P.E.R.C. NO. 96-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-92-419

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-94-158

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission modifies the determinations of two Hearing Examiners on discovery and subpoena issues that test the interplay of relevance and privilege. The Commission declares that in assessing the discovery/subpoena issues in these cases, it must evaluate the employer's ability to defend against the unfair practice charges filed by the AAUP against Rutgers, the State University in light of any potential interference with AAUP's internal affairs. This need to balance the parties' interests recognizes that there is an inherent relationship between the parties' arguments on relevancy and privilege.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

Appearances:

For the Respondent, Carpenter, Bennett & Morrissey, attorneys (John J. Peirano, of counsel in CO-H-92-419; James E. Patterson, of counsel in CO-H-94-158 and at oral argument in both cases)

For the Charging Party, Reinhardt & Schachter, attorneys (Denise Reinhardt, of counsel)

DECISION AND ORDER ON SPECIAL PERMISSION TO APPEAL

This case involves two unfair practice charges that we have consolidated for purposes of this decision only. The issue before us is whether the Hearing Examiners properly ruled on discovery and subpoena issues that test the interplay of relevance and privilege.

CO-H-92-419

On June 30, 1992, the Rutgers Council of AAUP Chapters ("AAUP") filed an unfair practice charge against Rutgers, the State University. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] when its president created a Special Review Committee ("SRC") to investigate a dispute involving faculty in biochemistry programs. The creation of the SRC allegedly changed employment conditions without negotiations.

AAUP separately asked its national AAUP affiliate to investigate faculty governance issues associated with the biochemistry dispute. Professor Bergquist of Villanova University investigated on behalf of the national AAUP.

A Complaint and Notice of Hearing issued and Rutgers filed its Answer. Rutgers contends that the allegations constitute, at most, a breach of contract and that creating the SRC involves non-negotiable managerial prerogatives.

1/ These subsections 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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

A hearing began. After the fourth day, Rutgers served subpoenas duces tecum on AAUP seeking all documents related to the Bergquist investigation. AAUP also served a subpoena duces tecum on Rutgers. Both parties petitioned to quash the other's subpoenas.

On March 15, 1995, Hearing Examiner Stuart Reichman issued a letter decision on the motion. He quashed most paragraphs of AAUP's subpoena, finding that they were in the nature of discovery and therefore untimely. He denied AAUP's motion to quash Rutgers' subpoena, rejecting AAUP's claims that the material was irrelevant, hearsay and privileged and that enforcement was premature.

AAUP requested special permission to appeal and a stay. These requests were granted.

CO-H-94-158

On November 22, 1993 and February 28 and June 24, 1994, AAUP filed a second unfair practice charge and amended charges against Rutgers. That charge alleges that Rutgers violated subsections 5.4(a)(1), (3) and (5) of the Act by soliciting and assisting in the filing of a grievance ("Edmunds document") by some unit employees against another unit employee, Thomas Figueira. The charge also alleges that Rutgers unilaterally changed terms and conditions of employment and repudiated the grievance procedure by processing the grievance under Article IX of the parties' collective negotiations agreement. The amended

charges incorporate these allegations and add, among other things, that the grievance against Figueira was improperly handled, his due process rights were violated, and he was discriminatorily transferred to an office at another campus after the grievance was sustained. Figueira was permitted to intervene.

A Complaint and Notice of Hearing issued and Rutgers filed its Answer. Rutgers denies that: the grievance procedure excludes grievances by unit members against other unit members; the "Edmunds document" falls outside of what is grievable under Article IX; the Edmunds document was solicited by the administration or prepared with its assistance; and Figueira's transfer was retaliatory. Rutgers asserts that public employers must permit their employees to present grievances; the charging parties are estopped from pursuing the charge; and we should defer the charge pending exhaustion of contractual remedies.

Rutgers moved to compel AAUP witnesses to answer questions asked in interrogatories and at deposition. AAUP responded that the information is irrelevant and violates a "union representation" privilege and attorney-client and work product privileges. AAUP filed a cross-motion seeking to compel answers to its interrogatories. Figueira did not respond to the motions.

