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-C

Appearances:

Jonathan Cermele, Attorney, Eggert & Ceremele, S.C., 1840 North Farwell Avenue, Suite 303, Milwaukee, WI 53202, appearing on behalf of Brown County Sheriff's Department Non-Supervisory Labor Association.

Thomas P. Godar, Attorney, Whyte Hirschboeck Dudek, S.C., One East Main Street, Suite 300, Madison, WI 53703, appearing on behalf of Brown County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 2, 2005, Examiner John R. Emery issued an interlocutory Supplemental Order to Order Denying Motions to Quash Subpoenas that had been filed by the Complainant, Brown County Sheriff's Department Non-Supervisory Labor Association (Association), in the captioned matter. In his Order, the Examiner quashed subpoenas *duces tecum* that had been issued to Attorney Rachel Pings and Attorney Laurie Eggert insofar as those subpoenas related to various documents and portions of documents that the Examiner had held to be protected by attorney-client privilege. The Examiner's Supplemental Order denied the Complainant's Motion to Quash as to all other subpoenaed documents, concluding that the attorney work product exception to discovery did not apply in this case.

On September 12, 2005, the Association filed a timely petition seeking review of the Examiner's interlocutory order. On October 17, 2005, the Commission voted to exercise its discretion to consider Complainant's appeal of the Examiner's interlocutory order and sought argument from the parties, the last of which was received on October 31, 2005.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. Paragraph 1 of the Examiner's Supplemental Order is set aside and the following paragraph 1 is ordered:

    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 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. 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.

2. Paragraphs 2, 3, and 4 of the Examiner's Supplemental Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Brown County

MEMORANDUM ACCOMPANYING ORDER

The Examiner's Decision and the Parties' Positions

The Complaint in this case alleged that the County had engaged in certain unlawful behavior during collective bargaining negotiations, in particular at the January 17 and February 11, 2005 bargaining sessions, that interfered with the rights of the Association and the employees it represents "to assist their labor organization, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining," all of which allegedly violated Sec. 111.70(3)(a)1, Stats. Examiner Emery scheduled a hearing in the matter for July 13, 2005. On or about July 7, 2005, the Association issued subpoenas *duces tecum* to three agents of the County, including one attorney, seeking

> all records, reports, summaries, notes, logs, computer printouts, computer-stored or generated data, diaries, recordings or communications, working papers, or other materials, whether in written form or otherwise recorded, that you have in your possession or may be available to you that relates in any fashion to any bargaining session during the year 2005, and that relates in any fashion to the events described in the Complaint of this matter ….

In response to these subpoenas, the County supplied notes from the collective bargaining sessions, evidently without raising any objection. At the July 13, 2005 hearing, attorney Rachel Pings testified about events that occurred at the January 17 bargaining session, where both she and attorney Laurie Eggert represented the Association, and at the February 22 bargaining session, where attorney Pings represented the Association. Ms. Pings also testified that, prior to the hearing, she had refreshed her recollection by referring to her own contemporaneously prepared typewritten notes regarding those sessions.

The hearing reconvened on July 28, 2005. Prior to that date, the County issued subpoenas *duces tecum* to attorneys Pings and Eggert, asking them to produce 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.

The Association moved to quash the Pings and Eggert subpoenas on the grounds of attorney-client privilege and the attorney work product doctrine. The Examiner concluded that he would quash the subpoenas insofar as they sought production of documents protected by the attorney-client privilege. He thereafter conducted an *in camera* inspection of the subject

documents and in paragraphs 2, 3, and 4 of his September 2, 2005 Supplemental Order he quashed the subpoenas regarding specified documents and/or portions of documents on the ground that they were privileged.[1]

However, the Examiner also concluded that the attorney work product exception to discovery did not apply to the present proceedings, partly because the Commission's rules do not provide for discovery and partly because, in the Examiner's view, the notes were not prepared "in anticipation of litigation or for trial" within the meaning of Sec. 804.01(2)(c)1, Stats., which codifies the work product exception.[2] Instead, in the Examiner's view, the subpoenas sought "notes concerning conversations occurring at bargaining sessions which pertained to contract negotiations, not pending or anticipated litigation." SUPP. ORDER at 4. Further, the Examiner reasoned, since attorney Pings had already testified about those contract negotiations and used her contemporaneous notes to do so, the County was entitled to examine the documents "to confirm or deny the assertions the Union's witnesses make in the hearing." Hence, while the Examiner found it understandable that the Union would prefer not to "give the County insight into its bargaining goals, strategies and tactics," the Examiner also concluded that, "This is, however, an unusual circumstance where the central issue of the case is the appropriateness of the conduct of the parties during bargaining." For these reasons, the Examiner denied the motion to quash documents or portions of documents other than those protected by the attorney-client privilege. ID. at 5.

