

H.E. NO. 2022-8

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY OF
NEW JERSEY,

Respondent,

-and-

Docket No. CO-2019-189

AAUP-BIOMEDICAL AND HEALTH SCIENCES
OF NEW JERSEY,

Charging Party.

SYNOPSIS

A Hearing examiner grants in part and denies in part the University's Motion to Compel and grants AAUP's Motion to Compel and the University's Motion for Protective Order subject to specific confidentiality procedures.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Rutgers, The State University of New Jersey
(Farrah Gold Henry, of counsel)

For the Charging Party,
Weismann & Mintz, attorneys
(Ira W. Mintz, of counsel)

HEARING EXAMINER'S DECISION
ON CROSS MOTIONS TO COMPEL DISCOVERY
AND RESPONDENT'S MOTION FOR A PROTECTIVE ORDER

On January 23, 2019, AAUP-Biomedical and Health Sciences of New Jersey (AAUP or the Association) filed an unfair practice charge against Rutgers, the State University of New Jersey (Rutgers or University). The charge alleges that on or about July 24, 2018, the Rutgers Board of Governors approved a Master Affiliation Agreement (MAA) with RWJ Barnabas Health, Inc. (RWJBH or Barnabas), for the purpose of creating a non-union clinical enterprise that performs the same functions as AAUP unit members.

AAUP alleges that Rutgers has replaced, and will continue to replace negotiations unit positions with non-union professionals who will perform unit work. AAUP further alleges that to the extent the MAA requires or allows Rutgers and Barnabas to unilaterally set terms and conditions of employment, Rutgers has violated its duty to negotiate in good faith. AAUP alleges that such conduct has violated subsections 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

On November 10, 2020, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing. On December 18, 2020, Rutgers filed an Answer asserting various affirmative defenses and denying that it violated the Act.

The parties mutually agreed to engage in informal discovery and met on several occasions. By letter dated April 16, 2021, AAUP served an "initial discovery request" seeking production of documents and answers to informal interrogatories. Rutgers maintained that the requests were vague, ambiguous, overly broad, and sought irrelevant, confidential, and privileged documents and

^{1/} These provisions prohibit public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

information. On May 28, 2021, AAUP emailed Rutgers fewer requests, requesting the information be provided within two weeks. Rutgers continued to characterize the requests as being vague, ambiguous, and overly broad. On July 8, 2021, AAUP requested a telephone conference call to discuss filing a motion to compel production to its April 16, 2021 discovery request. On July 16, 2021, Rutgers provided responses to AAUP's May 28, 2021 discovery request, including letters of appointment for Clinically-Focused University Practitioners who had commenced employment as of July 1, 2018, redacting addresses without an objection from AAUP.

I held a conference with the parties on August 3, 2021, at which time Rutgers explained that a meeting between the parties was scheduled for the following day to discuss the relationship with RWJBH, and AAUP agreed to provide a revised discovery request thereafter. On August 17, 2021, AAUP served its revised discovery request upon Rutgers.

On November 1 and 2, 2021, Rutgers provided responses to the interrogatories and document requests subject to and without waiving objections that the requests were overly broad, unduly burdensome, vague, ambiguous, and sought information that was confidential, privileged, and irrelevant. Rutgers redacted addresses, information it deemed to be third-party confidential information of private employer RWJBH, information it deemed to

be covered by the attorney-client and deliberative process privilege, and information it believed to be irrelevant. Rutgers produced the documents in a limited manner using a secure cloud content management service called "Box." This platform granted AAUP access to view the material but prohibited them from downloading, printing, or distributing the information.

AAUP demanded that Rutgers modify the Box permissions to permit AAUP to download the information. Rutgers emailed a draft confidentiality agreement on November 9, 2021, however, the parties were unsuccessful in reaching agreement on the terms of a confidentiality agreement. On December 21, 2021, Rutgers served AAUP with its own discovery request.

On February 20, 2022, AAUP filed a motion to compel responses to its August 17, 2021 discovery request to Rutgers. On February 26, 2022, Rutgers removed AAUP's access to Box because, it maintains, that upon further review, some of the documents previously produced contained third-party confidential information and/or were covered by the attorney-client and deliberative process privileges. On March 8, 2022, AAUP provided responses to Rutgers' December 21, 2021 discovery request.

On March 10, 2022, Rutgers filed its opposition to AAUP's motion to compel and its own motion for protective order, while reserving the right to file a cross-motion to compel. On March 11, 2022, AAUP signed a draft of a proposed confidentiality

agreement that it had prepared. On March 18, 2022, Rutgers filed a cross-motion to compel responses to its December 21, 2022 discovery request to AAUP. On March 22, 2022, AAUP filed its opposition to Rutgers' motion for protective order and a reply to Rutgers' opposition to AAUP's motion to compel. AAUP did not respond to Rutgers' cross-motion to compel.

