Supreme Court Case No. S-14233

SUPREME COURT OF THE STATE OF ALASKA

RUSSELL PETERSON, JR.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition for Review of an Order of the Superior Court for the State of Alaska First Judicial District at Juneau

Superior Court Judge Philip M. Pallenberg
Trial Court Case No. 1JU-10-00569CI

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 11.5 million working men and women.[1] The petitioner in this case, Russell Peterson, Jr., was represented in the grievance process by a representative of the Alaska State Employees Association, which is affiliated with the AFL-CIO through its parent union the American Federation of State, County and Municipal Employees. This case presents an important and recurring question for the AFL-CIO and its affiliates: the extent to which confidential communications between employees and their union representatives made during the grievance process are protected from disclosure in subsequent litigation involving the employee and the employer.

STATEMENT OF THE CASE

Petitioner Russell Peterson, Jr. (Peterson) was employed by the Alaska Department of Labor in a bargaining unit represented by the Alaska State Employees Association, AFSCME Local 52, AFL-CIO (ASEA). Petitioner's Excerpt (hereinafter Pet. Exc.) 142, 146. After he was fired from his position with the Department of Labor, Peterson filed a grievance pursuant to the collective bargaining agreement between the State of Alaska and the ASEA. Pet. Exc. 146. The agreement states clearly that only the union, and not private counsel, may

[1] Both parties have consented in writing to the filing of this brief *amicus curiae*.

represent an employee in the grievance process. Pet. Exc. 20. Pursuant to this provision, a non-lawyer representative of the ASEA handled Peterson's grievance. Pet. Exc. 20-21. The ASEA and the State were unable to resolve Peterson's grievance and the union decided not to pursue the grievance to arbitration. Pet. Exc. 128. Peterson then filed this suit for unjust termination in superior court. Pet. Exc. 2-8.

In court, the State subpoenaed the ASEA's entire grievance file pertaining to Peterson and subpoenaed the ASEA's Business Manager to appear for a deposition. Pet. Exc. 50. Peterson objected to the State's attempt to discover Peterson's communications with the ASEA during the grievance process and moved for a protective order, contending that the grievance-related confidential communications at issue were privileged. Pet. Exc. 34, 38-45. The superior court rejected this argument and denied Peterson's motion for a protective order. Pet. Exc. 146-151. Peterson then petitioned this Court for interlocutory review of the superior court's discovery order, which this Court granted. *See* Order Granting Pet. for Rev. 1.

SUMMARY OF ARGUMENT

A public employer's demand to discover confidential grievance-related communications between an employee and his union representative constitutes an unfair labor practice in violation of the Alaska Public Employment Relations Act. (PERA). Rather than require parties to commence wasteful satellite litigation by filing unfair labor practice charges under that law, this Court should, by means of

its supervisory authority over the discovery process, permit employees and their unions to assert a limited privilege for confidential grievance-related communications in court. The recognition of this limited privilege is necessary to permit the proper functioning of PERA's mandatory grievance and arbitration system and to ensure that labor disputes are, to the greatest degree possible, resolved through contractual dispute-resolution processes rather than through litigation.

ARGUMENT

A public employer's demand to discover confidential communications between an employee and his union representative made during the mandatory grievance and arbitration process interferes with the employee's right to union representation in violation of the Alaska Public Employment Relations Act (PERA). AS 23.40.070 et. seq. Alaska's civil discovery rules generally permit a party to "obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action." Alaska R. Civ. P. 26(b)(1). No express privilege exists under Alaska's Rules of Evidence for confidential grievance-related communications between employees and their union representatives. *See* Alaska R. of Evid. 501 – 509. In order to harmonize PERA's strong public policy in favor of contractual resolution of labor disputes with the civil discovery rules' presumption in favor of disclosure, this Court should recognize a statutory-based limited privilege for confidential grievance-related communications between employees and their union representatives.