The affidavits of Attorney Pings and Attorney Eggert, submitted by the Association, acknowledge that the County has subpoenaed documents that include notes relating or describing the discussion that took place during pertinent collective bargaining sessions. However, according to those affidavits, the documents also include other information that the Association contends should be withheld, based upon the attorney work product doctrine.

Pings' documents include, for example, "handwritten notes documenting discussions at the table, as well as my thoughts, impression(s), and strategic ideas regarding same," and "notes regarding anticipated litigation." Eggerts' documents include, for example, notes that "modify or clarify the Union's proposal," that pertained to "possible theories to be advanced in

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[1] The Association noted at footnote 1 on page 3 of its Petition for Review that the Examiner's August 31, 2005 e-mail "failed to redact all the attorney-client communications contained within the attorneys' materials." However, the Association went on to indicate that it was satisfied with the scope of the Examiner's follow-up Supplemental Order (dated September 2, 2005) on this issue. Accordingly, since it appears that neither party has objected to the Examiner's decision on the attorney-client privilege issue, the instant decision addresses only those materials that the Examiner has not already exempted or redacted.

[2] Section 804.01(2)(c)1, Stats., provides in pertinent part, "...a party may obtain discovery of documents and tangible things otherwise discoverable under para. (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."

negotiations," that identified or discussed the Association's bargaining strategies and/or

interest arbitration strategy, that pertained to "possible problems in a grievance that had previously been filed by the Union" and her "methods for presenting the Union's position in interest arbitration," and that set forth her "analysis of the merits regarding a portion of the County's proposal."

Discussion

In brief, the question on review is whether the Examiner erred in refusing to quash the Pings and Eggerts' subpoenas insofar as they require production of documents that contain previously undisclosed information about the Association's bargaining or interest arbitration strategies, and/or impressions and analyses of the relative merits of bargaining proposals or grievances.

The Examiner's authority to issue subpoenas is set forth in Sec. 111.07 (1)(b), Stats., as incorporated into Sec. 111.70 (4)(a), Stats., and supplemented in Sec. 227.46 (1)(b), Stats.[3] As the County notes, those statutory provisions do not expressly set forth the authority to quash a subpoena. However, such authority is implicit in the fact that the Commission's subpoenas *duces tecum* are subject to court enforcement through the potentially harsh procedures authorized in Sec. 885.12, Stats. While the propriety of the subpoena could be tested in the civil contempt proceedings under Sec. 885.12, Stats., it is surely preferable that the agency upon proper motion limit its own subpoena, if it concludes that such limitation is appropriate under the circumstances. CF. STATE EX REL. ST. MARY'S HOSPITAL V. INDUSTRIAL COMM., 250 WIS. 516 (1947) (refusing to allow review by *certiorari* of an administrative agency's refusal to quash a subpoena).

Implicit in the authority to quash an administrative subpoena *duces tecum*, in turn, is the existence of some lawful parameters for maintaining or enforcing such a subpoena. Other than the explicit authority in Sec. 227.46 (7), Stats., to protect "trade secrets," neither Chapter 885, Chapter 227, nor the Commission's own governing statute explicitly articulates the lawful parameters of a subpoena *duces tecum.* In the absence of more direct authority, guidance can be found in the statute that authorizes subpoenas in civil trials, i.e., Sec. 805.07, Stats., subpoenas that are also enforceable under Chapter 885. Section 805.07(3), Stats., allows a court to "quash or modify the subpoena [*duces tecum*] if it is unreasonable and oppressive." Relevance, materiality, and privilege, among other things, may be tested under these standards. SEE, E.G., STATE EX REL. ST. MARY'S HOSPITAL, SUPRA, AT 520; STATE V.

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[3] Insofar as the Commission's own governing statutes do not address a particular facet of administrative procedure, the Commission's proceedings in contested cases are subject to Chapter 227, the state Administrative Procedure Act. Section . 227.46 (1)(b), Stats., authorizes duly appointed hearing examiners to "Issue subpoenas authorized by law and enforce subpoenas under s. 885.12." Chapter 885 generally governs the means by which individuals may be compelled to provide testimony and produce documentary evidence. Like the Commission's statutes and Chapter 227, Chapter 885 does not specifically address quashing subpoenas *duces tecum* or set forth general limitations as to the documents that may be compelled. However, Sec. 885.12, Stats., specifically permits enforcement of a subpoena *duces tecum*, by authorizing a court to incarcerate a person who, without reasonable excuse, has failed "to produce a book or paper which the person was lawfully directed to bring …."

privilege at a contempt proceeding for refusal to comply with administrative subpoena). The Commission itself has quashed subpoenas where the information requested was not "relevant or material," RICHLAND COUNTY, DEC. NO. 23103 (WERC, 12/85) AT 8, and where the documents were deemed privileged pursuant to the attorney work product doctrine and had not been shown to be "relevant or material." CESA NO. 4, ET AL., DEC. NO. 13100-D (YAFFE, 4/76) AT 7, AFF'D BY OPERATION OF LAW, DEC. NO. 13100-G (WERC, 5/79).