STANDARD OF REVIEW

N.J.A.C. 1:1-10.1, entitled "Purpose and function; policy considerations; public documents not discoverable," provides:

(a) The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary.

(b) It is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) In considering a discovery motion, the judge shall weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness. Except where so proceeding would be unduly prejudicial to the party seeking discovery, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought.

(d) Discovery shall generally not be available against a State agency that is neither a party to the proceeding nor asserting a position in respect of the outcome but is solely providing the forum for the dispute's resolution.

"Our system of discovery is designed to make available information that is reasonably calculated to lead to relevant evidence concerning the respective positions of the parties," and "[a] litigation strategy that features surprise to the adversary is no longer tolerated." Young v. Latta, 123 N.J. 584, 597-59 (1991). See also New Jersey Court Rule 4:10-2.^{2/}

2/ R. 4:10-2 provides in pertinent part:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

Rutgers' Motion to Compel

Rutgers seeks an order compelling AAUP to respond to Rutgers' December 21, 2021 discovery request. Summaries of each request at issue, AAUP's answer to each request, and Rutgers' arguments in support of its cross-motion to compel (AAUP did not respond to Rutgers' motion), as well as my determinations are set forth below.

Summary of Interrogatory No. 1 and 2:

Identify all Persons having knowledge of any facts pertaining to the subject matter of the Complaint and describe in detail the extent and nature of their knowledge, the manner in which they acquired such knowledge, and the dates and places said knowledge was acquired.

Summary of AAUP Response: It is not clear which persons this question is referring. Among union staff, the Executive Director of the AAUP-BHSNJ, Diomedes Tsitouras. He has knowledge of the practice through his examination of documents provided by the university and through discussions with faculty hired as CFUP/90/10 as well as full-time faculty. Since there have been likely over 60 faculty hired by now at RWJMS as CFUP or as 90/10, many full-time Rutgers faculty at RWJMS who are AAUP-BHSNJ members know this practice is going on in their departments.

Rutgers argues that AAUP did not provide a complete response, that it did not detail the extent and nature of Tsitouras' knowledge, and that it indicated there were other individuals but did not identify them nor describe in detail the extent and nature of their knowledge, that it did not identify any individuals with whom Tsitoras spoke, the manner in which he

acquired knowledge from such individuals, or the dates and places said knowledge was acquired.

These requests were reasonably calculated to lead to the discovery of admissible evidence. AAUP is directed to provide an amended and responsive answer to interrogatories 1 and 2.

Summary of Interrogatory No. 4: Identify all Persons answering or assisting in the answering of these Interrogatories, and as to each individual, identify which of the Interrogatories that individual helped to answer, what information that individual provided for the answer, and the source of the information.

Summary of AAUP Response: Diomedes Tsitouras, AAUP-BHSNJ Executive Director.

Rutgers argues that the response is incomplete because AAUP did not identify all persons who assisted Tsitouras and/or the source of his information in answering the interrogatories, despite AAUP stating that Tsitouras had "discussions with faculty hired as CFUP/90/10 as well as full-time faculty" in its answer to interrogatory 2.

This request is reasonably calculated to lead to the discovery of admissible evidence. AAUP is directed to provide an amended and responsive answer to interrogatory 4.

Summary of Interrogatory No. 5: State the factual basis for the allegation in paragraph 6 of the Complaint that "Rutgers entered into the MAA with RWJBH for the purpose of creating a non-union clinical enterprise that performs the same functions as the clinical medical and other faculty employed by Rutgers and represented by the AAUP-BHSNJ."

Summary of AAUP Response: This is self-evident from the hiring practice. The University is claiming that CFUPs/90/10s are not full-time faculty and are only engaged in "casual duties" as part-time Rutgers employees. When examining both documentation and talking to CFUPs/90/10s, it is clear that CFUPs are doing work identical to full-time Rutgers unit member faculty and there is nothing "casual" about their academic duties.

Rutgers argues that the response is incomplete, and that AAUP has not provided the factual basis for its allegation but a cursory conclusion.

This request is reasonably calculated to lead to the discovery of admissible evidence. AAUP refers to documentation and discussions with CFUPs/90/10s and references identical work duties, but does not provide details. AAUP is directed to provide an amended and responsive answer to interrogatory 5.

Summary of Interrogatory No. 7: Identify the AAUP-BHSNJ negotiations unit members whose positions the Union contends "Rutgers **has** replaced" with "non-union doctors and other non-union healthcare professionals" as alleged in paragraph 7 of t

Summary of AAUP Response: From an examination of unit member lists, it is evident that there has been no hiring of Rutgers faculty greater than 50% on the professional-practice track at RWJMS since October 2020. All such hires are CFUP or 90/10s.

