

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

vs.

BROWN COUNTY, Respondent.

Case 708
No. 64521
MP-4133

Decision No. 31367-B

**SUPPLEMENTAL ORDER TO ORDER DENYING
MOTIONS TO QUASH SUBPOENAS**

On July 26, 2005 the Examiner issued an Order denying motions filed by the Complainant herein seeking to quash subpoenas *duces tecum* issued to attorneys Laurie Eggert and Rachel Pings by the Respondent requiring them to produce all documents "...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." The motions to quash had been made upon assertions of attorney-client confidentiality and attorney work product privilege. In the Memorandum Accompanying Order, however, the Examiner indicated a willingness to conduct an *in camera* review of the documents subject to the subpoenas in order to ascertain whether, in fact, any of the information contained therein would constitute privileged communications between attorney and client such that they need not be disclosed.

On July 28, 2005, at the continued hearing in the above matter, the parties agreed that the Complainant would provide the documents to the Examiner, who would examine them and advise the parties whether and to what extent the documents were subject to any claim of privilege. On August 24, 2005, the Complainant provided copies of the documents to the Examiner, who examined them and on August 31, 2005 advised the parties of his determination as to the discoverability of the documents. Pursuant to that advisement, and based upon the applicable law and the record as a whole, the Examiner makes and issues the following

No. 31367-B

ORDER

- 1) The following documents are not subject to claims of privilege and are to be disclosed: the handwritten bargaining notes of Attorney Laurie Eggert from February 17, 2004, June 9, 2004, July 12, 2004, August 31, 2004, November 16, 2004, December 7, 2004, and December 17, 2004; typewritten proposals to Brown County from the Brown County Sheriff's Department Non-Supervisory Labor Association, along with Attorney Eggert's handwritten notations thereon, dated June 9, 2004, July 12, 2004, November 15, 2004, December 7, 2004, December 17, 2004, January 17, 2005 and March 18, 2005; a typewritten Management Proposal dated August 31, 2004, along with Attorney Eggert's handwritten notes thereon; a typewritten document entitled "2005 Monthly Premiums," along with Attorney Eggert's handwritten notes thereon; a typewritten document entitled "Brown County Benefits Proposals February 11, 2005," along with Attorney Eggert's handwritten notes thereon; the handwritten bargaining notes of Attorney Rachel Pings from December 17, 2004 and January 17, 2005; typewritten proposals to Brown County from the Brown County Sheriff's Department Non-Supervisory Labor Association, along with Attorney Pings' handwritten notations thereon, dated December 17, 2004, February 11, 2005, January 17, 2005 and March 18, 2005; a typewritten document dated December 6, 2004 entitled "2005 Bulletin Vacation Breakdown"; a typewritten memorandum dated January 17, 2005, authored by Attorney Pings summarizing that day's bargaining session; a typewritten document entitled "Brown County Benefits Proposals February 11, 2005," along with Attorney Pings' handwritten notes thereon; a typewritten document entitled "2005 Monthly Premiums," along with Attorney Pings' handwritten notes thereon.
- 2) The following documents contain some material that is subject to attorney-client confidentiality: a typewritten memorandum dated February 14, 2005, authored by Attorney Pings summarizing the February 11 bargaining session and discussions with her clients and the County's representatives; a typewritten memorandum dated March 18, 2005, authored by Attorney Pings summarizing that day's bargaining session and discussions with her clients and the County's representatives. As to the February 14 memorandum, the Complainant may redact the first two bullet points on page one and the last three bullet points on page four. Once redacted, the document is to be disclosed. As to the March 18 memorandum, the first four bullet points on page one may be redacted. Once redacted, the document is to be disclosed.
- 3) Attorney Pings' handwritten notes of a meeting with Union President Al Phillips on December 17, 2004 are privileged and need not be disclosed.

- 4) The following documents go beyond the scope of the subpoenas and need not be disclosed: a typewritten proposal to Brown County from the Brown County Sheriff's Department Non-Supervisory Labor Association dated February 17, 2004; an undated typewritten document from Attorney Eggert's file entitled "Sheriff Non-Supervisory 2004-2005 Labor Contract," a letter dated February 11, 2005 from Union President Todd DeLain to Brown County Human Resources.

Dated at Fond du Lac, Wisconsin this 2nd day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

BROWN COUNTY

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

The backdrop to this Order is set forth in the Examiner's original Order Denying Motions to Quash Subpoenas, Dec. No. 31367-A. The basis for the original motions was that the material sought was subject to attorney-client privilege and/or constituted attorney work product and in either case was not subject to subpoena. For the reasons stated therein, the Examiner found that the documents were not inherently privileged and denied the motions, but provided for the possibility of an *in camera* inspection of the requested documents prior to transfer to determine whether they did, in fact, contain any privileged material.

At the July 28, 2005 hearing, the Examiner agreed to perform an *in camera* inspection of the documents prior to requiring their disclosure to the Respondent. On August 24, 2005, the Complainant provided the Examiner with file documents of Attorneys Laurie Eggert and Rachel Pings, which purportedly met the criteria of the subpoenas issued by the Respondent. On August 30, 2005, the Complainant provided the Examiner with affidavits from Attorneys Eggert and Pings in which they identified the documents provided and provided some general information as to when, how and for what purpose they were created.

With a couple of exceptions, the documents can be categorized into three types: handwritten notes of Attorneys Eggert and Pings purportedly made during negotiation sessions with the County, typed bargaining proposals between the parties on which the attorneys had made hand written notations and typed memoranda prepared by Attorney Pings after bargaining sessions in which she summarized both the negotiation sessions and caucuses taken by the Association bargaining team. Material that references private communications between the attorneys and their client are subject to attorney-client confidentiality and need not be disclosed. Thus, Attorney Pings' note regarding her private conference with the Union President on December 17, 2004 is privileged as, likewise, are references to discussions in Union caucuses contained in her January 17, 2005, February 14, 2005 and March 18, 2005 memoranda. The material contained in the bargaining notes and proposals, however, purport to be either summaries of discussions between the parties at the negotiation table, or notes regarding bargaining strategy. These materials do not constitute private attorney-client communications and are not subject to the privilege.

For the reasons previously stated in the July 26 Order, I remain unpersuaded that the attorney work product exception to discovery, codified in Sec. 804.01(2)(c), Wis. Stats. applies here. That exception applies specifically to documents "...prepared in anticipation of litigation or for trial," and even then the exception is not absolute where the moving party can establish compelling need. As noted in the July 26 Order, "...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." Furthermore, no authority has been cited to indicate that Chapter 804, dealing with discovery,

has any application in proceedings under Chapter 227 or the WERC administrative rules, which do not provide for discovery, but do give effect to subpoenas *duces tecum*.

Clearly and understandably, the Union would prefer, if it could, to withhold the documents sought rather than give the County insight into its bargaining goals, strategies and tactics. This is, however, an unusual circumstance where the central issue of the case is the appropriateness of the conduct of the parties during bargaining. Furthermore, Attorney Pings testified on behalf of the Union and admitted to having used her notes to refresh her recollection prior to testifying. Therefore, the County has a legitimate interest in determining whether the bargaining notes and memoranda of the Union's attorneys, who were participants and witnesses to the events in question, tend to confirm or deny the assertions the Union's witnesses make in the hearing. While the Union's predicament is understandable, therefore, except as indicated in the Order it has not provided a satisfactory legal basis for withholding the documents.

Dated at Fond du Lac, Wisconsin this 2nd day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

