P.E.R.C. No. 77-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,
Respondent,

-and- Docket No. CO-76-231-76

NEWARK TEACHERS UNION, LOCAL
481, AFT, AFL-CIO,
Charging Party.

SYNOPSIS

In an Interlocutory Decision the Commission affirms the ruling of the Hearing Examiner denying motions to quash subpoenas in an unfair practice hearing. The employee organization seeks to obtain documentary evidence alleged to be supportive of certain of its allegations by subpoenaing counter-proposals made by it in the possession of the employer, and the transcript of minutes and notes made by the employer during the face-to-face negotiations between the parties. The Commission first holds that it does have authority to issue subpoenas in an unfair practice case. It also reaffirms the overriding necessity to protect the strict confidentiality of the mediators, as stated in its Rules (N.J.A.C. 19:12-3.4), but finds that the counter-proposals sought by the employee organization are not in the mediator's possession nor were they prepared by the mediator. They were the employee organization's own documents which were merely transmitted to the employer by the mediator as part of the parties' bilateral negotiations. Additionally, the other documents sought were also all prepared by one of the parties, and not the mediator, during the face-to-face bilateral negotiations and thus do not involve the confidentiality of the mediator. To further insure that neither the confidentiality of the mediation process nor the possible privileged communications of the employer and its attorney are jeopardized the Commission adopts the Hearing Examiner's provision for his in camera inspection of all documents produced prior to their receipt by the other side to insure that no confidential or privileged material is divulged.

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NEWARK TEACHERS UNION, LOCAL 481, AFT, AFL-CIO,
Charging Party.

Appearances:

For the Respondent, Pickett & Jennings, Esqs., General Counsel (Mr. Robert T. Pickett, of Counsel; Mr. Pickett and Mr. Reginald A. Jennings, on the Brief); Gerald L. Dorf, P.A., Special Labor Counsel (Mr. Thomas J. Savage, of Counsel and on the Brief)

For the Charging Party, Liss and Meisenbacher, Esqs. (Mr. Raymond Meisenbacher, of Counsel, filed a Letter Memorandum)

INTERLOCUTORY DECISION

On June 2, 1976 Hearing Examiner Robert T. Snyder issued the attached Ruling Denying Motions to Quash Subpoenas in the above-captioned unfair practice proceeding (H.E. No. 76-11, 2 NJPER 195). By Order dated June 22, 1976 and issued June 24, 1976 (P.E.R.C. No. 76-48, 2 NJPER 221) the Commission granted the motion of the Respondent, Newark Board of Education (the "Board"), unopposed by the Charging Party, Newark Teachers Union, Local 481, AFT, AFL-CIO (the "Union"), for special permission pursuant to N.J.A.C. 19:14-4.5 to appeal the Hearing Examiner's Ruling. General Counsel to the Board have filed a brief, together with copies of their brief submitted to the Hearing Examiner,

in support of the appeal. Special Labor Counsel to the Board have filed copies of their brief submitted to the Hearing Examiner, in support of the appeal. Counsel to the Union have filed a Letter Memorandum relying on the Hearing Examiner's Ruling as their opposition to the appeal.

The gravamen of the underlying unfair practice proceeding is the Union's allegation that agreements were reached with the Board in three economic areas, but that the Board subsequently refused to reduce such agreements to writing and to sign such agreements, in violation of N.J.S.A. 34:13A-5.4(a)(6). The Union alleges that the manner in which such agreements were reached is as follows. As to two matters, the Union transmitted its written counter-proposals to the Board by presenting the counter-proposals to assigned Commission mediators who in turn delivered them to the Board. Thereafter the Union was informed by one of the mediators that the Board had accepted the counter-proposals. As to the third matter, the Union alleges that the parties reached oral agreement in face-to-face negotiations conducted in the presence of one of the mediators.

In an effort to obtain documentary evidence supportive of its allegations, the Union served subpoenas duces tecum upon two Board attorneys, who accepted service on behalf of the Board. One subpoena, served upon Gerald L. Dorf, Esq. of Gerald L. Dorf, P.A., Special Labor Counsel to the Board, seeks the production of the following:

> (1) any union counter-proposals to the Board's money offers transmitted to

the Board by the union through the mediators, Glasson and Mastriani;

(2) transcript of all minutes and notes taken by the Board including those taken by Thomas Savage at all meetings between the parties from February 2, through February 8, 1976;

(3) entire file and contents thereof of notes and writings made during the negotiations between the parties between February 2 and February 8, 1976 now in the possession of Gerald L. Dorf.