1. The NLRB has held that an employer's demand to discover confidential communications between an employee and his union representative made during the grievance process interferes with the employee's right to union representation and therefore will not be enforced. *See Cook Paint and Varnish Co.*, 258 NLRB 1230 (1981). The NLRB's ruling has been followed by every state court and public employment labor relation board that has addressed the question. *Ill. Ed. Lab. Rel. Bd. v. Homer Cmty. Consol. Sch. Dist.*, 547 N.E.2d 182, 188 (Ill. 1989); *Seelig v. Shepard*, 578 N.Y.S.2d 965 (N.Y. Sup. Ct. 1991); *Int'l Bhd. of Elec. Workers v. Pub. Util. Dist. 1*, Dec. 7656-A, 2003 WA PERC LEXIS 46, 55 (Wash. Pub. Employment Relations Comm'n, June 11, 2003); *N.H. Troopers Ass'n v. N.H. Dept. of Safety*, Dec. 94-74 (N.H. Pub. Employee Relations Bd., Aug. 31, 1994), *available at* http://www.nh.gov/pelrb/decisions/board/documents/1994-074.pdf. Thus, there is unanimous agreement that an employer's attempt to discover confidential grievance-related communications between an employee and his union representative interferes with the employee's protected rights.[2]

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[2] Neither of the cases cited by the State in its Brief in Opposition to Petition for Review, *see* Resp. Br. in Opp., p. 8 n.11, are to the contrary. In *Atwood v. Burlington Indus. Equity, Inc.*, 908 F.Supp. 319 (M.D.N.C. 1995), the court held that the presence of a non-lawyer union representative at pre-litigation meetings between employees and an attorney destroyed the attorney-client privilege. *Atwood* is factually inapposite because the conversations did not occur during the grievance or arbitration process. In *Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992), the court held that a citizen injured by a police officer could discover communications made between the officer and a union representative during internal employer disciplinary proceedings. However, the plaintiff in *Huie* was a stranger to the collective bargaining process in which the communications took place, so that case is distinguishable as well.

The logic of these decisions is unassailable. The grievance process is a mechanism by which a union, performing its statutory role as the exclusive representative of all the employees in the bargaining unit, is able to exercise its statutory responsibility to enforce the terms of the collective bargaining agreement through "the continuing administration of the contract" and thus "protect the interest[s] of . . . employee[s]" in the terms and conditions of employment set forth in that contract. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). Allowing an employer to compel the disclosure of confidential grievance-related communications would necessarily inhibit the union from "obtaining needed information from employees" that is critical to the union's ability to perform its statutory duty as exclusive representative to police the agreement. *Cook Paint*, 258 NLRB at 1232. Likewise, requiring such disclosure would materially interfere with the union's representation of individual employees in the grievance process by "restrain[ing] employees in their willingness to candidly discuss matters with their chosen, statutory representatives." *Ibid.* In other words, "[t]he right to union representation would be meaningless if, upon disclosing the facts needed for representation, the disclosure were then available to the employer upon asking. The union representative would become little more than a conduit." *N.H. Troopers Ass'n*, *supra*, at 5.

This same logic applies with equal force to the union's statutory responsibilities under PERA. PERA was enacted by the Alaska Legislature "to promote harmonious and cooperative relations between government and its

employees and to protect the public by assuring effective and orderly operations of government." AS 23.40.070. An important mechanism for accomplishing this purpose is the statutory requirement that every public sector collective bargaining agreement must "include a grievance procedure which shall have binding arbitration as its final step." AS 23.40.210(a). *Accord United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."). In order to ensure that labor disputes are resolved through the grievance and arbitration procedure rather than in court, public employees in Alaska "must first exhaust their contractual or administrative remedies, or show that they were excused from doing so, before pursuing a direct action against their employer." *Cozzen v. Municipality of Anchorage*, 907 P.2d 473, 475 (Alaska 1995).[3]

The relevant provisions of PERA are modeled on Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157 & 158(a)(1). Like the NLRA, PERA makes it an unfair labor practice for "[a] public employer or an

[3] Once a grievance is decided by an arbitrator, that decision is given "great deference" by this Court, which "will only vacate an arbitration award arising out of a collective bargaining agreement where it is the result of gross error – those mistakes that are both obvious and significant," *State v. Pub. Safety Employees Ass'n*, 235 P.3d 197, 201 (Alaska 2010), further ensuring that labor disputes are resolved through the grievance and arbitration procedure rather than in court.

agent of a public employer" to "interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080." AS 23.40.110(a)(1). That section of PERA, like Section 7 of the NLRA, guarantees the right of Alaska public employees to "form, join, or assist an organization to bargain collectively through representatives of their own choosing." AS 23.40.080. For this reason, "[r]elevant decisions of the National Labor Relations Board and federal courts [are] given great weight" in interpreting PERA. 8 AAC 97.240. *See also Alaska Pub. Employees Ass'n v. Department of Admin., Div. of Labor Relations*, 776 P.2d 1030, 1032 (Alaska 1989) ("We have followed federal decisions interpreting the NLRA when the provisions of the NLRA are similar to state statutes.").