Rutgers argues that this response is non responsive in that AAUP has not identified any particular negotiations unit member it contends Rutgers has replaced with a non-union doctor. I agree. This request is reasonably calculated to lead to the

discovery of admissible evidence and AAUP is directed to provide an amended and responsive answer to interrogatory 7.

Summary of Interrogatory No. 9: State the factual basis for the allegation in paragraph 8 of the Complaint that "[t]he MAA requires Rutgers and RWJBH to unilaterally develop policies and procedures for evaluating clinical performance and to establish clinical schedules and hours of work for AAUP-BHSNJ bargaining unit members, without bargaining over such procedures and schedules with the AAUP-BHSNJ."

Summary of AAUP Response: Section 4.1, Section 9.1.1, and Section 9.1.2(a) of the MAA. Section 9.1.2(a) states: "RWJBH will be responsible for the management of the Integrated Practice, which management responsibility will include the usual incidents of practice management, including, consistent with the PSA (as defined below), establishing applicable policies and procedures, developing criteria for clinical performance and evaluating such performance, having responsibility for clinical quality, and setting clinical schedules and office time." Given this, RWJBH has already implemented some of these measures. For instance, it required RWJMS faculty to attend an all-day training on how to use a new electronic medical record system. It did not negotiate with the Union over any extra compensation for added responsibilities associated with this training or the implementation of this new system.

Rutgers argues that the response is non responsive because, according to Rutgers, AAUP did not state the factual basis for the allegation in the Complaint that the MAA requires Rutgers and RWJBH to unilaterally (emphasis from Rutgers) develop policies and procedures and establish clinical schedules and hours of work

for bargaining unit members. I find that AAUP did articulate purported facts for its allegation. It appears that Rutgers is arguing that these facts do not establish that the MAA requires unilateral action, however, that is argument on the merits and not a basis to allege that the response is non responsive.

Rutgers' cross-motion to compel with respect to interrogatory 9 is denied.

Summary of Interrogatory No. 11: State the factual basis for the allegation in paragraph 18 of the Complaint that "[u]pon information and belief, one or more doctors have been hired by RWJBH as an Assistant Professor, a title within the AAUP-BHSNJ's negotiations unit."

Summary of AAUP Response: At the time the charge was filed, this statement referred to Dr. Russell Langan who was the first hired as a 90/10. Since then, the number of such CFUP or 90/10 individuals has grown and is likely over 60 today. Also, note that the term "90/10" is now used as a term on the official negotiations unit list the University provides the Union every two weeks.

Rutgers argues that the response is incomplete because AAUP did not identify more names than Langan and did not state the factual basis for the allegation that they were hired into the faculty title of Assistant Professor, nor did AAUP provide the referenced official negotiations list. This request is reasonably calculated to lead to the discovery of admissible evidence. AAUP's complaint makes the allegation that RWJBH hired doctors in the negotiations unit title of Assistant Professor and

its response references approximately sixty (60) 90/10 individuals and an official negotiations list, making such information relevant and responsive to the request if provided. AAUP is directed to provide an amended and more complete answer to interrogatory 11, including providing the referenced list.

Summary of Interrogatory No. 12 and 14: State which portion or portions of the MAA can be considered subcontracting as alleged in paragraph 19 of the Complaint or as establishing a joint employer relationship between Rutgers and RWJBH as alleged in paragraph 20 of the Complaint.

Summary of AAUP Response: These requests calls for legal argument which is beyond the proper use of discovery.

Rutgers argues that AAUP's response is non responsive because AAUP did not provide the factual support for the allegations made in the Complaint, including, facts regarding the specific nature of the alleged subcontract and the individuals impacted by such alleged subcontracting. Rutgers argues that if AAUP cannot identify such facts, the allegations must be dismissed.

Inasmuch as interrogatories 12 and 14, unlike many of the other interrogatories, do not ask for AAUP to state the "factual basis" for its allegation, but instead asks to state which portions of the MAA "can be considered subcontracting" or "can be considered as establishing a joint employer relationship", it calls for legal argument. An argument to dismiss the allegations

because of a lack of identified facts is also inappropriate for a motion to compel. Those arguments can be made in a motion for summary judgement, which is premature as the parties are currently in discovery. Rutgers' cross-motion to compel with respect to interrogatories 12 and 14 is denied.

Summary of Interrogatory No. 13: State the factual basis for the allegation in paragraph 19 of the Complaint that "[t]o the extent the MAA or any portion of the MAA can be considered subcontracting by the University, that subcontract violates N.J.S.A. 34:13A-5.4a(1) and (5)."

Summary of AAUP Response: See answer to #12.

Rutgers argues that the response is non responsive in that the interrogatory requested the factual basis to support the allegation and AAUP did not provided any facts. This request, inasmuch as it asks for facts in the possession of AAUP related to the allegation made by AAUP in the Complaint, is reasonably calculated to lead to the discovery of admissible evidence. AAUP is directed to provide an amended and responsive answer to interrogatory 13.