Rutgers wants AAUP and Figueira to provide the content of all communications and documents between AAUP officials and between AAUP officials and members concerning the amended charge. Rutgers also wants all communications and documents pertaining to

the grievance and AAUP's pre-charge position that the grievance procedure does not contemplate grievances filed by unit employees against other unit employees. Rutgers also wants all AAUP instructions or guidelines concerning the procedure for filing grievances.

On January 11, 1995, the Hearing Examiner Jonathon Roth granted Rutgers' motion and AAUP's cross-motion. H.E. No. 95-14, 21 NJPER 57 (¶26040 1995). He rejected the claim of a union representation privilege and the claims of attorney-client and work product privileges. He ordered AAUP, Figueira and Rutgers to respond to the discovery requests, except for one overbroad request.

AAUP requested special permission to appeal and a stay. These requests were granted and the parties filed supplemental briefs.

Oral argument on both cases was held on October 31, 1995.

Analysis

We begin with AAUP's claim that disclosing the requested materials would violate the attorney-client and work product privileges. These privileges do not appear to apply. It has not been specifically alleged or shown that any of the requested documents were developed at the direction of AAUP's counsel. We also reject the more general and unsupported contention that all communications in pursuit of potential or actual grievances are protected by the attorney-client privilege.

We next address AAUP's claim that the material sought by Rutgers in both cases is protected from disclosure by a union representation privilege and is irrelevant. AAUP claims that the Act prohibits an employer's intrusion into a union's sphere of operation -- that the shroud covering a union's internal affairs protects the fundamental employee and union interest in a vital union. Cf. Newburgh v. Newman, 70 A.D.2d 362, 421 N.Y.S.2d, 103 LRRM 3000 (N.Y. App. Div. 1979) (questioning of union official about observations and communications with member, if permitted, would tend to deter members from seeking advice and representation and seriously impede participation in employee organization); New York Public Employees Federation and State of New York, 26 PERB (¶4525 1993) (privilege attaching to communications between employee and union representative to facilitate the grievance process); Seelig v. Shepard, 578 N.Y.S.2d 965 (N.Y. 1991) (privilege on intra-union communications but not communications to non-union members); In re Northwest Public Schools and Northwest Education Association, 1986 MERB Lab. Op. 590 (7/17/86) (recognizing union's confidential closed door santuary where members and leaders can share opinions without fear of investigation or repercussion); Ohio SERB v. City of Cleveland and Rudolph, 11 NPER OH-19705 (1988) (questioning of union representative about meeting with member abhorrent to principle that representative and employer are peers in collective bargaining). The employer responds that there is no legal basis

for a union representation privilege and that its discovery requests seek relevant information. See Figueira v. Lawrence, Civil Action 95-2468(JCL) 5/2/96 (letter opinion of Magistrate), app. pending.

Our Act prohibits an employer from dominating or interfering with the formation, existence or administration of any employee organization. N.J.S.A. 34:13A-5.4(a)(2). Each challenge under that subsection to an employer's action depends on the particular circumstances of that case. Similarly, whether a discovery/subpoena request so intrudes into a union's internal affairs that protection is warranted depends on the particular facts. In assessing the discovery/subpoena issues in these cases, we must evaluate the employer's ability to defend against AAUP's unfair practice charges in light of any potential interference with AAUP's internal affairs. This need to balance the parties' interests recognizes that there is an inherent relationship between the parties' arguments on relevancy and privilege.[2/]

2/ Given this inherent relationship and our focussed examination of the facts of each case, we need not answer the question of whether a broad union representation privilege exists. We note that Rawlings v. Jersey City Police Dept., 133 N.J. 182 (1993), held that the attorney-client privilege did not prevent disclosure of conversations between an arrested police officer who refused to submit to a drug test and the officer's union representative who was not an attorney or an attorney's agent. It did not consider or rule out an inquiry into the degree of intrusion versus the degree of relevance in each case.

CO-H-92-419 charges that Rutgers violated the Act when its president established a Special Review Committee to investigate a dispute involving faculty in biochemistry programs. AAUP alleges that establishing this committee changed established evaluation, grievance and discipline procedures; notified employees of new criteria for measuring performance and conduct; increased faculty workload; constituted direct dealing; and threatened employees who used the grievance procedure.

Rutgers seeks information about an independent national AAUP investigation of associated faculty governance issues. At this juncture, we believe that the relevance of the independent AAUP investigation to this charge is outweighed by the intrusion into AAUP's internal affairs. Whether any of the employer's actions violated the Act as alleged in CO-H-92-419 turns on questions of negotiability, not on the opinions of AAUP unit members, leaders or investigators. For example, whether AAUP's first witness, its former president, thinks that the creation of the SRC and the adoption of the SRC's recommendations involve mandatorily negotiable issues is irrelevant to our ultimate negotiability determination. It is our role, not the role of any witnesses in any unfair practice proceeding, to apply the negotiability tests set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982). Those tests require us to balance the interests of the employees and any interference with educational policy determinations. The legal conclusions of witnesses do not shape

our analysis. Healy v. Fairleigh Dickinson Univ, __ N.J. Super. ___ (App. Div. 1996). This limitation on the relevance of witness opinion applies to both parties. Neither AAUP nor employer witness opinions are relevant to our negotiability determinations.

Rutgers argues that if AAUP opined that the national AAUP should become involved because the principal issues involved collegiality or faculty governance, that evidence would bear on the credibility of AAUP's witness. It further argues that AAUP's other potential witnesses may have communicated with the national AAUP or Bergquist and their credibility may become an issue as well. Credibility of witnesses is relevant when a finder of fact is finding facts. Whether a witness testified that a subject is mandatorily negotiable, but previously opined that the same subject matter is not negotiable is irrelevant to our legal conclusion on the negotiability of that subject.

Thus, given the irrelevance of the legal opinions of those who may have spoken to Bergquist during his investigation, and given our concern that an inquiry into the legal opinions of AAUP officials might unduly intrude into the internal affairs of AAUP, we will not order disclosure of the material sought by the employer at this time. Instead, the material at issue should first be reviewed by the Hearing Examiner in camera to determine whether it may go to the credibility of any of AAUP's witnesses on factual issues in dispute. If so, that information may be

released to the employer. Legal opinions of AAUP unit members and leaders should not be released. Any information provided by administration officials to Bergquist can be released to the employer as this would not reveal AAUP's internal information.

We view differently some of the information sought in CO-H-94-158. That charge involves allegations that Rutgers violated the Act by unlawfully soliciting and assisting in the filing of a grievance by some unit employees against another unit employee, Thomas Figueira. The charge, as amended, also alleges that by processing the grievance under Article IX of the parties' contract, Rutgers unilaterally changed terms and conditions of employment and repudiated the grievance procedure, and that the grievance against Figueira was improperly handled, his due process rights were violated, and he was illegally transferred to another campus after the grievance was sustained.

Rutgers sought certain information through interrogatories. The following requests remain in dispute. The first set of interrogatories was addressed to AAUP.

Interrogatory 2 asks if the charging party has ever taken the position that the grievance procedure excludes grievances filed by unit members against other unit members. It also asks AAUP to identify all related documents and oral communications. CO-H-94-158 essentially alleges that the employer changed terms and conditions of employment and repudiated the grievance procedure by processing a grievance by certain unit members

against another unit member. Central to our determination of this charge is our assessment of the parties' practice with regard to such grievances and their intent in negotiating Article IX of their grievance procedure. Disclosure of external communications of AAUP to third parties may be relevant to this determination and would not appear to intrude into the union's internal affairs. External communications may reflect the parties' practice or mutual understanding. By contrast, disclosure of AAUP's internal position or internal debates on these types of grievances, if they exist, would appear to be of limited relevance to our assessment of the parties' practice or mutual intent during collective negotiations and would intrude into the union's internal affairs. Balancing the employer's interest in disclosure and the union's interest in protecting its internal affairs from its employer's scrutiny, we grant AAUP's motion to protect any such internal communications from disclosure.

Interrogatory 3 asks for all written or oral communications between AAUP or its officers and Figueira (or his attorney) concerning the amended unfair practice charge and the grievances including the "Edmunds document." Consistent with the Hearing Examiner's finding on interrogatory 4, we find that the aspect of the interrogatory seeking all communications concerning the amended unfair practice charge is overbroad. We will, however, permit discovery on a specific issue that has been identified.

AAUP has alleged that Rutgers improperly processed the "Edmunds document" by treating it as an Article IX grievance. Rutgers denies that the document falls outside of what is grievable under Article IX. AAUP transmitted the document to Rutgers pursuant to Section 3.2 of Article IX. Thus, the "hows" and "whys" of the processing of the "Edmunds document" are relevant. We will require disclosure of AAUP's communications about the processing of the "Edmunds document" even though those communications might be characterized as internal. The material sought is potentially relevant to AAUP's claim that Rutgers repudiated the parties' grievance procedure by processing a document that AAUP itself filed. In this situation, the potential relevance outweighs AAUP's interest in shielding internal union communications. This is not simply a general inquiry into AAUP opinions about the processing of grievances between unit members. AAUP transmitted the "Edmunds document" to Rutgers and its reasons for doing so are in dispute.

Interrogatory 3 also seeks communications about all grievances referred to in the amended charge. Paragraph 6 of the amended charge alleges that Figueira has filed several Article IX grievances. In its Answer, Rutgers admits that Figueira has filed such grievances and refers the charging parties to the grievances for their contents. Under these circumstances, we agree that the best source of information about the contents of those grievances

is the grievances themselves. Any internal communications between Figueira, his attorney, and AAUP would not shed any additional light on the relevant issues of Figueira's protected activity and the nature of the grievances. In addition, we also believe that requiring the disclosure of such internal communications between a grievant and his union without a proper showing of need by the employer could chill the exercise of protected rights.

Interrogatory 4 asks for the identity of all persons who have communicated with Figueira about the charge and copies of all documents relating to such communications. The Hearing Examiner found this request to be overbroad, a ruling that has not been challenged. He limited discovery to the issue of Figueira's availability for a step one grievance meeting. We agree that information about Figueira's availability is relevant and would not unduly intrude into the union's internal affairs.

Interrogatory 6 asks for all AAUP communications about the "Edmunds document," AAUP's position related to the document, and any other matters raised by the charge. We believe that AAUP's communications about the propriety of Rutgers' processing the "Edmunds document" as an Article IX grievance are relevant and should be disclosed. However, any communications about the merits of the complaints raised in the "Edmunds document" would be irrelevant and would unduly intrude into the union's internal affairs. AAUP need not disclose any such communications. Consistent with the Hearing Examiner's finding regarding

interrogatory 4, we find that the request for communications about "any other matters raised by the ... charge" is overbroad.

Interrogatory 41 asks for all instructions or guidelines maintained or issued by AAUP concerning the procedures for filing grievances. The amended charge alleges that the administration's processing of the "Edmunds document" was a unilateral change, misuse and repudiation of the negotiated grievance procedure. These allegations place into dispute the proper procedures for handling the "Edmunds document" and similar "grievances" filed by unit members against other unit members so AAUP's instructions or guidelines for grievance filing appear to be relevant. We are not convinced that disclosure of such information would unduly intrude into the union's internal affairs. Disclosure would not reveal internal opinions about the merits of grievances or the statements or thoughts of individual grievants. Accordingly, we order AAUP to comply with interrogatory 41.

The second set of interrogatories was addressed to Professor Figueira.

Interrogatory 1 asks for all communications between Figueira or his attorney and AAUP concerning the allegations contained in the "Edmunds document." To the extent those communications address the procedures by which the "Edmunds document" was handled, we find the material relevant to the employer's defense and not unduly intrusive into the union's internal affairs. To the extent those communications involve

Figueira or his attorney's opinions on the merits of the complaints against Figueira, we find the material irrelevant and will not compel disclosure.

Interrogatory 3 asks for all communications between Figueira or his attorney and AAUP concerning submission of the "Edmunds document" to the administration, the step one meeting concerning the "Edmunds document," and AAUP's position with respect to the "Edmunds document." We have no basis to find that any of these communications would be protected by the work product privilege. Consistent with our earlier discussion, we order disclosure of communications about the submission of the "Edmunds document," the step one meeting, and AAUP's position on the procedures surrounding the submission of the "Edmunds document." We will not order disclosure of communications about the merits of the complaints raised in the "Edmunds document" or AAUP's opinions on the merits of those complaints.

Interrogatory 6 asks for all communications between Figueira or his attorney and AAUP relating to the propriety of one unit member filing a grievance against another. We have no basis to find that any of these communications would be protected by the work product privilege. Consistent with our earlier discussion, we order disclosure of those communications.

Interrogatories 8, 9 and 10 ask for all communications between Figueira and AAUP representatives concerning the "Edmunds document," the allegations in the document, and AAUP's response to

the document. Consistent with our earlier determinations, we order disclosure of any communications about the processing of the "Edmunds document," but not about the merits of the complaints raised in the document.

We next address AAUP's claim that the Hearing Examiner in CO-H-92-419 erred in quashing its subpoena on the ground that it was untimely. The Hearing Examiner correctly noted that N.J.A.C. 1:1-10.4 provides that the parties shall complete discovery no later than five days before the first scheduled evidentiary hearing or by such date ordered by the judge at the prehearing conference. At the time of his ruling, we had no discovery rules and it was proper for the Hearing Examiner to refer to the rules of the Office of Administrative Law.

The OAL's subpoena rules provide that:

> A subpoena which requires production of books, papers, documents or other objects designated therein shall not be used as a discovery device in place of discovery procedures otherwise available under this chapter, nor as a means of avoiding discovery deadlines established by this chapter or by the judge in a particular case. [N.J.A.C. 1:1-11.1(d)]

However, unlike the OAL's discovery rules, for which we have no counterpart and on which we rely, we have our own subpoena rules. They require us to furnish all subpoenas requested, N.J.A.C. 19:15-1.2(d), and permit a Hearing Examiner to quash a subpoena if it does not reasonably relate to any matter under investigation, inquiry or hearing, or does not describe with sufficient

particularity the evidence sought, or seeks information privileged under the law or our rules.

The Hearing Examiner's sole basis for quashing AAUP's subpoena was that it was untimely. Given our broad subpoena rules, it would be unfair in this case to first impose a time limit on subpoenas after the time for discovery has passed. This ruling would not interfere with a Hearing Examiner's right to issue discovery orders pre-hearing. However, it does not appear that such an order was issued in this case. Accordingly, we reverse the Hearing Examiner's order quashing AAUP's subpoena as untimely and remand for consideration of any other objections to that subpoena.

ORDER

CO-H-92-419

The information sought in the subpoena served by Rutgers, the State University shall be reviewed *in camera* by the Hearing Examiner. Only material that may go to the credibility of any of AAUP's witnesses on factual issues or information provided by administration officials may be released.

The Hearing Examiner's decision quashing AAUP's subpoena as untimely is reversed. The motion to quash AAUP's subpoena is remanded to the Hearing Examiner for consideration of any other objections to that subpoena.

Interrogatories addressed to AAUP

2. AAUP must disclose all external communications, but not internal communications, in which it has taken the position that the grievance procedure does not contemplate grievances being filed by unit members against other unit members.

3. AAUP must disclose all communications about the processing of the "Edmunds document," but not the merits of the complaints raised in the document.

4. AAUP must disclose all information about Figueira's availability for a step one grievance meeting.

6. AAUP must disclose all communications about the propriety of Rutgers' processing the "Edmunds document" as an Article IX grievance.

41. AAUP must disclose all instructions or guidelines maintained or issued by AAUP concerning the procedures for filing grievances.

Interrogatories addressed to Thomas Figueira

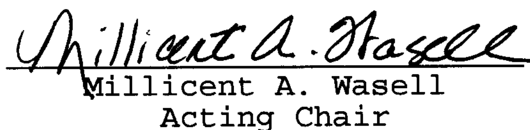
1. Figueira must disclose all communications that address the procedures by which the "Edmunds document" was handled.

3. Figueira must disclose all communications about the submission of the "Edmunds document"; the step one meeting; and AAUP's position on the procedures surrounding the submission of the "Edmunds document," but not the merits of the complaints raised in the document.

6. Figueira must disclose all communications relating to the propriety of one unit member being permitted to file a grievance against another unit member.

8, 9, 10. Figueira must disclose all communications about the processing of the "Edmunds document," but not the merits of the complaints raised in the document.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Acting Chair

Acting Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: June 20, 1996
Trenton, New Jersey
ISSUED: June 21, 1996

H.E. NO. 95-14

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-94-158

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a Motion and Cross-Motion to Compel Discovery. The AAUP objected to the discovery requests, arguing that the information sought was not potentially relevant, or violated a "union representation" privilege or attorney-client and work product privileges.

The Hearing Examiner found that the information sought is potentially relevant and violates no privileges.

H.E. NO. 95-14

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Appearances:

For the Respondent
Carpenter, Bennett & Morrissey, attorneys
(James E. Patterson, of counsel)

For the Charging Party
Reinhardt & Schachter, attorneys
(Denise Reinhardt, of counsel)

For the Intervenor
Wills, O'Neill & Mellk, attorneys
(G. Robert Wills, of counsel)

HEARING EXAMINER'S DECISION ON MOTION AND
CROSS-MOTION TO COMPEL DISCOVERY

On November 22, 1993 and on February 28 and June 24, 1994, Rutgers Council of AAUP Chapters filed an unfair practice charge and amended charges against Rutgers, The State University. The charge alleges that Rutgers violated subsection(s) 5.4(a)(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

34:13A-1 et seq., by unlawfully soliciting and assisting in the filing of a grievance ("Edmunds document") by some unit employees against another unit employee (Figueira). The charge also alleges that the processing of the grievance under Article IX of the current collective agreement is a fundamental unilateral change and repudiates the grievance procedure. The amended charges incorporate these allegations and add, among other things, that the grievance against Figueira was improperly handled, violating his procedural due process rights and that after sustaining the grievance, Rutgers unlawfully transferred Figueira to an office at another University campus.

The Director of Unfair Practices granted unit employee Figueira's request to intervene, insofar as the University's actions may have violated rights protected under subsection 5.4(a)(3) and (1) of the Act.

The University filed an Answer on July 11, 1994, denying that it engaged in any unfair practice, admitting some facts, denying others and asserting some defenses.

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

The parties in this case have engaged in voluntary discovery, including propounding and responding to interrogatories and deposing witnesses. On October 31, 1994, Rutgers filed a Motion to Compel Discovery, pursuant to N.J.A.C. 1:1-10.1 et seq. It seeks to compel responses of AAUP witnesses, and seeks responses to specific questions propounded in interrogatories and at deposition.

On November 18, the AAUP filed a response, asserting that information sought by the University is not relevant and violates a "union representation" privilege, and attorney-client and work product privileges. Accompanying the briefs are the questions and responses. The AAUP filed a cross-motion seeking to compel answers to interrogatories.

N.J.A.C. 1:1-10.1 states that the purpose of discovery is to "facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal." Discovery rules are to "give litigants access to facts which tend to support or undermine their position or that of their adversary."

Commission decisions are consistent with the intent of the administrative code. In Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981), and reaffirmed in State of New Jersey (OER), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), the Commission, relying on federal precedent, held:

> ...an employer must supply information if we find a probability that the information is potentially relevant and that it will be of use to the union in carrying out its statutory duties. Id. at 236. Relevance in this context is determined under a discovery-type standard, not a trial-type

> standard, see NLRB v. Acme Industrial Co., 385 U.S. 432, 437, 64 LRRM 2069 (1967), and therefore "a broad range of potentially useful information should be allowed....
>
> [State of New Jersey (OER) at 754].

The Commission wrote that the majority representative did not have an absolute right to obtain all requested information;

> ...rather, the duty to disclose turns upon the circumstances of the particular case. Thus, an employer is not obligated to disclose information clearly irrelevant or confidential.
>
> [Id. at 754].

Rutgers wants the AAUP and Figueira to respond to interrogatories and to questions asked at deposition. The AAUP was asked to provide the content of all communications and documents among AAUP officials, between AAUP officials and members, concerning the second amended charge. Rutgers also specifies that it wants all such communications pertaining to the "Edmunds document" and concerning "the position" (taken prior to the filing of the charge) that the grievance procedure "does not contemplate" grievances filed by unit employees against other unit employees (requests 2, 3, 4, 6). The University also wants "all [AAUP] instruction or guidelines" concerning the procedure for filing grievances (request 41).

The AAUP opposes these requests, arguing that the information sought is not relevant, or violates a privilege, or the request is "overbroad."

Relevant evidence is "evidence having an tendency in reason to prove any material fact." Dixon v. Rutgers, The State University, 110 N.J. 432, 442 (1988). Even if the materials sought are potentially relevant, their discovery may be precluded by legal privilege.

