STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN KOVACIK,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 97-0076-PC-ER

RULING
ON
MOTION TO
RECONSIDER

On September 7, 2000, the Commission issued a ruling on separate motions to compel by both parties. Complainant had sought discovery of a memorandum to respondent's counsel from one of respondent's employees, Sandra Catencamp. Respondent had sought discovery of complainant's personnel file and related information. The Commission denied complainant's motion to compel discovery of the Catencamp memo, finding the memo was within the scope of the attorney-client privilege, but granted respondent's motion to compel discovery of complainant's state personnel file. Complainant subsequently filed a motion to reconsider. Efforts by the Commission to resolve the dispute informally have been unsuccessful. The parties filed briefs on that motion, along with supporting affidavits. The Commission also conducted an *in camera* inspection of material documents.[1] This inspection has resulted in the conclusion that the only document even remotely consistent with complainant's description of the Catencamp memo was a memo from Ms. Catencamp to respondent's attorney dated June 27, 1997, that is stamped "Confidential."

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[1] By letter dated October 18, 2001, the Commission directed respondent to file a copy of the following documents with the Commission for *in camera* review:

1. All documents produced, pursuant to a subpoena duces tecum, at the time of the Brockmann deposition;
2. Any other documents that would even arguably satisy the complainant's description, set forth in his November 7, 2000, affidavit, of a memorandum written by Ms. Catencamp discussing the hiring process.

Complainant was one of 5 candidates, from an initial list of 11, whose name was forwarded by an initial interview panel to the hiring authority for filling a Personnel Manager 5 vacancy. The hiring authority rejected the first panel's results and convened a second panel that re-interviewed all 11 candidates, ultimately selecting a female candidate who was not one of the five names forwarded by the initial panel. The issue for hearing reads:

> Whether respondent discriminated against complainant on the basis of sex, in the hiring process for the position of Personnel Manager 5 at Central Wisconsin Center in June of 1997, when it rejected the initial interview panel's recommendations.
> Subissue: If so, what is the appropriate remedy?

In a ruling dated April 19, 2000, the Commission described the underlying position of the parties and the scope of the proceeding as follows:

> Complainant's position is that the first panel's results were rejected due to sex discrimination. Respondent contends the first panel did a bad job, and that the results it reached were flawed to the extent respondent opted to start over again. Respondent may be able to support its view by examining the second panel's analysis and establishing why, in contrast, those results were reliable. As a general matter, respondent will be allowed to present evidence tending to support its position that the initial process was faulty, and complainant will be allowed to present evidence tending to support his view that the decision to reject the conclusions of the first panel constituted discrimination based on sex.

I. Catencamp memo

Respondent employs Ms. Catencamp as a Personnel Assistant 3 at Central Wisconsin Center (CWC). She is the "point person" at CWC for proceedings involving that agency at the Personnel Commission and she prepares information and reports for respondent's Office of Legal Counsel in response to discrimination claims. The Office of Legal Counsel directs its request to the Personnel Office at CWC and the request is then assigned to Ms. Catencamp by her supervisor. In response to a request from respondent's counsel, she prepared a "comprehensive response" to "each and every allegation" in complainant's complaint of discrimination. She stamped her memo, dated June 27, 1997, "CONFIDENTIAL." This June 27th memo was the subject of the com-

plainant's motion to compel discovery that was denied by the Commission in the September 7, 2000, ruling.

In its September 7th ruling, the Commission concluded that the June 27th memo was within the scope of the attorney-client privilege.[2] The Commission found that: 1) Respondent's counsel was asserting the attorney-client privilege on behalf of his client, the Department of Health and Family Services; 2) Ms. Catencamp was acting as a "representative of the lawyer," within the meaning of §905.03(1)(c), Stats.,[3] when she investigated the complaint and prepared her report; and 3) the memo was not intended to be disclosed "to 3rd 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."[4] In reaching this conclusion, the Commission noted:

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[2] Pursuant to §905.03(2), Stats:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose 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.