The second subpoena, served upon Robert T. Pickett, Esq. of Pickett & Jennings, Esqs., General Counsel to the Board, seeks the production of the documents referred to in paragraphs (1) and (2) of the Dorf subpoena.

The Board's General Counsel and Special Labor Counsel filed with the Hearing Examiner separate motions to quash the subpoenas. Neither motion disputed the relevance or materiality of the documents subpoenaed, or the particularity with which the documents are described. Rather, the motions sought to quash the subpoenas on the grounds that the Commission lacks authority to issue subpoenas in unfair practice proceedings; that assuming such authority arguendo, documents transmitted by mediators or prepared in their presence are precluded from production by virtue of Commission Rule Section 19:12-3.4 entitled "Mediator's confidentiality"; and that documents prepared by Board attorney-negotiators are precluded from production by virtue of the attorney/client and attorney work product privileges. In the attached Ruling the Hearing Examiner denied both motions.

The instant appeal on special permission granted followed.

We shall turn first to the Board's contention that the Commission lacks authority to issue subpoenas in unfair practice cases. In this regard, we concur with the conclusion of the Hearing Examiner substantially for the reasons expressed at pages 6-10 of his Ruling. We reject the Board's additional contention on appeal that while subpoena power in representation and impasse cases is necessary in order to resolve labor disputes expeditiously, on the other hand unfair practice cases occur after the fact, do not require the Commission to act quickly, and therefore only require voluntary participation by the parties. To the contrary, it is evident that the legislative design in according the Commission exclusive jurisdiction over quasi-judicial enforcement proceedings, previously litigated in the courts, would be effectively emasculated if subpoena power were not also intended. We are unable to attribute to the Legislature an intention to create ineffectual proceedings with respect to the enforcement of the Act.

We turn next to the Board's argument that N.J.A.C. 19:12-3.4 precludes production of documents transmitted from one party to the other by a mediator, or documents prepared by a party in the course of negotiations conducted in the presence of a mediator. The cited regulation reads as follows:

> 19:12-3.4 Mediator's Confidentiality
> Information disclosed by a party to a mediator in the performance of his mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports,

> documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him, on behalf of any party to any cause pending in any type of proceeding, including but not limited to unfair practice proceedings under Chapter 14 of these rules.

In N.J.S.A. 34:13A-2 the Legislature has declared as the public policy of the State that the interests of the citizenry are served by the prevention or prompt settlement of public sector labor disputes through collective negotiations and voluntary mediation under the guidance and supervision of the Commission. In order to implement that policy, the Commission promulgated the above regulation in recognition of the fact that mediators are not only required to be impartial and discreet, but also that the parties to a public sector labor dispute must be confident of such impartiality and discretion. It is clear that the effectiveness of the mediation process, and the public interests to be served thereby, would be undermined if the parties to a dispute had to risk a mediator's disclosure of their confidences. Settlement of disputes is enhanced by encouraging the parties to reveal to mediators matters which they might not reveal publicly.

While a mediator's testimony as to such matters, or the production of documents prepared or received by a mediator relating to such matters, might be useful to a party in subsequent litigation, it is clear that the over-all effectiveness of the

mediation process is of paramount importance in the public interest. The prohibition against disclosure set forth in the above regulation attaches to the mediator and the public interest, not to the parties to the dispute. If the parties to a negotiations dispute are not free to approach mediation openly and without fear of subsequent disclosures by the mediator, the usefulness of the Commission's mediation services in the settlement of future negotiations disputes would be seriously diminished, if not destroyed, to the ultimate detriment of the public.

It is clear that, in accordance with the above regulation and related discussion, the parties to the instant dispute may not properly subpoena the mediators as witnesses, and may not properly compel the production by the mediators of confidential documents prepared or received by them. The above regulation unambiguously states that the "mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him,..." The distinction relied upon by the Hearing Examiner in permitting disclosure, and from which the Board appeals, is that the documents herein sought are not in a mediator's possession and are not described as having been prepared by a mediator. Rather, the Board is asked to produce documents in its possession, prepared by the parties with respect to bilateral negotiations.