Given the similarities between the relevant provisions of PERA and the NLRA, the Alaska Labor Relations Agency (ALRA), the body charged with enforcing PERA, would undoubtably reach the same conclusion as the NLRB reached in *Cook Paint* and would hold that an employer's demand to discover confidential grievance-related communications between an employee and his union representative constitutes an impermissible unfair labor practice.[4] Faced with such a discovery request, whether in the form of a civil subpoena or otherwise, the affected employee and/or his union could file an unfair labor

[4] Because ALRA expressly permits non-lawyers to represent parties before the agency, 8 AAC 97.355(a), there can be little doubt that ALRA would find that an employer's attempt to discover communications between an employee and a non-lawyer union representative made in preparation for an ALRA proceeding constitutes an unfair labor practice and would not permit that discovery to occur.

practice charge with ALRA and would be entitled to an order enjoining the employer's unlawful discovery effort.

2. In this case, Peterson chose to assert his PERA-protected rights by objecting to the State's discovery requests in superior court, rather than filing an unfair labor practice charge with ALRA. Under Alaska Rule of Evidence 501 and the Court's supervisory authority over the discovery process, this Court should sustain Peterson's objection and rule that employees and their unions may assert a limited privilege against being forced to disclose confidential grievance-related communications in court without having to engage in the time-consuming and wasteful extra step of instituting collateral litigation before ALRA by filing an unfair labor practice charge to challenge an employer's discovery request.

The Alaska Rules of Evidence state that "no person, organization, or entity has a privilege to . . . refuse to disclose any matter; or . . . refuse to produce any object or writing . . . [e]xcept as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court." Alaska R. Evid. 501. Although "[p]rivileges in litigation are not favored and should be narrowly construed," Alaska courts recognize that "where some major public policy clearly articulated in a constitutional provision, statute, or court rule clearly outweighs the truth-seeking function . . . a privilege should be recognized." *Russell v. Anchorage*, 706 P.2d 687, 693 (Alaska App. 1985).

There is no explicit privilege in the Alaska Rules of Evidence for confidential grievance-related communications between an employee and a union representative. Alaska R. Evid. 501 – 509. Because the grievance belongs to the union rather than the grievant, Alaska's lawyer-client privilege does not apply. *See* Alaska R. Evid. 503(b) (privilege only applies to "confidential communications . . . between the client . . . and the client's lawyer"). That is so even if the union were to designate one of its attorneys, rather than a lay union representative, as the person responsible for representing the union's interest in the grievance. *See Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985) ("We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an 'attorney-client' relationship in the ordinary sense with the particular union member who is asserting the underlying grievance.").[5] The proper functioning of PERA's mandatory grievance and arbitration system, however, requires, some protection for – to paraphrase Alaska's lawyer-client privilege rule – "confidential

[5] A union attorney does, of course, have an attorney-client relationship with the union itself and, in some cases, may also establish an attorney-client relationship with an employee where the attorney "specifically agree[s] . . . to provide direct representation to [the employee] as an individual client." *Peterson*, 771 F.2d at 1261. *See also Bachner v. Air Line Pilots Ass'n.*, 113 F.R.D. 644, 648 (D. Alaska 1987) (same). For example, a union may provide or pay for a private attorney for an individual employee as a benefit of union membership. In this situation, "a tripartite attorney-client relationship exists" between the employee, the union's lawyer, and the private attorney. *Raymond v. N.C. Police Benevolent Ass'n, Inc.*, __ S.E.2d __, 2011 N.C. LEXIS 224 (N.C., April 8, 2011).

communications made for the purpose of facilitating the rendition of [grievance-related representative] services to the [employee]." Alaska R. Evid. 503(b).