[3] This paragraph reads:

> (c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

[4] In *Dyson v. Hempe*, 140 Wis. 2d 792, 413 N.W.2d 379 (Ct. App., 1987), the court of appeals described the following language from *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950) as "the classic statement of the lawyer-client privilege:

> [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 a lawyer; (3) the communication relates to a fact 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 (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. 89 F.Supp. 357, 358-59.

> Complainant contends the privilege is inapplicable because Ms. Catencamp "is a witness who has given a written statement" rather than an "employee whose acts or omissions are at issue" or a "managerial employee who has the authority to make critical recommendations or decisions relating to this matter." Comp. Brief, p. 2. *Nothing in the materials submitted by the parties suggests that Ms. Catencamp was a witness to the personnel action that is the subject of this complaint.* (Emphasis added.)

A review of the depositions filed in this matter show that this last (highlighted) conclusion was incorrect and that Ms. Catencamp was a witness to the selection process used to fill the personnel director position that is the subject of this complaint. The depositions make it clear that Ms. Catencamp was involved in the recruitment process for the vacancy and she had contact with the members of the first interview panel when they turned in the results of their interviews. Ms. Catencamp's role was clearly more than merely as an assistant to respondent's counsel; she was also a participant in administering the selection process that is the subject of this complaint.[5]

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[5] Solely for the purpose of ruling on the complainant's motion to reconsider, the Commission notes that the depositions indicate:

- Ms. Catencamp was listed on a job announcement as the person to contact for current employees interested in a permissive transfer, reinstatement or voluntary demotion into the position. These were persons who did not have to go through the Achievement History Questionnaire (AHQ) procedure. [Brockmann deposition transcript, pp. 22 and 42]
- Ms. Catencamp reworked the position description so that the position could be classified at the Administrative Officer 1 level, although that change was ultimately rejected. [Catencamp deposition transcript, p. 14]
- Ms. Catencamp discussed the questions used as part of the AHQ with Joanne Brockmann, of respondent's Bureau of Personnel and Employment Relations, who was the personnel specialist involved in the examination process. [Catencamp deposition transcript, p. 18]
- Ms. Catencamp received the results of the AHQ [Catencamp deposition transcript, p. 18] and handled the mechanics of organizing the interviews conducted by the first interview panel. [Bunck deposition transcript, p. 8] She contacted the transfer/reinstatement/demotion candidates by letter and asked them to call to set up an appointment, she recruited the interview panel, and she made contacts to pull together the interview questions. [Catencamp deposition transcript, p.22]
- Ms. Catencamp met with Mr. Bunck, who served as the Director of Central Wisconsin Center. They discussed the procedure to be followed, the

However, the Commission is unaware of any legal authority for the proposition that Ms. Catencamp's status both as a witness to facts underlying the complaint of discrimination and as the person who pulled together information to serve as a basis for respondent's answer to the complaint would cause the memorandum she wrote to respondent's counsel to be outside of the lawyer-client privilege. The Commission finds that: 1) Respondent's counsel was asserting the attorney-client privilege on behalf of his client, the Department of Health and Family Services; 2) Ms. Catencamp was acting as a client[6] or client's representative when she prepared her report; and 3) the memo was not intended to be disclosed to 3rd persons other than those to whom disclosure was in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The fact that Ms. Catencamp prepared the memo does not serve as a basis for refusing to respond to questions relating to her role as a witness to the underlying personnel transaction. As noted in *Upjohn Co. v. United States*, 449 U.S. 383, 66 L.Ed.2d 584, 595, 101 S.Ct. 677 (1981):

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classification level he wanted for the vacancy, and she asked him to review the position description. [Catencamp deposition transcript, p. 9]