The Board does not claim that the documents sought contain matters relating to confidential communications to or

from a mediator, but rather that the Union's counter-proposals are tainted by their mere receipt by a mediator, and that negotiator's notes should not be produced because they may contain matters relating to confidential communications to or from a mediator. As to these contentions, we are in accord with the analysis and conclusions of the Hearing Examiner and affirm substantially for the reasons expressed at pages 10-15 of his Ruling. In order to protect the confidentiality of the mediation process, the Hearing Examiner quite correctly provided for in camera inspection to ensure that matters attributable to confidential communications to or from a mediator are not contained therein. We note that the tenor of the Hearing Examiner's Ruling clearly reveals his accute sensitivity to the confidentiality of the mediation process and the overriding need to protect such confidentiality, and we are accordingly confident that disclosure will not be permitted with respect to matters even arguably related to protected communications.

Finally we turn to the Board's arguments concerning the attorney/client and attorney work product privileges. The Administrative Procedure Act requires the Commission, in contested cases, to "give effect to the rules of privilege recognized by law." N.J.S.A. 52:14B-10(a). This requirement has been incorporated verbatim in the Commission's Rules governing unfair practice hearings. N.J.A.C. 19:14-6.6.

The Hearing Examiner recognized the nature and scope

of the lawyer-client privilege, as pertaining to "communications between lawyer and his client in the course of that relationship and in professional confidence." Rules of Evidence, Rule 26. See also DR4-101. We hold that the Hearing Examiner correctly distinguished, for purposes of invoking the claimed privilege, between matters reflecting confidential lawyer-client communications, and matters simply reflecting the parties' face-to-face negotiations. Clearly the latter has nothing to do with the attorney functioning qua attorney, and the Hearing Examiner is affirmed substantially for the reasons expressed at pages 15-17 of his Ruling. Similar to his handling of the mediator's confidentiality, the Hearing Examiner correctly provided for in camera inspection of any documents produced hereunder and claimed by the Board to contain references to privileged lawyer-client communications.

For the foregoing reasons, the Hearing Examiner's Ruling Denying Motions to Quash Subpoenas is hereby affirmed in all respects.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Commissioner Hurwitz did not participate in this matter.
Chairman Tener and Commissioners Hartnett, Hipp and Forst voted for this Decision.
Commissioner Parcells voted against this Decision.
DATED: Trenton, New Jersey
September 21, 1976

ISSUED: September 22, 1976

H.E. No. 76-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-76-231-76

NEWARK TEACHERS UNION, LOCAL 481
AFT AFL-CIO

Charging Party.

RULING DENYING MOTIONS TO QUASH SUBPOENAS

Preliminary Statement

On May 4, 1976, prior to opening of hearing in the above-captioned proceeding that day, application was made by the attorney for the charging party for the issuance of two subpoenas duces tecum. Subpoenas in conformity with the form of subpoena adopted for use by the Commission were thereupon submitted by the said attorney for issuance by the undersigned. Each of the subpoenas named the witness and the books and papers sought to be produced. Certain of the records sought to be produced appeared to the undersigned on an initial reading to be privileged and other records sought on the face of the subpoena clearly were not in the custody and control of the claimed custodian. The improperly sought documents were stricken and certain language was added limiting the scope of the subpoenas to materials not subject to a privilege. The undersigned thereupon issued the subpoenas.

During the course of the hearing on May 4 one of the attorneys appearing as general counsel on behalf of respondent as well as the attorney

appearing of counsel to special labor counsel to the respondent advised that each of them had been served with a subpoena duces tecum and each of them admitted service thereof on behalf of their client, the respondent. The respective co-counsel for the respondent advised that each would move to quash the subpoena served upon him.

Thereafter, in accordance with the direction of the undersigned two separate notices of motion to quash subpoena were served and filed on May 11, 1976. (The notices of motion filed by respondent's firm of general attorneys was filed with the Commission's Executive Director. On May 17, 1976 the said Executive Director advised said attorneys in writing that in accordance with the Commission's Rules, applications of this nature are to be addressed to the designated Hearing Examiner subsequent to the issuance of complaint and commencement of formal proceedings and that therefore he was forwarding the papers directly to the undersigned for appropriate disposition.) The motion filed by general counsel as well as the motion filed by special counsel are hereby denied in accordance with this ruling.