The protection extended to such confidential grievance-related communications need not be absolute. The United States Supreme Court has long recognized "limited" or "qualified" privileges for certain confidential communications not otherwise protected by the evidentiary rules, such as a limited privilege for confidential Executive Branch conversations and correspondence. *United States v. Nixon*, 418 U.S. 683, 708 (1974). *See also Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (recognizing a "limited" or "qualified" privilege against disclosure of certain monetary policy directives by Federal Reserve); *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (applying the work product doctrine in the criminal context, while explaining that "[t]he privilege derived from the work-product doctrine" is "qualified," "not absolute"). Similarly, this Court has recognized a "qualified" privilege for "confidential . . . internal governmental communications" necessary to "protect the deliberative and mental processes of decision makers," *Capital Information Group v. State of Alaska*, 923 P.2d 29, 33-34 (1996) (quoting *Doe v. Alaska Superior Court*, 721 P.2d 617, 622-23 (Alaska 1986)), based on the conclusion that "the public policy rationale upon which the Supreme Court relied in *United States v. Nixon* is equally applicable to our state government," *Doe*, 721 P.2d at 623.

When a party invokes a limited privilege, the superior court must apply a "balancing test" to determine the applicability and scope of the privilege. *Capital Information Group*, 923 P.2d at 37. First, the party asserting the privilege must make a "threshold showing" that the communication is covered by the privilege. *Ibid.* "If [the party asserting the privilege] . . . meets the threshold requirements, then there is a presumptive privilege and the party seeking disclosure must make a sufficient showing that the need for production outweighs the need for secrecy." *Ibid. See also Doe*, 721 P.2d at 626 ("[W]hen a formal specific claim of . . . privilege is asserted, a presumptive privilege attaches.").

Because PERA – an "enactment[] of the Alaska Legislature," Alaska R. Evid. 501 – explicitly requires the inclusion of a mandatory grievance and arbitration procedure in every public sector collective bargaining agreement, and because the effective operation of PERA's mandatory contractual dispute-resolution system constitutes a "major public policy clearly articulated in a . . . statute," *Russell*, 706 P.2d at 693, this Court has authority under Rule 501 to recognize a privilege for confidential grievance-related communications between employees and their union representatives. For reasons similar to those that motivated this Court to recognize a limited deliberative process privilege for confidential internal government communications, this Court should recognize a limited privilege for such grievance-related communications, thus creating a "presumption in favor of nondisclosure." *Capitol Information Group*, 923 P.2d at 37.

3. The precise nature of the limited privilege required by PERA flows from the role that the grievance and arbitration procedure plays in the collective bargaining process.

"[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers*, 363 U.S. at 578. It is the grievance and arbitration process that provides "a common law of the shop which implements and furnishes the context of the agreement." *Ibid.* The union's obligation, as the "exclusive representative of *all the employees* in the bargaining unit," AS 23.40.100 (emphasis added), is to enforce the collective bargaining agreement in a manner that establishes a "common law of the shop" most favorable to all the employees. Although "[t]he rights of individual employees concerning . . . conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts," *Smith v. Evening News*, 371 U.S. 195, 200 (1962), "[t]he bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (U.S. 1953).

The grievance, therefore, is controlled by the union. By "giv[ing] the union discretion to supervise the grievance machinery and to invoke arbitration," "frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedure[]," "both sides are assured that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved." *Vaca v.*

Sipes, 386 U.S. 171, 191 (1967). In contrast, "[i]f the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined," and "a significantly greater number of grievances would proceed to arbitration," "greatly increas[ing] the cost of the grievance machinery and . . . overburden[ing] the arbitration process as to prevent it from functioning successfully." *Id.* at 191-92.

Without a proper recognition of the employee's right to freely confer with his union representative during the grievance process, PERA's policy of "promot[ing] harmonious and cooperative relations between government and its employees and . . . protect[ing] the public by assuring effective and orderly operations of government" through contractual resolution of labor disputes would be thwarted. See AS 23.40.070. Permitting the State to discover the contents of confidential grievance-related communications will "discourag[e] the communication of relevant information by employees . . . to [union representatives]" in the grievance process, *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981), because employees will justifiably fear that such communications will be discoverable in subsequent litigation. Employee reluctance to communicate with the exclusive bargaining representative will, in turn, substantially interfere with the union's ability to represent employees in the grievance process, as "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. And this, in turn, would wreak havoc on the

mandatory exhaustion-of-remedies requirement that is designed to resolve labor disputes in the grievance and arbitration procedure without the necessity of court involvement. If employees refuse to cooperate with a union's investigation, the union will lack the information it needs to effectively settle cases or decide which grievances to take to arbitration, ultimately leading to fewer labor disputes resolved through contractual means and more cases that will be heading to the Alaska courts.

There are two important lessons to be drawn from the foregoing description of the collective bargaining process with regards to the scope and application of a limited privilege for confidential grievance-related communications between an employee and a union.