- Ms. Catencamp maintained the file for the selection process. [Bunck deposition transcript, p. 18]
- Ms. Catencamp met briefly with the interview panel before the first interview and received the results from the panel after the last interview. She had at least a limited discussion with the panel with respect to the interview results. [Catencamp deposition transcript, p. 65] She commented to the panel that Mr Bunck would be pleased that there was at least one female among the top five candidates. [Moritz deposition transcript, p. 26]
- Ms. Catencamp was concerned that the interview panel had failed to follow agency procedures for analyzing the candidates. She raised her concerns with Jane Adams, a human resources representative in respondent's Bureau of Personnel and Employment Relations who has responsibilities for the Division of Care and Treatment Facilities. Ms. Catencamp told Ms. Adams the names of the top candidates identified by the first interview panel. [Adams deposition transcript, p. 26]

[6] Pursuant to §905.03(1)(a), Stats:

> A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

> Application of the attorney-client privilege puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:
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> > "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (ED PA. 1962)

In the present case, the respondent has not invoked the privilege in an attempt to thwart complainant's efforts to discover facts known by Ms. Catencamp in her role as someone who assisted with the hiring procedure in question. Complainant conducted an extensive deposition of Ms. Catencamp on August 20, 1997 The transcript of the deposition is approximately 90 pages in length and respondent never invoked the lawyer-client privilege during the course of the deposition.

Complainant makes two arguments to support his contention that Ms. Catencamp's memorandum to respondent's counsel must, nevertheless, be made available. Complainant alleges that the respondent has waived the privilege and also that the document must be made available because the information it contains is not available from another source.

A. Alleged waiver[7]

Complainant contends that Ms. Catencamp's memo was shown to him during the course of a series of depositions and, as a consequence, respondent has waived the lawyer-client privilege. Pursuant to §905.11, Stats:

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[7] In this ruling, the Commission uses the term "waiver" to include unintentional as well as intentional abandonment of the lawyer-client privilege. There is no contention that respondent intentionally waived the privilege.

> A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

The facts surrounding the alleged waiver are not entirely clear. Complainant filed his own affidavit stating that he was present during the deposition of Joanne Brockmann on August 15, 1997, and that pursuant to a subpoena *duces tecum*, Ms. Brockmann brought with her various materials that complainant reviewed while his attorney was conducting the deposition:

> In reviewing these materials, I found among them a memorandum that had been written by Sandra A. Catencamp. In this memorandum, Catencamp discussed the hiring process that was the subject of the proceeding and expressed concern that the process had been discriminatory, based on gender. I showed this memorandum to my Attorney, during a break in the Brockmann deposition, and pointed out to him the reference to the process having been discriminatory.
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> 5. The Catencamp memorandum that I and my Attorney saw on August 15, 1997 was not stamped "confidential", at least not when I saw it, and there was nothing on the face of the document to indicate that it was intended to be confidential.

According to complainant's affidavit, respondent's counsel agreed to provide complainant with copies of all materials produced in response to the subpoena *duces tecum*, but when the copies were produced on August 20th, at Ms. Catencamp's deposition, they did not include the memorandum in question. Respondent has subsequently declined to produce Ms. Catencamp's June 27, 1997, memorandum.[8]

Respondent has submitted affidavits by both Ms. Brockmann and Ms. Catencamp. According to Ms. Brockmann's affidavit, she produced the "recruitment/certification file" at her deposition pursuant to the subpoena *duces tecum*, she has not removed documents from that file, and the file did not contain a memo prepared by

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[8] As noted in the first paragraph of this ruling, the memo and other material documents were produced for an *in camera* inspection by the Commission.

Ms. Catencamp that "discussed the hiring process at issue in this proceeding and expressed concern that the process had been discriminatory based on gender." According to Ms. Brockmann's affidavit, the file did not contain a memo from Ms. Catencamp to respondent's counsel, she (Ms. Brockmann) "never received or had custody of any such document(s)", and she never had possession of, or produced, Ms. Catencamp's file of the hiring transaction in issue.

In her affidavit, Ms. Catencamp stated the following:

> 3. I have maintained a file pertaining to my involvement in the hiring process at issue in this case and my involvement in assisting legal counsel in responding to the complaint. I started the file before my deposition and have added to it since then.
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> 4. Prior to my deposition, the file contained my file copy and Dr. Theodore Bunck's copy of my June 27, 1997 memorandum to Eric Wendorff [respondent's counsel], which I identified in my July 28, 2000 affidavit. These documents were initialed by myself and stamped "CONFIDENTIAL." The File also contained a few e-mail communications between myself and Mr. Wendorff. I understood my communications to Mr. Wendorff about the substance of John Kovacik's complaint to be protected confidential communications.
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> 5. Prior to my deposition, I gave my file to Mr. Wendorff for his review, and he returned it to me on August 20, 1997, prior to my deposition.
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> 6. I did not give my file or a copy of my June 27, 1997 memorandum addressed to Mr. Wendorff to Joanne Brockmann prior to her deposition in this case.
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> 7 Following my deposition, I printed out from my computer file another copy of my June 27, 1997 memorandum to Mr. Wendorff and placed it in my file so that I had some record of my involvement in this case. I placed a "post-it" note on the memorandum, stating: "Eric kept both my copy and Dr. B's copy of the memo following 8/20 deposition along with my copies of email conversations between me & Eric." I did not initial this copy of the memorandum or stamp it "confidential."
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> 8. On December 22, 2000, I sent my file in an envelope, marked. "confidential" to Mr Wendorff per his request. I have reviewed the file in Mr. Wendorff's office for the purpose of making this affidavit.

Respondent's counsel, Eric Wendorff, also filed an affidavit stating he was not authorized to produce the Catencamp memorandum for complainant or complainant's counsel and did not knowingly or intentionally do so and, to the best of his knowledge, he did not produce Catencamp memo for inspection by complainant or his attorney and removed attorney-client communication documents prior to the deposition. Finally, respondent's counsel states:

> 11. If, during the course of the depositions, Mr. Kovacik or [his attorney] Mr. Ehlke saw a copy of Ms. Catencamp's memorandum to me, such access to the document was totally inadvertent and unintentional on my part.

For the purpose of this ruling, only, the respondent has offered the following stipulation:

> DHFS is willing to stipulate (without admission), solely for the purpose of facilitating the Commission's deciding complainant's motion to compel, that complainant obtained access to a copy of the June 27, 1997 memorandum from Sandra Catencamp to DHFS legal counsel (which I assume is the document complainant seeks) during the course of Joanne Brockmann's deposition. In so stipulating DHFS does not admit that complainant obtained access to the memorandum or that Mr. Kovacik's description of it is accurate, and further, DHFS denies that a disclosure occurred in the manner complainant alleges. I submit that the issue before the Commission is then whether a disclosure of the memorandum waived attorney-client privilege and attorney work product protection with respect to the document.
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> If the Commission is unable to resolve the issue, based upon the parties' written submissions I would be willing to consider stipulating to some kind of in camera inspection in order to move this case along.[9]

The Commission is unaware of any direct precedent from a Wisconsin court on the question of whether an inadvertent showing of a document otherwise subject to the lawyer-client privilege, waives the privilege. However, when analyzing the lawyer-client privilege, Wisconsin courts have applied the following consideration:

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[9] As noted in the first paragraph of this ruling, the memo and other material documents were produced for an *in camera* inspection by the Commission.

> The inevitable conflict between the "salutary" policy of the lawyer-client privilege [that clients be safe in confiding their most secret facts in order to receive advice and advocacy] and the "fundamental polic[y] of our law that the judicial system and rules of procedure should provide litigants with full access to all reasonable means of determining the truth," *Jacobi v. Podevels*, 23 Wis. 2d at 156-57, 127 N.W.2d at 76, has resulted in decisions attempting an accommodation between these policies. We apply the principles of these decisions [in this case]. *Dyson v. Hempe*, 140 Wis. 2d 792, 814, 413 N.W.2d 379 (Ct. App., 1987)

There are three different tests that have been applied by various courts when considering whether an unintentional disclosure of a privileged document results in waiver of that privilege.[10] The first, or "traditional" test is simply that any actual disclosure automatically means the end of the privilege. This test gives full weight to the consideration that the privilege comprises an impediment to the discovery of the truth. The second test, representing the opposite end of the spectrum, is the test that seeks to determine the client's subjective intent: If the client did not intend to waive the privilege, no waiver occurred.