The Subpoenas

One subpoena is directed to Gerald L. Dorf, Esq., 17 Academy Street, Newark, New Jersey, and requires the production of the following:

(1) any union counter-proposals to the Board's money offers transmitted to the Board by the union through the mediators, Glasson and Mastriani;

(2) transcript of all minutes and notes taken by the Board including those taken by Thomas Savage at all meetings

between the parties from February 2, through February 8, 1976;

(3) entire file and contents thereof of notes and writings made during the negotiations between the parties between February 2 and February 8, 1976 now in the possession of Gerald L. Dorf.

The other subpoena directed to Robert Pickett, Esq., c/o Board of Education, 2 Cedar Street, Newark, New Jersey, required the production of the same items encompassed by paragraphs one and two of the Dorf subpoena, and eliminated a third paragraph altogether.

Each of the subpoenas, by its terms was made returnable on the issuing date, May 4, 1976, but by agreement of all counsel were to be returnable at the next hearing date following final disposition of the respective motions.

The pleadings and the setting in which negotiations were conducted

The complaint alleges that the respondent violated N.J.S.A. 34:13A-5.4(a) § (6) by refusing to reduce certain negotiated agreements to writing and to sign said agreements. Two of the agreements, relating to aides' salary schedule and incorporation of learning disabilities teacher consultants in a psychologist and social workers' salary schedule, are alleged to have been consummated during a negotiation session on February 3, 1976. A third agreement, providing that all monetary items not specifically mentioned and changed in negotiating proposals and not specifically excluded in a session between the parties held on February 7, 1976, including such items as summer recreation, outdoor recreation, driver education, among others, would be

increased by 3% in 1976-77 and by 5.5% in 1977-78, is alleged to have been concluded on February 7, 1976.

The union alleges in each instance that the respondent reneged on these agreements at a negotiating session on February 7 and 8, 1976. With respect to each of the first two agreements alleged, the union asserts that agreement resulted from respondent acceptance of union counter-proposals made through Commission mediator Robert Glasson. With respect to the third alleged agreement, the union claims that agreement was arrived at in the presence of and with the participation of Commission mediator Glasson.

The respondent's amended answer denies the allegations of violations of the Act and specifically avers that it is without information to admit or deny the allegations charging that agreements were concluded since it or its agents were not present during the discussion charging party had with the mediators.

The first witness called by the union in support of the allegations in the complaint was Joseph Visotski, Executive Vice-President and member of the union's negotiating team. From Mr. Visotski's testimony it appears that various meetings were held between the parties in an effort to resolve a dispute regarding terms to be included in a successor collective negotiations agreement, commencing on the expiration date of the prior agreement, January 31, 1976. At a meeting concluded early in the morning of February 3, 1976, negotiations were conducted with the assistance of Commission mediators Glasson and Mastriani. Each of the parties separately caucussed and contact was maintained between them through the mediators. Proposals were made by the respondent and received by the union negotiators through mediators and, in turn, union counter-proposals were transmitted to the respondent through the mediators.

Witness Visotski testified that at a subsequent meeting between the parties commencing on or about February 7, 1976, attended by attorney Thomas Savage for respondent, among others, the parties negotiated face to face in the presence of a mediator. According to the witness, on February 7, the respondent admitted receipt of certain of the union counter-proposals which had been transmitted through the mediators to the respondent on February 3.

During the course of the hearing held on May 4, 1976, Mr. Pickett and Mr. Savage 1/ each indicated on the record that they had been involved in various phases of the negotiations on behalf of the respondent during the period February 2, through February 8, 1976.

At a subsequent hearing conducted on May 21, 1976, witness Visotski, under cross-examination, admitted that reliance was placed by the charging party upon the respondent's failure to respond or to counter to one or more of its counter-proposals for evidence that agreement, in fact, was achieved on one or more of the counter-proposals alleged by charging party to comprise the agreements. He also admitted that final agreement on an overall successor contract had not yet been concluded.

The Motions

Neither motion claims that the material sought to be produced by subpoena is irrelevant or immaterial to the issues framed in the proceeding. Neither does either motion assert that the subpoenas do not describe with sufficient particularity the evidence sought. Both motions assert the following grounds to quash the subpoenas:

(1) The Commission lacks authority to issue subpoenas in unfair practice cases.

1/ Robert T. Pickett, Esq., a member of the firm of Pickett and Jennings, Esqs., appeared with his partner as general counsel for respondent. Thomas J. Savage, Esq. appeared of counsel, to Gerald L. Dorf, P.A., Special Labor Counsel for respondent.

(2) the confidentiality of the mediation process, recognized by the regulations and policies of the Commission, precludes discovery of the union counter-proposals, and minutes and notes taken by the Board.