Summary of Interrogatory No. 15 and 18: State the factual basis for the allegation in paragraphs 20 and 21 of the Complaint that the University violated its obligation to negotiate in good faith by unilaterally setting terms and conditions of employment of AAUP-BHSNJ negotiations unit members in violation of sections 5.4a(1) and (5).

Summary of AAUP Response: We would refer the University to the AAUP-BHSNJ position

statement on this matter. At the time the charge was filed, some 90/10s had been hired but no CFUPs. While the 10% portion of the unit member's job was in the unit, the 90% was not. Again, this was explained in the AAUP-BHSNJ's position statement.

Rutgers argues that the responses to interrogatories 15 and 18 are non responsive because a position statement, by itself, is not evidence, and that the position statement does not provide any specificity and makes generalized statements without providing names of individuals.

I find that AAUP's mere reference to its position statement is not responsive to these requests. These requests are reasonably calculated to lead to the discovery of admissible evidence. AAUP is directed to provide an amended and responsive answer to interrogatories 15 and 18, including restating responsive facts previously provided in its position statement, if any.

Summary of Interrogatory No. 17: State which portion or portions of the MAA the Union alleges "permits RWJBH to set terms and conditions of employment" in paragraph 21 of the Complaint, if any, and identify the clinically focused faculty the Union alleges are in titles represented by AAUP-BHSNJ for whom RWJBH has set such terms and conditions of employment.

Summary of AAUP Response: See above answers.

Rutgers argues that the response is non responsive and that AAUP did not even specify which of its previous interrogatory responses it was relying to respond to interrogatory 17. Because

the only objection AAUP had raised in any of its prior responses was that Rutgers was calling for legal argument, I interpret AAUP's response to interrogatory 17 to raise the same objection. I find that the first part of the interrogatory requesting AAUP to state which portions of the MAA it alleges permit RWJBH to set terms and conditions of employment calls for legal argument, and Rutgers' cross-motion to compel with respect to this portion of interrogatory 17 is denied. The second part of interrogatory 17, requesting the names of certain faculty members, is reasonably calculated to lead to the discovery of admissible evidence. AAUP is directed to provide an amended and responsive answer to this part of interrogatory 17. To the extent AAUP desires to reference any amended responses to any other interrogatory that is also fully responsive to interrogatory 17, AAUP is directed to specify the specific interrogatory and response by number.

Summary of Interrogatory No. 21: State which portion or portions of the MAA the Union contends "permits the University to negotiate directly with clinically focused faculty over their terms and conditions of employment" as set forth in paragraph 23 of the Complaint.

Summary of AAUP Response: The University is requiring CFUPs to sign outside employment contracts with RWJBH. Such employment agreements contradict terms and conditions within the CNA.

Rutgers argues that the response is non responsive in that the AAUP did not identify any portions of the MAA it contends support its allegation. I find that this request calls for legal

argument and Rutgers' cross-motion to compel with respect to interrogatory 21 is denied.

Rutgers also argues that AAUP's responses to its document requests are deficient in that AAUP provided approximately 100 pages of documents and responded to Rutgers' document requests Nos. 2 through 19 by stating: "The AAUP-BHSNJ is at a loss to fully satisfy this request given that the University cut off access to its discovery. Notwithstanding this, see attached." Rutgers argues that AAUP did not identify any document that it provided and did not explain how the documents were responsive to the requests. Rutgers argues that AAUP essentially states that it has no factual support of its own (i.e., not dependent on discovery responses from Rutgers) to support its allegations at the time AAUP filed its Charge.

AAUP is only required to provide documents responsive to the requests that were in its possession. To the extent it would not have been in possession of certain documents unless Rutgers provided those very documents to AAUP as a discovery response, AAUP was not required to provide those documents. AAUP did provide some documents, but did not provide context. AAUP is directed to identify those documents it did provide and identify which documents are responsive to which document requests. The parties can supplement their responses to each others' discovery

requests to the extent their adversary's responses lead them to possess new responsive information.

AAUP's Motion to Compel and Rutgers' Motion for Protective Order

AAUP seeks an order requiring Rutgers to produce all of the requested documents with any redactions (which AAUP maintains should only be to protect personal information such as social security numbers) or privileges specified in a privilege log. As Rutgers has removed access to all previously provided production and has not provided anything since, AAUP's motion covers its entire discovery request of August 17, 2021.

In Rutgers' response to AAUP's motion to compel, Rutgers raises objections of relevance, confidentiality/private third-party information, attorney-client privilege (with common interest doctrine), and deliberative process privilege, and Rutgers' seeks a protective order based on alleged confidential and proprietary business information, third-party confidential business information, and information covered by attorney-client privilege or deliberative process privilege.

