STATE OF WISCONSIN PERSONNEL COMMISSION

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MARIE IWANSKI,

Appellant,/
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 89-0074, 0088-PC-ER
89-0096-PC

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RULING ON MOTION
TO COMPEL DISCOVERY

The underlying appeal and complaints of discrimination/retaliation relate to respondent's termination of appellant/complainant's employment effective July 10, 1989. On March 27, 1991, appellant/complainant filed a Motion to Compel Discovery and for Attorney's Fees with the Commission. The parties were permitted to file briefs in relation to such Motion. The briefing schedule was completed on July 8, 1991.

The parties have completed extensive discovery in these cases. Appellant/complainant has deposed nine of respondent's employees and these depositions have lasted a total of approximately 35 hours. Many of the questions asked of these employees during these depositions related to the aspects of appellant/complainant's work performance which formed the basis for the termination decision, the manner in which the termination decision was reached, and the rationale for the termination decision.

During the deposition of Regina Cowell, the personnel manager for respondent's Division of Health, appellant/complainant's employing unit during the relevant time period, Ms. Cowell described a series of at least four meetings with appellant/complainant's supervisors and with representatives of respondent's employment relations, employee assistance, and legal staffs. The representative from respondent's legal staff in attendance at such series of meetings was Robert Paul. It appears, from Ms. Cowell's testimony at this deposition, that the sole or overriding purpose of these meetings was to consult

with the experts from each of these staffs in order to solicit their advice and to reach a consensus as to what course to follow in regard to appellant/ complainant's employment with respondent. Part of the purpose, then, was to solicit legal advice from Mr. Paul is regard to this situation. This, according to Ms. Cowell's deposition testimony, represented respondent's standard procedure, i.e., to take a team problem-solving approach to situations such as that involving appellant/complainant's employment by respondent. During Ms. Cowell's deposition, when counsel for appellant/complainant asked her questions regarding this series of meetings, Ms. Cowell was advised by counsel for respondent not to answer these questions. This advice was based on respondent's position that information exchanged during this series of meetings was protected by the attorney-client privilege and, therefore, not discoverable. This prompted appellant/complainant to file the instant Motion.

In support of its invocation of the attorney-client privilege, respondent has submitted several affidavits from the persons in attendance at the meetings in question. The following is a representative assertion from one of these affidavits (Mr. Tainter's):

> During the course of Ms. Iwanski's employment with the bureau, I sought legal advice from Robert Paul concerning questions I had with respect to the laws affecting management's and Ms. Iwanski's rights, obligations and duties regarding her employment. . . . I met with Mr. Paul in order to obtain his legal advice and communicate with him regarding Ms. Iwanski's employment. It was my understanding that the meetings and the communications made therein were protected under the lawyer-client privilege.

While this, as well as the other affidavits, make it clear that the affiants met with Mr. Paul for the purpose of communicating with him and receiving legal advice, the affidavits do not clearly assert that this was the only purpose of the meetings with Mr. Paul. The affidavits also are not inconsistent with Ms. Cowell's statement during her January 16, 1991, deposition, that implies that the meetings were called to elicit the views of a number of people. She testified she called a meeting of several people, including Mr. Paul, pursuant to an established procedure within the Division of Health:

> Within the Division of Health personnel is taken as a whole, meaning you don't go to employment relations alone because one

> impacts on the other. You have to have everybody as a team to discuss the problem. p.21.

In Dyson v. Hempe, 140 Wis. 2d 792, 812, 413 N.W. 2d 792 (Ct. App. 1987), the Court provided the following formulation of the attorney-client privilege:

> It is generally agreed that the classic statement of the lawyer-client privilege is found in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):
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> [T]he [lawyer-client] privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as lawyer; (3) the communication relates to a fact of of which the lawyer was informed (a) by his client (b) without the presence of strangers (c) for the purposes of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. (emphasis added)

The one element of the privilege that is in doubt here is the requirement that the communication be made primarily for the purpose of obtaining legal help. While clearly this was at last part of what was going on at these meetings, Ms. Cowell testified that: "You just don't go to personnel alone. You just don't go to employment relations alone because one impacts on the other. You have to have everybody as a team to discuss the problem." This raises the question of whether the attorney-client privilege can rightfully be claimed for all communications that occur at a meeting where a problem is discussed and advice is sought from a number of person, one of whom is a lawyer.[1] A similar question was addressed in United States v. International Business Machines

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[1]While the record before the commission is adequate to support the foregoing finding, the burden is on respondent in any event to establish the facts necessary to provide the elements of the attorney-client privilege: "The law places the burden of proving the applicability of the attorney-client privilege on the party resisting discovery on those grounds. To meet that burden, the party resisting discovery should show by affidavit sufficient facts to bring the disputed matters within the confines of the privilege. In camera examination by the Court of the document here in question does not constitute an adequate or suitable substitute for such proof." (citations omitted) North American Mortgage Investors v. First Wisconsin Natl. Bank of Milwaukee, 69 F.R.D. 9, 12 (E. D. Wis. 1975).

Corp., 66 F.R.D. 206, 213 (S.D. New York 1974), the defendant sought to extend the privilege to documents requesting simultaneous review of a problem by both legal and nonlegal personnel. The court held:

> The question of whether a document was prepared primarily to seek legal advice must be resolved by examining the circumstances under which the document was prepared. If the document was prepared for purposes of simultaneous review by legal and non-legal personnel, it cannot be said that the primary purpose of the document is to secure legal advice. Therefore, one of the critical elements of the attorney-client privilege is absent at the outset.

The same principle applies to the instant case. Since the meeting was held to elicit the advice of a number of people besides counsel, it cannot be said that the primary purpose of the communications made by those present at the meeting besides counsel was to facilitate the obtaining of legal advice. See also International Telephone and Telegraph Co. v. United Tel. Co. of Fla., 60 F.R.D 177,185 (M.D. Fla. 1973) ("the mere attendance of an attorney at a meeting, even where the meeting is held at the attorney's instance, does not render everything done or said at that meeting privileged.").

To the extent that complainant's motion runs to advice that may have actually been rendered by counsel at these meetings,[2] this presents another question. Clearly, the attorney-client privilege runs to communications from counsel to client, see Dyson v. Hempe, 140 Wis. 2d 792,818, 413 N.W. 2d 379 (Ct. App. 1987). While respondent has failed to establish that the communications from the other participants at these meetings were made primarily for the purpose of facilitating the rendition of legal advice, it seems self-evident on this record that any statements of legal advice by counsel falls within the scope of the attorney-client privilege and therefore is exempt from disclosure.

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[2]The motion seeks "an order . . . requiring the respondent . . . to provide information with respect to a series of meetings which were held at DHSS for the purpose of terminating Complainant's employment." However, the briefs do not address per se communications by counsel of legal opinions to clients.

ORDER

Complainant's motion to compel discovery is granted in part, and respondent is ordered to provide information on a series of meetings held to discuss complainant's employment situation, described above, except that respondent will not be required to provide information regarding the content of any legal advice rendered by counsel at said meetings.

Dated: August 21, 1991 STATE PERSONNEL COMMISSION

LRM/lrm/gdt/2

LAURIE R. McCALLUM, Chairperson