(3) The attorney client privilege and the canons of legal ethics preclude discovery of the documents sought.

Analysis

The power of the Commission to compel the attendance of witnesses before it and to require the production of books, papers, and documents or other evidence is conferred, specifically, by N.J.S.A. 34:13A-6 § (e). That subsection provides as follows:

> "For the purpose of this section the Division of Public Employment Relations shall have the authority and power to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas duces tecum, and to require the production and examination of any governmental or other books or papers relating to any matter described above."

This provision was part of the original enactment which created the Public Employment Relations Commission in 1968 (New Jersey Employer-Employee Relations Act, C. 303, P.L. 1968). It thus predates the C. 123 amendments to the Act which granted to the Commission power to prohibit unfair practice by public employers and employee organizations in 34:13A-5.4, effective January 20, 1975. At the time that the Legislature amended the Act to confer unfair practice jurisdiction upon the Commission, it did not in connection therewith confer a separate grant of power to compel process, documents or witnesses, in unfair practice proceedings.

On February 2, 1976, the Public Employer-Employee Study Commission presented its report and recommendations to Governor Brendan T. Byrne, including the text of proposed amendments and supplements to the Act to effectuate its statutory recommendation (Public Employer-Employee Study Commission Report, pursuant to P.L. 1974, C. 124). Among other clarifying and administrative amendments, the Commission recommended that the statute should definitely provide that the Commission have subpoena power in unfair practice and scope of negotiation proceedings. To that end it recommended an amendment to C. 34:13A-6(e), incorporating 34:13A-5.4 by reference, and another to C. 34:13A-5.4 by the insertion of a new subsection providing the Division of Public Employment Relations with explicit authority and power to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas duces tecum, and require the production and examination of any governmental or other books or papers relating to any matter described in this section. The proposed amendments also provide for the enforcement of such a subpoena in the Superior Court by Commission application for compliance on notice and for proceedings in the same Court to punish for failure to obey such a subpoena. The Study Commission noted as follows at pp. 66 and 67 of its report:

> "The Legislature undoubtedly intended the pre-existing language of § 6 (e) concerning commission subpoena power to apply to the unfair practice and scope of negotiations function added by chapter 123. This recommendation would clarify the commission's subpoena power in such proceedings. Furthermore, this proposal would distinguish the enforcement procedures applicable to unfair practice subpoenas from other subpoenas, in recognition of the quasi-judicial and adversary nature of unfair practice proceedings. Subpoenas issued in unfair practice proceedings are stated to be akin to those issued in purely judicial proceedings.

> It is anticipated that the Commission's unfair practice function will be more efficacious under such circumstances. The recommended dichotomy in enforcement of subpoena procedures is consistent with the approach of the Court Rules. See R. 1:9-6." /Emphasis added/

Commission Executive Director Jeffrey B. Tener, in a statement of March 26, 1976 to the Assembly Labor Committee considering a Public Employment Relations Commission dispute bill following the submission of the Study Commission's Report, made the following comments with respect to the Commission subpoena power appearing at pp. 11 and 12 of his written remarks:

> "The Study Commission has recommended the addition of provisions in the unfair practices section of the Act giving the Commission the authority to issue subpoenas in unfair practice cases and setting forth a procedure for the enforcement of such subpeonas (Lines 95 to 109 of §6 on page 10). Although I am satisfied that the legislative intent is clear with regard to PERC's unfair practice subpoena power, I believe that it would be helpful for the statute to specifically authorize the issuance of subpoenas in unfair practice proceedings." /Emphasis added/

Clearly, by the amendments of C. 123 the Commission was granted exclusive power to prevent anyone from engaging in any unfair practice listed in § (a) and (b), respectively, of C. 34:13A-5.4. (See § (c) thereof). Furthermore, under a further amendment enacted at that same time, the Commission was granted specific authority "...to implement fully all the provisions of this act." (C. 34:13A-5.2). Under an established principle of construction applicable to administrative agencies, these two specific grants of statutory authority are to be construed liberally so as to enable the agency to fulfill its mandate and discharge its statutory responsibilities. In this instance, such incidental subpoena power as may be necessary to make the express authority to prohibit unfair practice effective may be held to be reasonably contained within the authority expressly granted. As stated by the New Jersey Supreme Court in Cammarata v. Essex County

Park Commission, 26 N.J. 404 (1958) at 410 and 411:

> "It is settled beyond controversy that the Legislature may enact statutes setting forth in broad design its intended aims, leaving the detailed implementation of the policy thus expressed to an administrative agency. ***The grant of an express power is always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective. ***Authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. ***The purpose of the statute is not to be frustrated by an unduly narrow interpretation." [Citations omitted]

In the disposition of these motions the undersigned has been guided by §19:14-6.3 of the Commission's Rules conferring authority on the hearing examiner after his designation and before transfer of the case to the Commission to grant applications for subpoenas and to rule upon motions to quash subpoenas. Further, in considering the adequacy of the subpoena for issuance and in setting the time limits on filing of the instant motions the undersigned was guided by § 19:16-1.1 to 2.3 of the Commission's Rules relating to its general subpoena authority. These rules, of course, were adopted in full compliance with the provisions of the Administrative Procedure Act. That Act, inter alia, requires publication, public inspection and notice prior to publication of the rules in the New Jersey Administrative Code. The rules relied upon by the examiner, herein above described, fully complied with these requirements and appear in the New Jersey Administrative Code.

Based upon the foregoing, I conclude that the power of the Commission to compel process in the instant unfair practice proceeding may be reasonably implied from the power expressly granted to prohibit unfair practice and to implement fully all the provisions of the Act. I further conclude that such authority to issue subpoenas, compel attendance of witnesses and produce documents is necessary to the due exercise of the powers expressly granted. Cammarata v.

Essex County Park Commission, supra; See also California Drive-In Restaurant Assoc. v. Clark, 22 Cal. 2d 287 140 p. 2d 657: Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892; Coffman v. State Board of Examiners in Optometry, 331 Mich. 582, 50 NW 2d 322.

This conclusion is reached in full recognition that the matter is not entirely free from doubt and that in all likelihood a final determination on these motions must await a further review before the Commission and, perhaps, in the Courts. (The respondent as well as the charging party have advised the undersigned that each intends to seek to invoke the Commission's discretionary authority to grant interim review from an adverse ruling. See § 19:14-4.5 of the Commission's Rules - Appeal on Special Permission).

Turning to the issue of confidentiality of the mediation process, both motions press this argument but from slightly different perspectives. Both motions rely upon the language of § 19:12-3.4 of the Commission's rules which provides as follows:

> "Information disclosed by a party to a mediator in the performance of his mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him, on behalf of any party to any cause pending in any type of proceeding, including but not limited to unfair practice proceedings under Chapter 14 of these rules."

Attorney Dorf recognizes that a balance must be struck between the interests of admissibility of evidence in administrative hearings on the one hand, against the interests of secrecy and confidentiality in the labor relations process on the other. Attorney Dorf would strike this balance in such a way as to even preclude negotiator's notes taken during a course of negotiations in which Commission mediators were present and involved. Furthermore, Dorf would exclude

negotiator's notes because they may contain notes of confidential discussions with mediators which are inextricably bound with notes taken at the negotiating table. Under these circumstances, Dorf concludes that the prejudice to the respondent resulting from compelled disclosures of confidential communications as well as the Commission's interest in maintaining the integrity of the mediation process, outweighs the interest in full disclosure and discovery and should prevail, resulting in the subpoena being quashed.

From what has been previously summarized of the pleadings and relevant testimony to date, it is clear that the charging party claims that agreements were reached by the parties, whether or not agreement was communicated to a mediator. Assuming the validity of the Commission's authority to compel production of documents and witnesses, the charging party should be afforded every reasonable opportunity to examine books and records in the possession of the respondent which it believes may disclose,on their face,evidence of agreement or, which may, in conjunction with examination of the witness or witnesses who prepared them, establish evidence of agreement. 2/ Discovery may not be foreclosed because those documents (here, union counter-proposals alleged to be in the respondent's possession and minutes and notes taken in the course of face-to-face negotiations) have either been transmitted by the mediator or have been prepared by the negotiator during across-the-table negotiations with the other party in the presence of the mediator. In neither case has the confidentiality

2/ Whether or not the documents so produced pursuant to subpoena are probative of any such agreements or even admissable in evidence are separate issues not before the undersigned for determination on these motions which are concerned solely with the discovery of the documents themselves.