Relevance

With respect to the relevance objections, in its brief on these motions, Rutgers states that it "produced meeting agendas of the Joint Committee between Rutgers leadership and RWJBH leadership, which comprised 56 pages of Rutgers' production. From the agendas, Rutgers redacted information that is not

relevant to the matter at hand, which included, but was not limited to, information pertaining to COVID-19, Graduate Medical Education, loan forgiveness, campus buildings, and fundraising.” It does not appear that AAUP’s motion briefs specifically demand the production of information falling under the enumerated categories above, which I find would not be reasonably calculated to lead to the discovery of admissible evidence in this case.

In its November 1, 2021 responses to AAUP’s August 17, 2021 request, Rutgers objected that certain documents were not relevant to the extent the requests sought them: documents for schools other than RWJMS (Robert Wood Johnson Medical School) or documents prior to the execution of the Integrated Practice Agreement (IPA) (Interrogatory 1, 2, 3, 4, 5). Rutgers objected that requests pertaining to the AMC Clinical Workforce Committee were seeking documents that were not relevant (Interrogatory 6, 7, 8). Rutgers objected that requests pertaining to meetings of the Joint Committee were seeking documents that were not relevant (Interrogatory 9, 10, 11). Rutgers objected that requests pertaining to RWJMS Clinical Chair Committee member notes and meetings were seeking documents that were not relevant (Interrogatory 12, 13, 14, 15, 16, 17, 18).

Other than for interrogatories 1, 2, 3, 4, and 5, Rutgers does not elaborate on its objection as to why it believes the information requested is not relevant. This case involves

allegations that Rutgers transferred AAUP unit work to RWJBH employees, and information related to the agreements and meetings involving Rutgers and RWJBH might be relevant. I find that all of AAUP's interrogatories are reasonably calculated to lead to the discovery of admissible evidence. Even documents before the execution of the IPA may lead to the discovery of admissible evidence pertaining to the motive and intent of the IPA. As interrogatories 1, 2, 3, 4, 5 all reference Rutgers and RWJBH, or refer back to interrogatory 1 which references Rutgers and RWJBH, I do not view these interrogatories as requesting information pertaining to other schools.

Confidential Third-Party Information

The party asserting a confidentiality interest has the burden of proof. NLRB v. United States Postal Serv., 888 F.2d 1568 (11th Cir. 1989). Courts balance the competing interests in each case to determine if relevant information should be disclosed. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 542 (1997). The Payton Court explained that confidentiality, like other privileges, is disfavored. Id., 148 N.J. at 539. The Court in Payton also observed that the confidentiality privilege does not offer "blanket" protection; it rather ". . . applies selectively depending on the nature of the materials involved." Id. at 542.

Recognized confidentiality interests in the information request context have been described as follows:

that which would reveal, contrary to promises or reasonable expectations, highly personal information such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses, and that which is traditionally privileged, such as memoranda for pending lawsuits.

State of New Jersey (Kean University), H.E. No. 2021-6, 47 NJPER 363 (¶85 2021) quoting Detroit Newspaper Agency, 317 NLRB 1071, 1073 (1995).

Even where an employer articulates a legitimate and substantial confidentiality interest, it cannot fulfill its statutory duty by refusing to provide the information, but instead must make an offer that would accommodate its interest and the union's interests. State of New Jersey (Kean University), citing Borgess Medical Center, 342 NLRB 1105, 1106 (2004) citing U.S. Testing Co.v. NLRB, 160 F.3d 14, 21 (D.C. Cir. 1998).

There are several safeguards to protect confidentiality: in-camera review of documents, redaction of confidential information and the issuance of confidentiality and/or protective orders. Payton, 148 N.J. at 542; see also Dixon v. Rutgers, the State Univ. of New Jersey, 110 N.J. 432 (1988). A hearing examiner

could use any combination of them to protect the confidentiality of any disputed document in this case. Bergen Cty. College, H.E. No. 2013-6, 39 NJPER 260 (¶89 2012). "Only in truly extreme cases should the need for confidentiality require suppression of specific documents." Payton, 148 N.J. at 542.

Rutgers' argues that the information in the Joint Committee meeting agendas related to the developing Rutgers-RWJBH affiliation contain proprietary information and third-party (and non-party) confidential information. Rutgers also argues that employment agreements for RWJBH clinicians that Rutgers had in its possession contain non-public confidential personal employment information of a private third-party employer, including terms and conditions of employment provided by RWJBH to the employees and the names and addresses of the employees. The requests for this information are reasonably calculated to lead to the discovery of admissible evidence. As Rutgers requests a protective order and AAUP, having offered a confidentiality agreement, has indicated a willingness to be bound by conditions ensuring the confidentiality of produced documents, I will issue a discovery confidentiality order. Non-privileged but relevant documents deemed confidential will need to be produced in accordance with the order, but the status of documents as confidential may also be challenged later in accordance with the order.

