

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY CORRECTIONS GUILD,)	
)	
Complainant,)	CASE 19549-U-05-4959
)	
vs.)	DECISION 9291 - PECB
)	
SNOHOMISH COUNTY,)	
)	
Respondent.)	ADMISSIBILITY OF EVIDENCE
)	
_____)	

Cline & Associates, Christopher J. Casillas, for the union.

Steven Bladek, Deputy Prosecuting Attorney, for the employer.

On June 13, 2005, the Snohomish County Corrections Guild (union), filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission). The complaint encompassed over thirty allegations and named Snohomish County (employer) as the respondent. In preparation for the first set of hearings to be held on December 12 through December 15, 2005,¹ the union requested several documents from the employer, the majority of which were provided. On January 9, 2006, the employer provided the union with both a log of materials it deemed privileged under the work product theory and additional documents that became available after the first hearing dates. At this time the employer requested payment of what it termed outstanding charges for copying fees.

On January 31, 2006, the employer notified the union that it had more documents available for review and that it would provide

¹ As there are many allegations, the case is not expected to conclude until May 2006.

copies to the union upon payment of outstanding charges. Alleging that the employer unilaterally modified their past practice of providing documents to the union without costs, the union filed another unfair labor practice complaint with the Commission on February 3, 2006. In addition, the union filed a motion with the Commission on February 6, 2006, to compel discovery of the materials the employer labeled privileged and the documents employer withheld due to the payment dispute.

During the continuation of the hearing, on February 15, 2006, the Examiner issued a formal letter denying the union's motion to compel discovery.² At this time, the union issued the employer a subpoena for the production of the above materials. After the issuance of the subpoena, the parties reached the following agreement concerning the materials withheld due to a payment dispute:

The employer would provide those materials to the union and the pending unfair labor practice complaint would resolve the issue of payment.

However, the employer continued to withhold documents it deemed privileged. The Examiner reviewed the documents in-camera during the hearing and stated that he would rule on the admissibility of the documents following the filing of briefs by both parties.

ISSUE

At issue is whether the documents the employer has withheld due the work product theory are admissible.

² The Examiner noted that pursuant to the authority delegated by RCW 34.05.446 (2), PERC does not compel discovery.

ANALYSISWork Product Doctrine

The work product doctrine directs that a party may not obtain discovery of documents or other tangible items prepared in anticipation of litigation by or for another party by or for that other party's representative (including the other party's attorney, consultant, surety, insurer, or agent), unless it proves that it has substantial need of the materials in the preparation of its case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. See Civil Rule 26(b)(4); Federal Rule of Civil Procedure 26(b)(4). The work product doctrine also directs that those documents reflecting the mental impressions, opinions, or strategy of an attorney enjoy absolute immunity from discovery. *Hickman v. Taylor*, 329 US 495, 510-511 (1947). Thus, all documents prepared in anticipation of litigation are protected by, at the very least, a qualified privilege under discovery rules and need be produced only upon a substantial showing of need.

Discussion

In the present case, the employer maintains that the documents at issue were created at the request of counsel for the purpose of responding to union allegations.³ Attorneys for the employer posed questions to Steve Thompson, Director of the Snohomish County Corrections. The questions that Thompson could not readily answer were passed down to supervisory staff members. These workers, in turn, provided answers to the questions through memos.⁴

³ Director Steve Thompson provided a written statement that each of the documents at issue were created after the filing of the union's complaint through the Department of Corrections chain of command at the request of counsel.

⁴ This explanation was attained through a conference with representatives for the union and the employer on February 15, 2006.

The union maintains that the documents in question do not seem to be generated by the employer's attorneys or any other representative of Snohomish County. The attorneys are neither the authors or recipients of the documents. Simply because they ended up in the attorney's hand, the union asserts, does not make them work product. The union hypothesizes that the documents may be generated by and for potential witnesses.

Anticipation of Litigation

The first test for determining whether a document deemed work product is discoverable is whether the documents were prepared by the employer or for the employer in anticipation of litigation. It is noted that there is no difference between attorney and non-attorney work product. The primary focus is on why the documents were produced and for whom. In the present case, each of the documents at issue⁵ will be analyzed to determine whether they were prepared for the employer in anticipation of litigation.

Document SC-01111-01112

This memo, dated November 17, 2005, is from Captain Elisa Eby to Commander C. Bly. Given the substance of the document and the time it was produced, it is clear that the memo was produced for the employer in anticipation of the hearing to be held in December 2005.

Document SC-01011

This memo, dated August 3, 2005, is from Captain Robin Haas to Captain Randy Harrison and is entitled unfair labor practice

⁵ The documents at issue were labeled SC-00001-0003, SC-00003, SC-01007, SC-01008, SC-01011, SC-01111-01112, SC-01118-01119, SC-00005-00006, and SC-02377 by the employer. Some of these documents are identical. Those documents which are repetitive will not be analyzed twice. Thus, for the purposes of this order, the documents under consideration are SC-01111-01112, SC-01011, SC-01008, SC-00003, SC-00001-0003.

response. Given the details of the memo, and the period it was written, it is clear that the memo was produced for the employer in anticipation of litigation.

Document SC-01008

This document specifically refers to the complaint filed by the union. The document points out sections of the complaint which it deems untrue. Judging by its content, the document was produced for the employer in anticipation of a hearing.

Document SC-00003

This document refers to the complaint filed by the union. Sections of the complaint it deems untrue are detailed. Judging by its content, the document was produced for the employer in anticipation of a hearing.

Document SC-00001

This memo, dated November 9, 2005, is from Deborah Payne, administrative operations coordinator for the employer, to Janet Hall. The content and date of the memo clearly reflects that it was prepared in anticipation of the hearing to be held December 2005.

Showing of Necessity

The second test for determining whether documents deemed work product are admissible is twofold. First, the party requesting the documents must demonstrate it has a substantial need for the documents to prove its case. Secondly, that party must also demonstrate that they would be unable to obtain substantially similar materials by other means without undue hardship.

In the present case, the information contained in the documents at issue encompasses facts the employer has asserted in its answer to the original complaint and during the hearing. Moreover, the

documents also contain factual information in the mind of witnesses the union will most likely have the opportunity to cross examine. Thus, the information contained in the documents is not in the exclusive control of the employer. The union may use alternate means to acquire the information, and there is no evidence that utilizing other means to obtain this information would place an extreme burden on the union.

Summary

The Examiner finds that the documents were prepared for the employer at the request of counsel in anticipation of the hearing to be conducted by the Public Employment Relations Commission. The Examiner also finds that information contained in the documents is not in the exclusive control of the employer. The union has and will have access to the information by other means. Thus, the union will not suffer an unfair burden or prejudice if it is denied these documents.

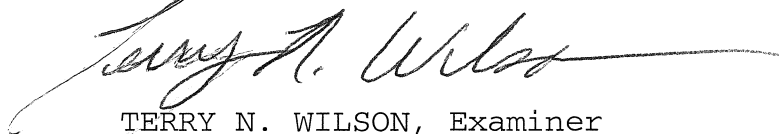
NOW, THEREFORE, it is

ORDERED

The documents at issue are inadmissible as evidence.

Issued at Olympia, Washington, on the 26th day of April, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in cursive script, reading "Terry N. Wilson", written in black ink. The signature is fluid and extends across the width of the text below it.

TERRY N. WILSON, Examiner