of the mediation process been impaired. 3/

With respect to the union's counter-proposals given to the mediator for transmittal to respondent, I have already noted that the record contains testimony that the respondent has admitted receipt of some of them. As to others, if they are, in fact, in the respondent's possession they must be produced for inspection by the charging party. Insofar as these counter-proposals actually came into possession of the respondent for its consideration of the substance of the proposals therein made by the union, they constitute part of the interplay by the principals during the course of negotiations. The fact that a mediator transmitted them cannot detract from the conclusion that once received by the respondent they constitute part of the negotiation process between the parties. I am not unmindful, and, indeed, there is some evidence in the record of the fact that the mediator or mediators may have timed transmittal to the respondent of the counter-proposals in accordance with a schedule of his or their own devising and, further, that transmittal may have been accompanied by oral or written communication either separate from the counter-proposals or incorporated thereon. I conclude, nonetheless, that insofar as

3/ Contrary to Dorf's brief in support of its motion to quash subpoena, the undersigned does not construe the complaint as resting solely upon communications from mediators to the respondent. The complaint does allege representations by Commission mediator Glasson that the respondent had accepted and agreed to the union's counter-proposals as to the aides' salary schedule and the inclusion of learning disability teachers consultants in the psychologist and social workers' salary schedule. However, the complaint does not rely solely on such contentions, evidence in support of which is clearly inadmissable as violating the mediator's confidentiality and which the undersigned has already struck from the record. The ultimate legal conclusions in the complaint are that agreements were reached between the parties, and that the respondent refused to reduce negotiated agreements to writing and to sign them. The charging party may adduce testimony from its own witnesses, including testimony from respondent negotiators if it so desires, as well as seek to introduce respondent documents which are produced pursuant to subpoena, in support of its legal conclusions. Indeed, material sought in the two subpoenas at issue here are just such documentary material which the charging party seeks to inspect in order to determine whether they support its ultimate contentions.

these counter-proposals were provided to the mediator for transfer to the respondent, they do not constitute "information disclosed by a party to a mediator in the performance of his mediation functions" prohibited from disclosure under §19:12-3.4 of the Commission's rules. Such counter-proposals lose any confidentiality by virtue of the fact that the charging party intended that they be weighed on their merits by the respondent in an effort to arrive at an agreement.

Attorney Pickett argues that the mere "receipt" of the documents by the mediator taints them and precludes discovery. Reliance is placed upon that portion of §19:12-3.4 which classifies as confidential "all...documents received...by a mediator while serving in such capacity..." The undersigned does not construe the rule so narrowly as to preclude from discovery documents transmitted by one party to the other through use of a mediator intermediary. While I reject the argument that union counter-proposals received by respondent from a mediator are confidential and not subject to disclosure, as I have a duty to insure that the confidentiality of the mediation process itself is not impaired, I will require that any union counter-proposals in the respondent's possession which are subjects of the subpoenas be produced to the undersigned for an initial inspection in camera so that any notations or writings thereon attributed to a mediator may be removed prior to forwarding to the charging party.

With respect to the negotiation notes taken by respondent negotiators, such notes are subject to production for the purpose of inspection and examination of the person or persons who took them - here, attorneys Pickett and Savage at least, among others - unless proscribed by either the confidentiality of the

mediation process or the attorney-client privilege against disclosure argued here. As to the claim of breach of the confidentiality of the mediation process, the subpoenas are limited and, I construe them to be limited, to production of those negotiation notes made by the attorneys or others for the respondent relating to the subject matters under negotiation while in face-to-face negotiations with representatives of the charging party. Insofar as those notes contain the contemporaneous writings of the note taker of the respondent relating to the subject matters under negotiation between the parties they are subject to production pursuant to these subpoenas, even though taken in the presence of a mediator. Such notes, if any exist, relate to the note taker's function in the negotiation process and not to confidential communications with the mediator. They are therefore, not subject to the rule relating to the mediator's confidentiality.

The fact that notes or minutes were taken by the negotiator in the mediator's presence in the negotiation room during across-the-table negotiations by the parties cannot taint the process itself or the results of that process if the results include agreements arrived at orally or in writing, between the parties. Otherwise, a party to an unfair practice proceeding who, in fact, has entered agreement, either orally or in writing, which a charging party legitimately seeks to enforce may be able to assert mediation confidentiality as a full defense to the charge of refusal to execute or consummate the agreements. Such a defense cannot be countenanced by the Commission for it would abrogate the effectiveness of the authority of the Commission to find unfair practices and to effectuate appropriate remedies. 4/ Insofar as particular pages of the negotiators' notes