Attorney-Client Privilege and Common Interest Doctrine

The attorney-client privilege extends to public entities and their attorneys. In re Grand Jury Subpoenas, 241 N.J. Super. 18, 28 (App. Div. 1989). "A communication made in the course of the relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege." N.J.S.A. 2A:84A-20(3)(b); Evid. R. 504; City of Newark, P.E.R.C. No. 2016-56, 42 NJPER 441 (¶119 2016) (privilege was not nullified for City counsel's comment to Mayor made in presence of union representatives where there was no evidence it was overheard or intended to be overheard).

The attorney-client privilege "extends to the necessary intermediaries and agents through whom the communications are made." State of New Jersey (Human Services), P.E.R.C. No. 96-20, 21 NJPER 352 (¶26218 1995) citing State v. Kociolek, 23 N.J. 400, 413 (1957); cf. In re State Commission of Investigation Subpoena No. 5441, 226 N.J. Super. 461, 466-468 (App. Div. 1988), certif. den. 113 N.J. 382 (1988) (lawyer's communication to non-party who shares the client's interests remain privileged under "common interest" doctrine). The common interest exception to waiver of confidential attorney-client communications due to disclosure to third parties applies to communications between attorneys for different parties if the disclosure is made due to actual or

anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties. O'Boyle v. Borough of Longport, 218 N.J. 168, 198-99 (2014) citing Laporta v. Gloucester Cty. Bd. of Chosen Freeholders, 340 N.J. Super. 254, 262 (App. Div. 2001).

Rutgers argues that the attorney-client privilege and common interest doctrine apply to meeting agendas of the Joint Committee related to the developing relationship between Rutgers and RWJBH. Rutgers notes that the MAA sets forth the shared objective of Rutgers and RWJBH of "creating a world-class academic health system dedicated to education, research, and the delivery of healthcare to benefit patients, students, and the citizens of New Jersey." Rutgers notes that Rutgers and RWJBH are maintaining separate identities but considered it their shared objective to enter into the MAA and create the Joint Committee to facilitate the aligned strategic planning and coordinated oversight. Rutgers states that the Joint Committee acts in an advisory capacity to Rutgers and RWJBH for the purposes of facilitating development of aligned strategic planning; advising Rutgers and RWJBH with respect to major business, operational, and strategic decisions under consideration that are anticipated to have a material effect on the teaching, research, or patient care activities of the academic health system; establishing and

maintaining subcommittees to facilitate collaborative planning and oversight of key functional areas; identifying opportunities for the development and expansion of the academic health system; and undertaking other advisory functions.

Rutgers does not identify which attorneys were involved. As Rutgers is raising the common interest doctrine, it does not appear that it is arguing that Rutgers and RWJBH were both clients of the same attorney, but rather, that Rutgers and RWJBH's separate attorneys discussed legal issues before members of the Joint Committee from Rutgers and RWJBH. This would constitute a third-party disclosure.

While Rutgers articulates several common interests, it does not argue that the disclosures were made due to actual or anticipated litigation for the purpose of furthering those interests. O'Boyle, 218 N.J. at 198-99. Rutgers appears to argue that after AAUP filed its unfair practice charge and discovery commenced, Rutgers' and RWJBH's common interest in protecting the information in the agendas made the common interest doctrine applicable. However, the doctrine would only apply, if at all, if the agendas were made due to anticipated litigation. The doctrine does not retroactively apply simply because discovery is sought later in unanticipated litigation.

I find that Rutgers has not yet established that the common interest doctrine, and thus the attorney-client privilege

applies. However, because AAUP has expressed a willingness to have Rutgers provide a privilege log identifying the documents and redactions with sufficient specificity to enable a challenge to those designations, I will so order it as part of a confidentiality order.

Deliberative Process Privilege

The deliberative process privilege aims “. . . to establish a qualified privilege for governmental deliberative process materials because the government, like its citizens, needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.” In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000) (internal quotations omitted). To qualify for the privilege, the document must be both “pre-decisional” and “deliberative, containing opinions, recommendations, or advice regarding agency policies.” Id. at 84-85. The governmental agency initially bears the burden of showing that the documents it seeks to protect meet these two requirements. Id. at 88.

Not all government decision processes are protected by the privilege. The privilege should be narrowly construed. Redland Soccer Club, Inc. v. Dep't of the Army of the United States, 55 F.3d 827, 856 (3d Cir. 1995). More specifically, “[t]he [p]rivilege is properly limited to ‘communications relating to policy formulation at the higher levels of government; it does

not operate indiscriminately to shield all decision-making by public officials.’” Scott v. Bd. of Educ. of E. Orange, 219 F.R.D. 333, 337 (D.N.J. 2004) (quoting Grossman v. Schwarz, 125 F.R.D. 376, 381 (S.D.N.Y. 1989)).

The privilege does not protect “purely factual material,” meaning factual information that does not “reveal the nature of the deliberations that occurred during” an agency’s decision-making process. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000); Educ. Law Ctr. v. New Jersey, 198 N.J. 274, 295 (2009).

