

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-D

**ORDER PURSUANT TO COMMISSION ORDER ON REVIEW OF
EXAMINER'S DECISION ON MOTIONS TO QUASH SUBPOENAS**

On September 2, 2005 the Examiner issued a Supplemental Order to Order Denying Motions to Quash Subpoenas 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." [BROWN COUNTY, DEC. NO. 31367-B (Emery, 9/2/05)] In that Order, the Examiner, subsequent to an *in camera* review of the requested documents, made rulings on the required production of each of the documents in question which had been produced, ruling that a number of the documents were not subject to privilege and must be produced. On September 12, 2005, the Complainant petitioned the Wisconsin Employment Relations Commission for an interlocutory review of the Examiner's decision, which the Commission granted.

On November 21, 2005, the Commission issued an Order on Review of Examiner's Decision. [BROWN COUNTY, DEC. NO. 31367-C (WERC, 11/21/05)] In that Order, the Commission set aside paragraph 1 of the Examiner's September 2 Order, which had directed the release of certain of the documents, and substituted the following paragraph:

- 1) The documents or portions of documents encompassed by the subpoenas *duces tecum* of Attorneys Pings and Eggert that are not relevant, material, and, on balance, necessary to the disposition of the issues set forth in the Complaint and the Answer and/or to the credibility of the testimony

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adduced at the hearing, need not be disclosed. Following argument by the parties, the Examiner shall conduct an *in camera* inspection of said documents to determine which, if any portions, should be redacted in compliance with this paragraph.

The Commission affirmed the remainder of the September 2 Order, which had made dispositions regarding the disclosure of certain other documents.

Pursuant to the Commission's Order, the parties were invited to brief the issue prior to further review of the material by the Examiner, which they did. After due consideration of the parties' arguments, the Examiner engaged in an additional *in camera* review of the documents encompassed by the Commission's Order, applying the analysis set forth therein, and hereby makes and issues the following:

ORDER

In addition to those documents or portions thereof, referenced in paragraph 2 of the Examiner's September 2, 2005 Order, which is incorporated by reference, the following documents are to be disclosed: the handwritten bargaining notes of Attorney Rachel Pings from January 17, 2005; a typewritten memorandum dated January 17, 2005, authored by Attorney Pings, summarizing that day's bargaining session

Dated at Fond du Lac, Wisconsin, this 23rd day of May, 2006

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

BROWN COUNTY

**MEMORANDUM ACCOMPANYING ORDER PURSUANT TO COMMISSION ORDER
ON REVIEW OF EXAMINER'S DECISION ON MOTIONS TO QUASH SUBPOENAS**

The Commission's Order, dated November 21, 2005, stated, in pertinent part:

"The documents or portions of documents encompassed by the subpoenas *duces tecum* of Attorneys Pings and Eggert that are not relevant, material, and, on balance, necessary to the disposition of the issues set forth in the Complaint and the Answer and/or to the credibility of the testimony adduced at the hearing, need not be disclosed."

BROWN COUNTY, DEC. NO. 31367-C (WERC, 11/21/05) at 2

The Commission thus established a three-pronged test to determine whether any particular document, or portion thereof, was subject to disclosure: any document, not otherwise subject to a claim of privilege, need only be disclosed if it was found to be relevant, material and, on balance, necessary to the disposition of the case. By use of the conjunctive "and," the Commission made it clear that disclosure is only required if all three prongs of the test are satisfied.

In its accompanying Memorandum, the Commission found that "...the subpoenaed documents contain information related to bargaining strategy, not previously disclosed to the County nor (presumably) disclosed in testimony at the instant hearing, and thus carrying an expectation of confidentiality" and recognized "...the practical importance of affording some protection to a party's private collective bargaining notes..." even where technical evidentiary privileges may not apply. *Id.* at 6 The Commission also noted in footnote 4 that "the 'mental processes' of an attorney are the most highly protected form of 'attorney work product.' *Id.* at 6. Bargaining notes, however, are rarely, if ever, simply a verbatim record of exchanges across the negotiating table. While they contain much of such information, the information is usually inextricably woven with the author's own impressions, insights, evaluations and reactions – in short, the very sort of "mental processes" identified as subject to protection under the Commission's analysis. Such is the case here. The documents specified in paragraph 1 of the September 2 Supplemental Order thus rest behind a shield of confidentiality that may only be breached if the requirements of the balancing test are met.

The issue at hand in this litigation concerns an alleged verbal altercation that occurred between the County's chief negotiator, Don Vander Kellen, and a member of the Union bargaining team, George Gulczynski, at a bargaining session on January 17, 2005. The record, as it has so far been developed, reveals that the alleged altercation occurred during a discussion between some of the parties early in the session concerning an outstanding grievance. The essence of the complaint is that the Union alleges that, as a result of the incident on January 17, the County took punitive action against Gulczynski in violation of Sec. 111.70(3)(a)1, Wis. Stats. Key factual issues underlying this matter are whether Vander Kellen provoked Gulczynski at the January 17 meeting and whether Gulczynski's response was appropriate under the circumstances. A central evidentiary feature of this case, therefore, is the recollection of the attendants at the January 17

meeting as to what exactly occurred.