The third approach, and the one most consistent with the above language from *Dyson v. Hempe*, is a balancing test that requires evaluation of the circumstances surrounding the inadvertent production of the privileged document(s). As explained by the court in *Gray v. Bicknell*, 86 F.3d 1472 (8th Cir., 1996):

> This test strikes the appropriate balance between protecting attorney-client privilege and allowing, in certain situations, the unintended release of privileged documents to waive that privilege. The middle test is best suited to achieving a fair result. It accounts for the errors that inevitably occur in modern, document-intensive litigation, but treats carelessness with privileged material as an indication of waiver. The middle test provides the most thoughtful approach, leaving the trial court broad discretion as to whether waiver occurred and, if so, the scope of that waiver It requires a detailed court inquiry into the document practices of the party who inadvertently released the document.

In *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y 1985), plaintiff's counsel was permitted to review 7 or 8 boxes of materials in response

to a discovery request, containing 16,000 separate pages. Defendant had only one day to "segregate, review and collate" the documents prior to inspection. After the inspection on June 4 and 5, plaintiff asked for copies of approximately 3,000 pages. When those documents were transmitted to defendant's litigation counsel for transmission to plaintiff, defendant found that 22 documents were privileged and, pursuant to a letter of July 12, they were withheld from plaintiff who then moved to require production of the 22 documents. The court identified certain factors to consider:

> What is at issue here is whether or not the release of the documents was a knowing waiver or simply a mistake, immediately recognized and rectified. The elements which go into that determination include the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of the discovery and the extent of the disclosure. There is, of course, an overreaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference. 104 F.R.D. 103, 105.

The court concluded that the defendant had "only just adequately protected its privilege" and upheld the assertion of the privilege as to the 22 documents:

> The procedures followed are described by the Deputy General Counsel [for defendant] as follows:
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> > I instructed two paralegals in the Legal Department to extract from the file cabinets all documents falling within the categories Mr. Schutzman [plaintiff's attorney] desired to review. I then went through a sampling of those files with them and, noting that there were some privileged documents in the materials, I instructed to segregate documents of that kind from those which would be produced for Mr. Schutzman's inspection.
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> Levi apparently had no practice of designation of confidential documents at the time of origination. There is no statement as to any general instructions given to the reviewers other than to segregate documents "of that kind." There is no evidence that any privileged documents were among the 14,000 pages removed as not being within the requested categories. There is indeed no affidavit from the reviewers that in fact a requested search for privileged documents was in fact made.

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[10] See *Attorney-Client Privilege in Civil Litigation*, 2nd Edition (Vincent S. Walkowiak ed.) ABA (1997).

> However, only 22 documents out of some 16,000 pages inspected and out of the 3,000 pages requested to be produced are now claimed to be privileged. Under these particular facts, the evidence is barely preponderate that the disclosure of the privileged documents was inadvertent and a mistake, rather than a knowing waiver.
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> This conclusion accords with similar conclusions reached in this District and elsewhere. Clearly the harshness of the result sought by Lois is a factor. 104 F.R.D. 103, 105. (Citations omitted)

The present case includes affidavits describing the procedures followed by respondent regarding various documents. According to the October 31, 2000, affidavit of respondent's attorney, Eric Wendorff:

> 2. I submitted an answer to John Kovacik's complaint on behalf of DHFS. In preparing the answer, I used information in a memorandum to me from Sandra Catencamp, a personnel assistant employed by Central Wisconsin Center, which was stamped, "CONFIDENTIAL." Ms. Catencamp's memorandum responded to my request for "a comprehensive response" to Kovacik's allegations, in a memorandum I sent to the Central Wisconsin Center personnel office, marked, "CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE."
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> 7 My file for the Catencamp deposition contains a note I wrote, which is attached to the Catencamp memorandum. It is dated August 20, 1997, the date of the Catencamp deposition, and states, "Withheld from Sandi Catencamp file for review." My Catencamp deposition also contains a note, which I believe I wrote prior to the start of Mr. Ehlke's examination of Ms. Catencamp. At the top of the note is the date, "8-20-97," and the heading, "Sandi Catencamp Deposition." Under the heading, I wrote the name of the court reporter. Below that are three reminder notes I wrote to myself. Item number two, which I checked off, reads: "I removed 3 docs from SC file atty/client communication." . .
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> 12. By a letter dated November 11, 1997, Attorney Ehlke demanded a copy of the Catencamp memorandum. By a letter dated December 23, 1997, I refused to produce the document on the grounds of attorney/client privilege and attorney work product.

Ms. Catencamp's July 28, 2000, affidavit also includes the following information:

> 4. In the course of my employment, I was assigned to respond to a written request, dated June 10, 1997, from Eric Wendorff, an attorney with the Office of Legal Counsel, regarding the charge of discrimination

filed by John Kovacik in Case No. 97-0076-PC-ER. The memorandum from Attorney Wendorff contained the following notice in bold capital letters: "CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE." The memo stated in part:

> Attached is a copy of a discrimination complaint filed with the Personnel Commission.
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> I will be representing DHFS in this matter . . Please contact involved or knowledgeable persons and have them respond to the specific allegations in the complaint and any other information that may [be] related to this complaint. Send your comprehensive response to me by July 10, 1997 . . This response should answer each and every allegation and respond to the following questions – who was involved, what happened, where did it happen, when did it happen (this includes dates for every action taken by the complainant, witnesses and management staff), and why it happened. Be sure to send copies of all documents relating to your response. Do not write on these documents because we may use them as exhibits.
>
> To avoid possible future retaliation charges, do not disclose to anyone that this complaint has been filed.

5. In response to the request identified in paragraph 4, I prepared and sent to Attorney Wendorff a memorandum dated June 27, 1997 I stamped the memorandum, "CONFIDENTIAL."

It is also noteworthy that respondent asserted the privilege on two occasions in response to questions asked during the series of depositions noticed by complainant. (Sanger Powers deposition held on August 21, 1997, page 34; Kathi Steele deposition held on September 8, 1997, page 35). Counsel's objections in these two other depositions shows that respondent was not reluctant to promptly raise the privilege during the course of the discovery conducted by complainant. In contrast to the information before the court in *Lois Sportswear*, respondent DHFS did have a practice of designating documents as confidential at the time of origination, respondent's counsel screened the materials in the relevant files for confidential documents and several documents were actually screened out of the discovery process by respondent. In the present case as well as in *Lois Sportswear*, the document in question was only subject to visual inspec-

tion and the privilege was asserted before a hard copy had been provided to the requester. The inspection conducted in *Lois Sportswear* was of many more documents than were inspected in the present case. The size of the inspection in that case made it much more likely that at least one privileged document would slip through. However, there was no indication that any privileged documents were actually excluded prior to inspection in *Lois Sportswear*. Just one document was inadvertently made available in the present case. There was no delay by respondent in asserting the privilege once it became evident that complainant had seen the Catencamp memorandum. Here we also do not know how the document in question made it through respondent's attempt to screen out privileged materials.

Having weighed all of these factors, the Commission concludes that respondent's inadvertent action of allowing complainant to view the Catencamp memorandum did not waive respondent's claim of lawyer-client privilege as to that document.

B. Complainant has a "substantial need" for the document

Complainant's second contention in support of his request for the Catencamp memorandum is that it contains information that he is otherwise unable to obtain.

> "[The memorandum] is discoverable, because it remains the only means by which the information concerning the full extent of the conversations that occurred between Catencamp and the interview panel members *at the conclusion of the interviews*." Complainant's October 16, 2001, brief, page 1 (emphasis added)

> "[T]he substance of [Ms. Catencamp's] statement [during her deposition], in response to a follow-up question by opposing counsel, was that she did not recall any additional discussion about the candidates when she met with the members of the initial interview panel *upon the conclusion of their interviews*." Respondent's October 6th brief, page 2 (emphasis added)

Even if the Commission accepts complainant's characterization of Ms. Catencamp's statements in her deposition, the memorandum in question is still protected from discovery by the lawyer-client privilege. As explained in *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 579, 150 N.W.2d 387 (1967):

> Unless one of the few exceptions can be utilized, the protection afforded by the [lawyer-client] privilege is absolute. No showing of necessity, hardship, or injustice can require an attorney to reveal the protected information if his client does not waive the privilege, no matter how necessary the information is to a resolution of a particular issue on its merits.