Nor does the privilege apply to the “routine operating decisions” of a government agency. Scott, 219 F.R.D. at 338. The Court in Scott justified its decision not to apply the deliberative process privilege on its disapproval of extending the privilege to protect anything beyond important public policy decisions. Bergen Cty. College, citing Scott, 217 F.R.D. at 337-38. In Bergen Cty. College, an investigation report for a disciplinary matter related to sexual harassment allegations was found not to implicate an important public policy. Also, when the deliberations of a government agency are at issue, the privilege is not available to bar disclosure of such deliberations. Scott, 219 F.R.D. at 337.

Rutgers did not refer to the deliberative process privilege in any of its November 1, 2021 responses to AAUP’s discovery

requests. In its brief on the motions, Rutgers argues that the privilege applies to portions of meeting agendas of the Joint Committee between Rutgers leadership and RWJBH leadership that reflected deliberative discussions between Rutgers and RWJBH, a third-party clinical affiliate, regarding the strategic development of the relationship between Rutgers and RWJBH, and plans and draft agreements that never materialized. Rutgers argues that the information is pre-decisional in nature because Rutgers created and exchanged it as part of the process for evaluating whether to move forward with, modify, or abandon particular plans for the relationship and that the information included opinions, recommendations, and advice to aid in making these decisions.

Other than referring to this information as "strategic" and "pivotal", Rutgers does not explain why an important public policy was implicated. See Bergen Cty. College. Rutgers also stated that "[a]gendas from meetings of the Clinical Chairs Committee or AMC Workforce likewise may contain such information." (emphasis supplied). Given the vague and speculative nature of this claim, and the fact that AAUP has expressed a willingness to have Rutgers provide a privilege log identifying the documents and redactions with sufficient specificity to enable a challenge to those designations, I will so order it as part of the confidentiality order.

Additional Issues

In AAUP's reply to Rutgers' response brief to AAUP's motion to compel, AAUP refers to a number of other objections or alleged deficiencies of responses by Rutgers in its discovery responses. I agree with AAUP that Rutgers need not produce documents not in Rutgers' possession, but it is directed to produce non-privileged documents in its possession even if originally from another source or already in the possession of AAUP. Also, to the extent Rutgers has possession, it is directed to produce non-privileged copies of requested written or email communications with key words related to clinically-focused faculty and a privilege log identifying those communications asserted to be privileged; time records for faculty members whose appointment letters Rutgers originally provided as well as those it asserts are performing less than four hours of work per week for Rutgers; appointment letters reflecting physicians hired by Rutgers since July 1, 2018, into any of the clinical practices at the New Jersey Medical School or the Robert Wood Johnson Medical School; organizational charts or other documents reflecting the reporting relationships of all persons in the integrated clinical practice; and job descriptions. Rutgers is also directed to reproduce the RWJBH employment agreements in its possession even if not public documents, with the names of the employees, in accordance with the confidentiality order.

ORDER

Rutgers' cross-motion to compel is granted and AAUP is directed to provide amended and responsive answers with respect to Rutgers' interrogatories 1, 2, 4, 5, 7, 11, 13, 15, and 18, and the portion of interrogatory 17 requesting names.

Rutgers' cross-motion to compel is also granted in that AAUP is directed to identify the documents it has produced and the specific document requests to which they are responsive.

AAUP shall provide its responses and production as indicated above no later than **MONDAY, June 13, 2022.**

Rutgers' cross-motion to compel is denied with respect Rutgers' interrogatories 9, 12, and 14, and the portion of interrogatory 17 requesting the statement of portions of the MAA.

AAUP's motion to compel and Rutgers' motion for protective order are both granted in that the following discovery confidentiality procedures shall be followed:

1. Rutgers in its sole discretion shall initially determine what documents shall be marked as Confidential and treated as such. AAUP may challenge any determination by Rutgers that a document shall be treated as confidential by requesting review of the issue and a determination by the Hearing Examiner. The information contained on any document marked as Confidential shall be treated as confidential and shall not be duplicated, summarized, transcribed or otherwise repeated except as outlined below.

2. Only the representatives from AAUP authorized by Rutgers' and AAUP's attorney(s) shall maintain Confidential documents and any copies thereof and shall not transmit Confidential documents electronically or by hard copy to any other individuals or organizations. The representatives from AAUP authorized by Rutgers' and AAUP's attorney(s) shall maintain the Confidential documents in strict confidence. AAUP, representatives from AAUP authorized by Rutgers, and AAUP's attorney(s) shall protect all Confidential documents against unauthorized disclosure using the same degree of care, but no less than a reasonable degree of care, as they do to protect their own Confidential documents of like nature. Rutgers may require representatives of AAUP, as a precondition to being authorized by Rutgers, to first review this Order and agree to be bound by its terms. AAUP may challenge the denial by Rutgers of a request by AAUP to authorize additional representatives with access to the Confidential

documents by requesting review of the issue and a determination by the Hearing Examiner.