On this review, the Association seeks relief from the subpoenas on the ground that some portions of the documents are privileged as attorney work product. The County counters that the work product doctrine does not apply to these materials because they were not prepared "in anticipation of litigation, or for trial" within the meaning of Sec. 804.01(2)(c)1, Stats. The Examiner essentially agreed with the County, as recounted more fully in the preceding section of this memorandum.

Like the Examiner, we have some doubt about the effect of the work product discovery rule upon the scope of a subpoena *duces tecum* in an administrative hearing. Similarly, while we have little trouble concluding that interest arbitration is litigation for purposes of the work product rule, we also question whether the thoughts, impressions, and strategic commentary jotted down in the Pings and Eggert bargaining notes were prepared "in anticipation of litigation" within the fairly narrow embrace of the work product rule, rather than having been prepared in the ordinary course of business. We find it unnecessary to parse the work product issue so finely, however, as we believe the issues raised by the motion to quash are subject to a more practical resolution.

In its affidavits, the Association has established good cause to believe that the subpoenaed documents contain information related to bargaining strategy, not previously shared with the County nor (presumably) disclosed in testimony at the instant hearing, and thus carrying an expectation of confidentiality. Whether or not this information falls within one of the technical evidentiary privileges, the Commission recognizes the practical importance of affording some protection to a party's private collective bargaining notes, especially those containing impressions and strategies.[4]

Establishing a measure of protected confidentiality, however, does not terminate the inquiry. As the Examiner and the County have observed, the instant case directly concerns events that took place during bargaining sessions that are the subject of at least some of the subpoenaed notes. The Association's witnesses have already testified about those events, using the subpoenaed notes to refresh recollections. Clearly there may be relevant information in those notes, either corroborating or undermining the Association's testimony (and evidence that may be offered by the County). The situation therefore calls for the Examiner to balance the County's rightful interest in full adjudication of the pertinent issues with the Association's interest in maintaining the confidentiality of its bargaining notes, particularly those portions

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[4] Indeed, the "mental processes" of an attorney are the most highly protected form of "attorney work product" under the discovery rule in Sec. 804.01(2)(c)1, Stats. STATE EX REL DUDEK V. CIRCUIT COURT, 34 WIS. 2D 559, 602-03 (1967).

that reflect Pings' and Eggerts' strategy and thought processs.[5] This exercise is akin to the balancing test the Commission traditionally employs where one party to a collective bargaining relationship seeks ostensibly confidential information from the other party in connection with a collective bargaining dispute. In those situations, the Commission weighs the privacy and confidentiality interests of one party against the other party's need for the information, in determining whether and how much information must be conveyed. MADISON METROPOLITAN SCHOOL DIST., DEC. NO. 28832-B (WERC, 9/98), CITING MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93). The National Labor Relations Board applies a similar balancing test in similar situations, DETROIT EDISON CO. V. NLRB, 440 U.S. 301 (1979), including at least one case where the employer asserted attorney-client privilege as the basis for withholding the requested information. BP EXPLORATION, 337 NLRB NO. 141 (JULY 2002).

In undertaking the required balance, the Examiner should first determine which portions of the subpoenaed documents, if any, contain information that is confidential and has not previously been disclosed through testimony or in open negotiations session. As to those portions, the Examiner should proceed to determine their relevance/materiality to the issues in the case (including the credibility of witnesses). Finally, if confidential information is found relevant/material, the Examiner should determine whether the County's need for the evidence outweighs the Association's interests in keeping it confidential, especially those portions that reflect strategic information or thought processes. Where the parties' interests are roughly equivalent, the Examiner should exercise his discretion to reach an accommodation that will serve the interests of justice and the purposes of the Municipal Employment Relations Act, by, for example, redacting portions where feasible to do so.[6]

Dated at Madison, Wisconsin this 21st day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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[5] Even if the notes were deemed to fall within the protection of the work product doctrine, the County could compel their production by showing sufficient materiality and necessity. "In deciding what is good cause for discovery of certain matters within the knowledge or possession of an attorney, the court should consider the purpose of the inquiry in light of the facts and issues of the case." STATE EX REL DUDEK, 34 WIS.2D AT 605.

[6] In connection with the inquiry into relevance and materiality, we note that the Examiner, in his August 31, 2005 e-mail, has already cast doubt upon the admissibility of at least some of the subpoenaed materials.

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Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner