H.E. NO. 99-20

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-98-193

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1031,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Charging Partys' motion to sequester witnesses and permits each party to have one resource person to assist counsel. The Hearing Examiner denies Charging Party's request to sequester Rutgers' designated resource person where that person is also a witness. Applying a balancing test between the need of Rutgers to have more than one resource person and the necessity to maintain a fair record and keep witness testimony as pristine as possible, the Hearing Examiner denies Rutgers' request to change the designated resource person during the hearing.

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Appearances:

For the Respondent
Office of Employment/Labor Counsel
(John B. Wolf, attorney)

For the Charging Party
Weissman & Mintz, attorneys
(Mark A. Rosenbaum, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION TO SEQUESTER

The above-captioned matter arises from an unfair practice charge filed by Communications Workers of America, Local 1031 ("CWA") against Rutgers, The State University, alleging violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), and (3). CWA alleges that Rutgers retaliated against four individuals as a result of their organizing efforts on behalf of CWA.

A hearing commenced on March 8, 1999. Charging Party moved to sequester all witnesses. I granted the motion permitting each party to designate one resource person to assist during the

hearing. Prior to the testimony of CWA's first witness, Maureen D'Arcy, Charging Party objected to Rutgers' choice of resource person because that individual had been subpoenaed by CWA as a hostile witness. Specifically, CWA seeks to sequester Associate Provost Mark Rozewski during the testimony of Maureen D'Arcy. CWA seeks to have Rozewski testify regarding the reassignment of certain duties performed by D'Arcy to another unit. D'Arcy and Rozewski are employed at the Rutgers Camden campus.

Rutgers opposes any attempt by CWA to limit its choice of resource person or to enforce a sequestration order as to its designated resource person. It, also, objects to my sequestration order limiting the parties to one designated resource person for the duration of the hearing. Rutgers asserts that the charge involves four separate employment decisions relating to four individuals employed on three different Rutgers' campuses, and that decisions made locally by different supervisors necessitate its designating more than one resource person during the course of the hearing.1/

Pursuant to my authority under N.J.A.C. 19:14-6.3, I requested that the parties brief two issues raised by the objections. The first issue involves the right of Rutgers as a corporate entity to designate a representative to act as its

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1/ I conducted a pre-hearing conference in this matter on February 22, 1999. I discussed procedural and substantive issues which the parties might raise during the hearing including any request for sequestration of witnesses. Neither party requested sequestration during the conference.

resource person where that individual is also a witness and whether the sequestration order is enforceable as to that person. Secondly, the parties must address the issue of whether Rutgers is entitled to change its designated resource person during the hearing.2/ The parties submitted briefs and reply briefs on both issues.3/

On the first issue, Rutgers cites Morton Bldgs., Inc. v. Resultz, Inc., 127 N.J. 227 (1992) in support of its ability to designate a representative to assist it for the hearing and for that representative to be exempt from sequestration. In Morton, the Supreme Court held that a corporate entity in a civil action is entitled to designate individuals of its choice to act as its representatives during trial and that those representatives cannot be sequestered even if they are key witnesses. In Morton, the trial court granted a motion to sequester both corporate defendant's president and vice president, leaving its counsel as the only person present on behalf of Resultz.

The Supreme Court recognizing that the case presented an opportunity for it to examine the conflict between the policy

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2/ Rutgers is not requesting that it have more than one resource person at any given time, only that it be able to switch resource persons during the hearing.

3/ Rutgers submitted a reply brief on March 17, 1999 pursuant to my briefing schedule. CWA objects to the submission of a reply brief stating that my briefing schedule did not contemplate reply briefs. CWA is in error on this point. Therefore, I have considered Rutgers' reply brief as well as CWA's reply dated March 18, 1999.

favoring sequestration of witnesses and the right of a party to be present throughout a trial granted certification. It affirmed the judgment of the Appellate Division which found that any error in the scope of the sequestration order was not clearly capable of producing unjust results and did not require reversal of the judgment. However, relying on Federal Rule of Evidence 615, which sets out three exceptions to sequestration,[4/] the Court determined that a corporate party's right to have an officer or employee as its designated representative at trial is the equivalent of the right of a natural person party to be present during trial. Therefore, it found that a corporate party's representative should not be sequestered.[5/]

4/ Rule 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

5/ In Morton, the Court found this issue of sufficient importance to refer it to the Supreme Court Committee on Civil Practice for consideration of a Rule like Federal Rule 615. Thereafter, the Committee adopted N.J.R.E. 615 which provides that "[A]t the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses." The Committee incorporated into the Rule by reference the body of New Jersey case law on witness sequestration and in Pressler, Comment 2, under R 1:8-6 cites to Morton.

Rutgers concedes that in this proceeding federal and state rules of evidence and case law interpreting same are not controlling. N.J.A.C. 19:14-6.6. However, it contends that Morton and Federal Rule 615 are so persuasive that no good reason exists for failing to follow them. Furthermore, it argues that limited discovery in contested administrative proceedings can result in surprise testimony which supports even more strongly the need to exempt a corporate representative/witness from sequestration orders.

CWA distinguishes Morton in that Rozewski, unlike the president and vice president of defendant corporation in Morton, was not the only Rutgers representative available at the hearing to assist Rutgers' counsel. In Morton, the sequestration of Resultz's officers left counsel for defendant with no other representative to protect the corporate interest during the trial. CWA asserts that the Acting Director of Employee Relations, Susan Poldhemus, was present at the hearing and could have acted as the corporate resource person to assist Rutgers' counsel. Furthermore, it asserts that Rozewski is not a central administration officer but rather an officer of one of the outlying campuses (Camden) and, therefore, not as suited to protect the corporate interests as Poldhemus or another designated resource person.

I have considered the parties' arguments on this first issue and overrule CWA's objection to the designation by Rutgers to Rozewski as its resource person. As stated by the Morton Court, the purpose of sequestration is to discourage collusion and expose

contrived testimony. The likelihood of Rozewski, who has been subpoenaed as a hostile witness by CWA colluding with CWA's witnesses is remote. Secondly, CWA can avoid any possible taint to Rozewski's testimony by calling him before D'Arcy testifies.

Furthermore, although there is no rule requiring the parties to have one resource person to assist during the hearing, it has been our practice to allow such a person where sequestration of witnesses has been ordered. I see no reason based on the above to alter that practice.

Having considered the parties' arguments on the second issue of permitting Rutgers to change designated resource persons during the hearing, I reject this request as undermining the purpose of my sequestration order without good cause shown.

Rutgers asserts that under the third exception to sequestration in Federal Rule 615, namely the exception for a witness "essential to the presentation of the party's cause", it must be able to change its designated representative during the hearing. It contends that the charge alleges discriminatory acts taken by the University against four individuals on three different Rutgers campuses and that, therefore, it must utilize resource persons with first hand knowledge of the facts in each of the four separate and distinct incidents to insure that Rutgers' counsel is provided access to persons with information essential to its case. This access, it argues, is necessary in order for the resource person to render effective assistance. Rutgers concedes that the

person with first hand knowledge is likely to be called as a witness on its behalf, but asserts that the sequestration of such person would be unjust, and that not permitting Rutgers to utilize persons with the most direct knowledge of each incident would handicap its defense.

CWA counters that permitting Rutgers to change resource persons mid-witness or between witnesses would unduly delay the proceedings, would strain the appearance of fairness and is unnecessary where Rutgers can designate one high ranking central administration officer or employee to serve as its resource person throughout the hearing.

In reaching a decision on this second issue of whether Rutgers is entitled to designate different resource persons throughout the hearing, I must balance the purpose of sequestration -- i.e., to prevent witnesses from being educated by the testimony of witnesses that proceed them, Newark Redevelopment and Housing Authority, P.E.R.C. No. 87-34, 12 NJPER 766 (¶17292 1986) -- versus the right of Rutgers to have effective assistance in presenting its case and insuring that the University's interests are adequately protected.

Rutgers argues that because employment decisions were made locally it needs to have different resource persons -- i.e., supervisors -- with knowledge of events at each different campus to provide effective assistance to counsel. However, in support of its position, it has offered no representations generally as to how employment decisions are made. Specifically, Rutgers has made no

proffer that each employment decision was discrete and that, if authorized locally, was not reviewed by a central authority.

Moreover, Rutgers concedes that persons with first hand knowledge whom it would need as resource persons would likely also be witnesses. Applying the balancing test, it seems to me that permitting Rutgers more than one resource person in this case is outweighed by the necessity to maintain a fair record and keep witness testimony as pristine as possible. Indeed, granting such a request would defeat the purpose of sequestration and give undue advantage to the Respondent in these circumstances.

Finally, I reject Rutgers' concern that the possibility of surprise testimony requires it to change resource persons in order to have the best possible resource person available. This argument presupposes that at any given time Rutgers counsel cannot consult with its client prior to cross examination of CWA's witnesses and before putting on its own witnesses or rebuttal witnesses.

For the foregoing reasons, I overrule CWA's objection to Rozewski acting as Rutgers' one resource person and will not sequester him during D'Arcy's testimony. Furthermore, I reject Rutgers' request to change designated resource persons during the hearing.

Wendy L. Young
Hearing Examiner

DATED: March 24, 1999
Trenton, New Jersey