3. Confidential documents shall only be disclosed to, or used by, representatives from AAUP authorized by Rutgers, and AAUP's attorney(s) and only to the extent necessary to properly represent AAUP's interests in relation to this unfair practice litigation with docket number CO-2019-189.

4. Any Confidential documents introduced in this matter as an exhibit, whether in a hearing, in a written submission to the Commission, or in a deposition or otherwise, shall be marked "Confidential," and the Commission and the court reporter at any hearing or deposition shall be notified by AAUP and Rutgers concerning the treatment of such documents. Those portions of the transcript referring to or discussing the Confidential documents will be marked as Confidential. Rutgers may seek to have any exhibits, whether in a hearing, in a written submission to the Commission, or in a deposition or otherwise, deemed confidential by the Hearing Examiner.

5. Any Confidential documents provided by Rutgers as discovery responses shall be designated by stamping or otherwise marking (in a manner that does not interfere with the legibility of the document) the first page of the document containing confidential information with an appropriate notation substantially in the following form: "CONFIDENTIAL INFORMATION." Unless Rutgers intends to designate all of the information contained within the document as "CONFIDENTIAL INFORMATION," Rutgers should indicate in a clear fashion what portion of the document Rutgers intends to designate as containing "CONFIDENTIAL INFORMATION." In any filing with the Commission, Rutgers shall note on the cover page of the document that all or a portion of the document contains "CONFIDENTIAL INFORMATION" designated pursuant to this Order.

6. After the matter concludes, the representatives from AAUP authorized by Rutgers and AAUP's attorney(s) shall return all Confidential documents produced by Rutgers in its possession, including copies thereof (whether hard copy or electronic), to Rutgers.

7. If the documents provided pursuant to this order are found missing, AAUP, the representatives from AAUP authorized by Rutgers, and/or AAUP's attorney(s) shall report the same to Rutgers.

8. Rutgers may retroactively designate documents or information that were disclosed previously to AAUP or its attorney(s) without being marked as "Confidential." Rutgers's disclosure of documents not marked "Confidential" to AAUP, representatives from AAUP authorized by Rutgers, or AAUP's attorney(s) shall not be deemed a waiver of Rutgers's right to designate such documents as Confidential, to enforce the terms of this Order with respect to such documents, or to seek any other relief available due to the unauthorized disclosure of such documents by AAUP, representatives from AAUP authorized by Rutgers, or AAUP's attorney(s). Restrictions on the use and disclosure of documents retroactively designated confidential shall be prospective, except that AAUP shall be required to take all steps necessary to retrieve any documents retroactively designated as Confidential from any party not authorized by Rutgers except AAUP's attorney(s).

9. Rutgers, in addition to any other available remedies, shall have the right to seek an immediate injunction and any other equitable relief to enforce such restrictions and other obligations and to enjoin any violation or threatened violation of this Order.

10. This Order shall not constitute a precedent in matters involving other employees or other matters.

11. Confidential documents under this Order may be disclosed to the Hearing Examiner, Commission staff, and the court reporter used at hearing under whatever safeguards as the Hearing Examiner or Commission may direct so as to preserve and protect the confidentiality of information and to prevent harm to any party.

12. Rutgers shall provide access to downloadable copies of all documents previously provided in read-only format. Rutgers shall also produce all non-privileged documents in its possession even if originally from another source or already in the possession of AAUP responsive to AAUP's August 17, 2021 discovery requests, all of which are found in this Decision to be reasonably calculated to lead to the discovery of admissible evidence, including non-privileged copies of requested written or email communications with key words related to clinically-focused faculty and a privilege log identifying those communications asserted to be privileged; time records for faculty members whose appointment letters Rutgers originally provided as well as those it asserts are performing less than four hours of work per week for Rutgers; appointment letters reflecting physicians hired by Rutgers since July 1, 2018, into any of the clinical practices at the New Jersey Medical School or the Robert Wood Johnson Medical

School; organizational charts or other documents reflecting the reporting relationships of all persons in the integrated clinical practice; and job descriptions. Rutgers is also directed to reproduce the RWJBH employment agreements in its possession even if not public documents, with the names of the employees, in accordance with the confidentiality provisions of this Order. AAUP preserves its right to challenge all redactions through the Commission. Rutgers will provide a privilege log explaining all claims of privilege as well as any non-privileged redactions. Rutgers shall provide this production and privilege log no later than **Monday, June 13, 2022.**

13. Additional documents provided by Rutgers in this matter, if any, shall be subject to this Order.

/s/ Jordan Ablon
Jordan Ablon
Hearing Examiner

DATED: May 9, 2022
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.5, -4.6 this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by May 16, 2022.