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Attorney Rachel Pings is a member of the law firm representing the Union in its negotiations and was present at the January 17 meeting. At that meeting she took handwritten notes of the discussions at the bargaining table, which she subsequently summarized in a typed memorandum she prepared after returning to her office. On the first day of hearing, she testified as to her recollections of the meeting, and specifically of the exchange between Vander Kellen and Gulczynski. She further testified that prior to the hearing she reviewed her notes and memorandum in preparation for her testimony. As such, I find that her contemporaneous bargaining notes from that session and summary memorandum meet the tests of relevance and materiality set forth by the Commission. It is also my view that the fact that Attorney Pings relied on these documents to prepare her testimony in this matter makes their disclosure necessary to afford opposing counsel the opportunity to assess her credibility by comparing her testimony with her contemporaneous accounts and impressions. The Union has argued that an *in camera* examination of Attorney Pings is necessary to determine which of her notes would constitute bargaining strategy type information of the sort referred to in the Commission's Order, but I disagree. An examination of the documents in question satisfies me that to the extent the information contained therein contains the type of "mental process" information about which the Commission expressed concern in its Order, such is overridden by the County's need to be able to compare Attorney Pings' contemporaneous account of the events with her subsequent testimony. Thus, given the County's overriding interest in being able to assess the consistency, or lack thereof, between Attorney Pings' immediate perceptions of the exchanges on the day in question and her subsequent testimony, I find that the documents must be surrendered.

An examination of the other documents proffered by Attorney Pings reveals that they do not meet the standard for disclosure established by the Commission. That would include the following:

Handwritten bargaining notes from December 17, 2004; 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 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.

What is at issue here is whether the subpoenaed documents contain information so central to the issues of this litigation that failure to disclose it, even if otherwise protected, would substantially injure the County in the preparation and presentation of its defense, hence the requirement that the information not only be relevant and material, but also, on balance, necessary to the disposition of the case. The County argues that all bargaining notes should be disclosed because they will establish whether the behavior of Vander Kellen and Gulczynski on January 17 was anomalous or consistent with previous and subsequent sessions. The post-January 17 documents are also deemed necessary to confirm or deny the Union's contention that Vander Kellen attempted to restrict the participation of Union members at bargaining sessions subsequent to the Gulczynski incident.

Attorney Pings' notes prior to January 17 make no reference to the atmosphere of the bargaining sessions or behavior of the principals, and, as set forth above, the

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factual Documents that were created prior to the incident in question here which make no reference to matters at issue are neither relevant nor material. Documents created for bargaining sessions or meetings subsequent to January 17, 2005 are relevant and material only insofar as they address the matters in issue here and are discloseable only to the extent they do not violate attorney-client privilege. Those documents, or the discloseable portions thereof, are already identified in numbered paragraph 2 of the September 2, 2005 Supplemental Order, which was affirmed by the Commission, and are to be disclosed as set forth therein.

The remaining documents in issue are those contained in the files of Attorney Laurie Eggert, also a member of the law firm representing the Union. Attorney Eggert was also present at the January 17, 2005 bargaining session, but has not offered testimony at the instant proceeding. Her file contains documentary materials, including typewritten proposals and handwritten bargaining notes, from the outset of the negotiations as far back as February 2004. For the same reason as with Attorney Pings' notes from the December 17, 2004 bargaining session, I find these materials to be irrelevant, immaterial, and, thus non-discloseable. Apparently the only document in Attorney Eggert's file from the January 17, 2005 bargaining session is a "Four (4) page typewritten document entitled 'Proposal to Brown County from Brown County Sheriff's Department Non-Supervisory Labor Association.'" (Affidavit of Laurie A. Eggert at 3). This document was provided to the County at the time and contains no additional notations. As such, I find that it is irrelevant, immaterial and non-discloseable. Attorney Eggert did not attend the February 11, 2005 bargaining session and so has no documents or notes from that meeting, other than the memorandum of Attorney Pings of that date, which has been previously addressed above. The only other document in Attorney Eggert's file is a type written bargaining proposal from March 18, 2005, which was, likewise, shared with the County at that time. It contains a few handwritten notes on matters unrelated to the issues herein. I find, therefore, that it is irrelevant, immaterial and need not be disclosed.

The County points out with some ironic force that concerns for relevance, materiality and confidentiality did not prevent the Union from issuing similarly comprehensive subpoenas *duces tecum* to the County's witnesses seeking their bargaining notes and other documents. Thus far in the proceedings, the Union and County have not attempted to test the legitimate scope of these subpoenas. Should they do so, they will be subject to the same analysis employed here.

Dated at Fond du Lac, Wisconsin, this 23rd day of May, 2006

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

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