II. Complainant's personnel file and related information

In its September 7th ruling, the Commission granted respondent's motion to compel discovery of complainant's state personnel file[11] and held:

> [T]he information in the personnel file could tend to validate, or undermine, the analysis by the two selection panels and it could also relate to the issue of remedy. The Commission agrees that information from complainant's personnel file and his performance evaluations could bear on the reasonableness of the panelist's evaluation of complainant. The fact that the information from these sources may post-date the hiring decision does not eliminate its potential relevance.

In his motion to reconsider, the complainant asks that the Commission's ruling be modified to provide that "as a condition precedent to the production of Kovacik's personnel file, the Department shall take all steps necessary to produce the personnel files of all other applicants for review by the parties."

> If John Kovacik's personnel file is to be made available for inspection, then its production should be conditioned on all of the applicants' files being made available for review, so that a meaningful and relevant comparison can be made. Complainant's submission dated September 21, 2000.

Complainant's proposed modification is inconsistent with the motion, brought by respondent, to compel discovery of the *complainant's* personnel file. The Commission's September 7th ruling addressed the full scope of the respondent's motion to compel discovery, and it would be inappropriate for the Commission to order, at complainant's request, discovery of some additional materials that extend beyond the respondent's motion to compel.

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[11] The specific discovery requests were for items such as performance evaluations, letters of commendation, performance awards and disciplinary actions. The requests are set forth verba-

To the extent complainant is not asking the Commission to order production of the other candidates' personnel files but is only asking the Commission to reconsider its decision to grant respondent's motion to compel discovery of the complainant's personnel file, the Commission notes the following.

Respondent made the following argument in support of its request to obtain complainant's personnel file:

> Randall Parker, one of the persons involved in the decision to reject the initial panel's recommendations, testified at his deposition that his and Jane Adams' recommendation that Theodore Bunck interview all the candidates was based in part upon their surprise that the initial panel recommended Kovacik, whom they did not think would be a good fit for the position. Respondent's October 6th Brief, p. 3.

This argument identifies one basis for concluding that complainant's personnel file could yield potentially relevant information. Complainant suggests that respondent's argument reflects a "change in position" in what occurred in this matter. Complainant also offers arguments relating to the merits of the case. These arguments fail to undermine the Commission's conclusion that the complainant's personnel file could tend to validate, or undermine, respondent's evaluations of the candidates. As a result, the complainant's personnel file is discoverable.

III. Potential fee request

Respondent has indicated it may wish to request fees associated with its underlying motion to compel discovery. Respondent's request was in response to the reference in the September 7th ruling that provided respondent 14 days to indicate if it believed it was entitled to an award of reasonable expenses. Respondent subsequently suggested that in light of the motion to reconsider, the request for fees/expenses not be addressed until after the question of reconsideration had been addressed. The Commission will provide respondent a new time period for submitting a request.

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tim in the Commission's September 7th ruling. The parties and the Commission have, for con-

ORDER

Complainant's motion to reconsider the Commission's ruling of September 7, 2000, is denied.

Complainant is directed to respond to Interrogatory No. 15 and Request No. 2 within 20 days of the date this ruling is issued, unless a representative of the Commission agrees to modify the date the response is due.

Unless respondent indicates, in writing and within 14 days of the date of this ruling, that it feels such expenses are appropriate, the Commission will assume respondent has waived any request for fees/expenses.

Dated: November 13, 2001 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS: 970076Crul5.1

ANTHONY J. THEODORE, Commissioner

venience, generally referred to these materials as complainant's personnel file.