The charge and amended charges have 30 paragraphs -- among them are allegations that on July 28, 1993, the AAUP filed a "grievance" (Edmunds document); that Article IX requires the AAUP to deliver grievances "within one day of receipt"; and that on August 24, it demanded that the University treat the "grievance" "outside" Article IX.

Rutgers is entitled to probe the facts connected with the AAUP's apparently or arguably inconsistent filings, including documents drafted by and conversations between and among Figueira and union officials concerning these events. Having raised an inference that it complied with contractual obligations and almost one month later merely changed its decision, the AAUP cannot now complain that the University must accept that inference blindly. Did the AAUP initially regard the Edmunds document as "cognizable" under Article IX? If so, what obligation, contractual or otherwise, did the University have to regard it differently before and after August 24? Accordingly, I find that the requests pertaining to the Edmunds document are potentially relevant and responses must be provided, if they are not privileged. Similarly relevant are those communications and documents before November 22, 1993, concerning

the position that the grievance procedure does not contemplate grievances filed by unit members against other unit members. (Just how established that position was, if at all, and by whom, will be given its due evidentiary weight).

I agree with the AAUP that request 4, seeking all communications between AAUP and Figueira concerning the entire second amended charge is overbroad. The Union has alleged, however, that the University conducted the step one meeting on the Edmunds document "even though [Rutgers] knew Figueira was unavailable", and he was "deprived of his right to be heard."

The AAUP has argued that it is not relevant for the University to inquire about <u>its</u> motives concerning Figueira's "availability." I disagree with the AAUP's presumption about the purpose of the inquiry; "availability" is a fact in dispute and is potentially relevant to a determination on the circumstances under which the January 13, 1994 "step one meeting" was conducted.

Interrogatories served on Figueira seek all communications he had or his attorney had with the AAUP concerning the Edmunds document, the step one meeting, and the "propriety" of grievances filed by a unit member against another unit member. They also seek the content of all communications concerning the Edmunds document he had with B.J. Walker and Wells Keddie, two AAUP representatives.

Figueira has asserted a union representation privilege, attorney-client privilege and work product privilege to preclude this discovery.

The AAUP has asserted that the union representation privilege is really a "shorthand way of saying that respondent's demands violate the Act by interfering with protected activity." Responses to the University's requests "inject the administration directly into the internal affairs of the union." (AAUP Statement in Opposition, p. 8).

N.J.A.C. 1:1-15.4 identifies 18 privileges "recognized by law or contained in the following New Jersey Rules of Evidence...." Of the privileges asserted in this case, only the attorney-client privilege appears in the Rules.

No decision identifies a "union representation" privilege. The doctrine of privileged communication runs counter to the "fundamental theory...that the fullest disclosure of the facts will best lead to the truth....Thus, since privileges conceal the truth rather than advancing its ascertainment, courts have traditionally tended to restrict rather than create or expand them." Dixon v. Rutgers, The State University at 110 N.J. 446.

In Rawlings v. Police Department of Jersey City, 133 N.J. 182 (1993), the New Jersey Supreme Court rejected a plaintiff employee's argument that the attorney-client privilege prevented disclosure of a conversation with his union representative. After citing the statutory rule and definitions on attorney-client privilege (N.J.S.A. 2A:84A20; Evid. R.26), the Court emphasized that, "the privilege covers only communications between a client and a lawyer, and the client's communications made through 'necessary intermediaries and agents'." (citations omitted) Id. at 196.

The AAUP argues that, "here, the claimant of the privilege, the union, is the client. Unlike the employee-client's admissions in Rawlings, communications within the union among employees and unit members in pursuit of representation and litigation are protected."

Supreme Court decisions and policy and the administrative code discourage the creation of a "union representation" privilege. Furthermore, communications among officers and employees "in pursuit of representation and litigation" falls short of the Court's definition of privileged communication. Finally, the AAUP's lengthy charge asserts facts and raises inferences about its own conduct which the University may inquire about in discovery; a shield of a union representation privilege will only conceal the bases of these assertions and inferences. Accordingly, I do not find that a union representation privilege may preclude the discovery of potentially relevant evidence.

The AAUP has asserted an attorney-client privilege and filed a certification by the current AAUP president, Mary Gibson. Gibson certifies that,

> since the grievance procedure may lead the AAUP to court, or may lead to final internal or external adjudication of a union claim, we regard the entire grievance process as part of the advancement of employee and union rights. We therefore have received the advice of counsel in general terms as to the way in which conduct interviews of potential grievants....