4/ Contrary to the respondent, limited agreement, if it exists as to substantial salary and wage subject matters may result in a Commission determination requiring the respondent to reduce such agreement to writing and sign the agreement even though other issues remain unresolved. See Board of Education, Englewood Public Schools and Englewood Administrator's Association, PERC No. 76-18.

and minutes are claimed to contain writings of private or confidential communications between the note taker or any other respondent representative and the mediator, as well as notes of the negotiations, such notes shall be submitted under these subpoenas initially to the undersigned for an in camera inspection to determine if the writings contain confidential material as claimed, and, if so, whether such material may be capable of being expunged leaving non-confidential negotiation material for the union's inspection.

In his brief in support of motion to quash subpoena, attorney Dorf argues also that the notes taken by an attorney negotiator acting on behalf of his client in labor negotiations are privileged because the notes in issue contain references to communications with the respondent and constitute an attorney's work product. Reference is made to Canon No. 4 of the American Bar Association Code of Professional Responsibility, codified in restricted fashion at N.J.S.A. 2A:84A-20 (Rule 26). Rule 26 recognizes that communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged.

The negotiation minutes and notes called for in the subpoenas do not, on their face, relate to confidential communications between Thomas Savage, or any other respondent attorney-negotiator, and the respondent. Neither do the minutes, notes and writings sought relate to material prepared by an attorney in the course of his activities in preparing for litigation or in an attorney's private files. See Hickman v. Taylor, et al., 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed.___, (Supreme Court, 1947). Rather, the minutes, notes and writings sought relate solely to material comprising writings made by negotiators, whether they be attorneys or not, of, and during the course of, negotiations with the charging party. Such material is not privileged as an attorney's work product

or material prepared for litigation. 5/ Insofar as any of the notes taken by the attorney may contain references to communications from his client (as distinguished from notes taken in his role as negotiator) such notes need not be produced. If any such notes appear on documents which also contain the attorney-negotiator's notes subject to production hereunder, they shall be produced for my inspection in camera for a preliminary determination as to whether they contain privileged matter and whether such matter may be separated out from the material legitimately to be produced for the charging party's inspection.

Insofar as notes, minutes or writings were made by Thomas J. Savage, Esq., Robert T. Pickett, Esq. or any other attorney for respondent while acting in his capacity as negotiator for the respondent, such notes are required to be produced hereunder. See Rock & Rye Restaurant, Inc., operating Lion's Rock, 38 SLRB No. 48 at p. 2 of the Board's Decision and Order and pp. 7 and 8 of the Intermediate Report. As stated by the Court in In re Genesse Valley Union Trust Company of Rochester (Comstock), 21 A.D. 2d 843, 844 in discussing a provision of the New York Civil Practice Rules comparable to New Jersey Court Rule of Evidence No. 26:

> "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross examination it should be considered 'evidence material***in the prosecution or defense.'"

5/ Attorney Dorf's reliance upon 29 U.S.C. 401 et seq., for the proposition that the Labor Management Reporting and Disclosure Act recognizes an attorney-client privilege as applied to attorney negotiators is misplaced. Thus, an attorney acting as a labor relations negotiator for a client is not exempt from reporting under the Act financial information relating to such services. Under the Act an attorney engaging in "persuader" activities for an employer must report not only his receipts and disbursements in connection with such persuader clients but also all his receipts and related disbursements for non-persuader labor relations advice and service for non-persuader clients. Price v. Wirtz, 412 F. 2d 647 (C.A. 5, 1969).

CONCLUSION

For all the foregoing reasons, the companion motions to quash subpoenas are denied, and Gerald L. Dorf, Esq. and Robert J. Pickett, Esq. are required to comply fully with the subpoenas directed to them in accordance with the rulings made herein.

Robert T. Snyder

Robert T. Snyder
Hearing Examiner

DATED: Trenton, New Jersey
June 2, 1976

TO: Robert T. Pickett, Esq.
Pickett & Jennings, Esqs.
Gateway One
Newark, New Jersey 07102
(Certified RRR #770615)

Gerald L. Dorf, P.A.
by Thomas J. Savage, Esq.
2376 St. Georges Avenue
Rahway, New Jersey 07065
(Certified RRR #770616)

Raymond Meisenbacher, Esq.
Liss & Meisenbacher, Esqs.
5 Center Avenue
Little Falls, New Jersey 07424
(Certified RRR #770617