctrine does not appear to apply to the materials being sought here. In any event, with respect to Attorney Pings' notes, she has already testified to how and when the notes were created, the substance of the information contained therein and has indicated that her testimony was, in part, based on those notes. It is hard to conceive, under any circumstances, how a privilege to withhold those notes now would any longer apply.

Dated at Fond du Lac, Wisconsin, this 26th day of July, 2005

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