New Jersey Rule of Evidence 26(1) states that, "communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged...." The privilege is broad enough to "shield such communications when made or shared with the attorney's agent." State v. Davis, 116 N.J. 341, 361 (1989). "Agents" include experts engaged by the attorney. See Coyle v. Estate of Simon, 247 N.J. Super. 277, 282 (App. Div. 1991).

I do not believe that the asserted privilege, based on the certification, shows that the communications were made "in professional confidence." The privilege accords the shield of secrecy "only with respect to confidential communications made within the context of the strict relation of attorney and client" (emphasis added). Id. at 247. "Advice of counsel in general terms" does not fit within the definition.

Furthermore, the information sought concerns communications before November 22, 1993, by and among union officials (past or present), and union members. Accordingly, I find that the potentially relevant communications are not precluded from discovery by the asserted attorney-client privilege.[2/]

2/ In State v. Pavin, 202 N.J. Super 255 (App. Div. 1985), the Court found a "middle ground" between a blanket privilege and none at all with respect to statements made by an appellant defendant to an insurance adjuster. The Court found that a privilege should shield such communications when they were "in

Footnote Continued on Next Page

The AAUP has also asserted a work product privilege concerning discussions of the Edmunds document between AAUP officials and unit members. It maintains that the privilege applies because the statements, "made to the union...are for the dominant purpose of litigation, namely the filing and processing of grievances." (AAUP Statement in Opposition, p. 13).

Closely allied to the attorney-client privilege is that of work product, designed to "protect the effectiveness of the lawyer's work as the manager of litigation." McCormick on Evidence (2nd Ed. West Publishing Co. 1972, p. 202). Such "product" lies in "interviews, statements, memoranda, correspondence briefs, mental

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2/ Footnote Continued From Previous Page

fact made to the adjuster for the dominant purpose of the defense of the insured by the attorney and where confidentiality was the reasonable expectation of the insured." Id. at 262.

In this case, the communications sought were not made by or at the specific direction of counsel, nothing in the papers filed suggest that any direct communication with counsel had occurred and the AAUP conceivably had interests other than only protecting Figueira's rights under the agreement.

A unit member has a reasonable expectation of confidentiality when conferring with a union representative about processing a grievance. Similarly, union representatives ought not to be concerned about disclosures of their good faith strategies in advancing grievances. These communications may very well be entitled to a qualified privilege.

The anomaly of this case is that the AAUP's procedure in the filing of grievances, its attempted rescission of or redirecting a grievance and its "position" on whether certain grievances fall within Article IX of the agreement comprise a portion of the charge.

impressions, personal beliefs...." Hickman v. Taylor, 329 U.S. 495 (1947). Since the communications sought are potentially relevant and occurred prior to November 22, 1993, I reject the asserted work product privilege for the same reasons I denied the asserted attorney-client privilege.

ORDER

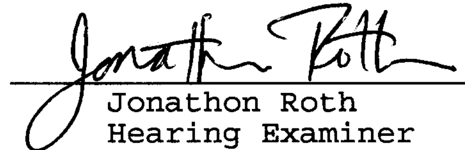
I order that the AAUP respond fully to requests 2, 3, 6 and 41 and Figueira respond fully to requests 1, 3, 6, 8, 9 and 10. The AAUP shall respond to request 4 insofar that it seeks communications pertaining to the Edmunds document and to the scheduling of a step one meeting.

I also Order that Rutgers shall respond fully to deposition questions asked of Ambrose.[3/] Responses at deposition shall be in accord with this decision.

3/ Finding no representation privilege in this matter, I also dismiss Rutgers' asserted "parallel" privilege to shield responses of its witnesses at deposition.

I also do not need to rule on the "waiver" of privilege asserted in the wake of representations made in a July 22, 1994 newspaper article.

The information sought shall be provided by January 25, 1995. In light of the order, I am cancelling Hearing dates of January 19 and 20, 1995. The parties shall commence the Hearing on January 30 and 31, 1995, at our offices in Trenton.



Jonathon Roth
Hearing Examiner

DATED: January 11, 1995
Trenton, New Jersey