First, the limited privilege would only operate where the parties to the underlying grievance are the same, or in privity to, the parties in the subsequent lawsuit, and where the lawsuit involves the same basic facts or occurrences as the grievance. In other words, the scope of the limited privilege is co-extensive with what would constitute an unfair labor practice under PERA. In the language of Alaska's civil procedure rules, where a public employer's discovery request would violate PERA, "the burden . . . of the proposed discovery" on the statutorily-protected right of an employee to union representation in the grievance process, as well as on the right of the union to enforce the collective bargaining agreement through the grievance procedure, strongly "outweighs its likely benefit" to the employer. Alaska R. Civ. P. 26(b)(1).

Moreover, to allow discovery of confidential grievance-related communications between an employee and the union would permit a public employer to obtain in litigation what it is forbidden by PERA from obtaining in the mandatory grievance and arbitration process. Such a rule would create "a trap by inducing confidential communications and then allowing them to be used against the [employee]." *Welfare Rights Org. v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983). It could not have been the Alaska legislature's intent to create a mandatory grievance and arbitration system for public employees in which "the only sound advice the authorized [union] representative could give [an employee] was, 'Don't talk to me.'" *Id.* at 1077 n.3.

In contrast, where discovery is sought by a party other than the public employer, or where the subject matter of the lawsuit is different from that of the underlying grievance, the limited privilege would not apply. Such a discovery request would instead be evaluated through the usual framework of Rule 26, which provides that a court may limit discovery "if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit," as, for example, where "the discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less expensive." Alaska R. Civ. P. 26(b)(2)(A). For example, where the subject of the lawsuit differs from the grievance, such as in the investigation of a criminal violation, the benefit of discovery often outweighs the burden on PERA-protected rights, because "[n]owhere is the public's claim to each person's evidence stronger than in the

context of a valid grand jury subpoena," *In re Grand Jury Subpoena*, 926 A.2d 280, 284 (N.H. 2007) (quoting *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982)). *See also Dep't of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994); *In re Grand Jury Subpoenas*, 995 F. Supp. 332 (E.D.N.Y. 1998).

The second lesson to be drawn from the role that the grievance and arbitration procedure plays in collective bargaining is that any privilege ultimately belongs to the union. Even though the grievant employee may assert the privilege initially, the union remains free to waive it in furtherance of the union's obligations to the bargaining unit as a whole.[6] That is because in some cases the union must be able to waive the confidentiality of its communications with employees in the grievance process in order to fulfill its broader "responsib[ility] to . . . the interests of all whom it represents." *Huffman*, 345 U.S. at 338. For example, where the union is called to represent the competing interests of two or more employees, the union is entitled to take a position that furthers the interest of the bargaining unit as a whole – as long as it does so "in good faith and in a nonarbitrary manner," *Vaca*, 386 U.S. at 194 – even if taking such a position requires the union to waive the confidentiality of its communications with an individual grievant:

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[6] Like the client in a lawyer-client relationship, the employee also can waive the limited privilege by testifying to a confidential communication or disclosing a confidential document in his possession. In such a case, the union still can, however, assert the limited privilege as a defense to disclosing any confidential communications that only the union possesses.

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

Humphrey v. Moore, 375 U.S. 335, 349-50 (1964).

4. When the limited privilege described above is applied to the facts of this case, it is clear that the confidential grievance-related communications between Peterson and the ASEA should be protected from disclosure.

The State seeks discovery of Peterson's communications with the ASEA for the purpose of "show[ing] that most of his lawsuit should be dismissed for failure to exhaust administrative remedies." Resp. Opp. to Pet. for Rev. at 4. As an initial matter, the State acknowledges that "the union, under its own authority, decided not to seek arbitration of Mr. Peterson's grievance." *Id.* at 3. Because an employee exhausts his contractual remedies when he requests that the union take his grievance to arbitration and the union refuses, *Casey v. Fairbanks*, 670 P.2d 1133, 1138-39 (Alaska 1983), the State requires no further discovery regarding exhaustion. Even if the law were, as the State argues, that "[i]f Mr. Peterson disagreed with the union's decision not to seek arbitration, he was required to appeal it with the union internally," Resp. Opp. to Pet. for Rev. at 3, the State still would not require discovery of Peterson's confidential grievance-related communications because a non-privileged communication from the ASEA to the State already in the record clearly states that Peterson did not appeal the union's

decision not to seek arbitration of his grievance. *See* Pet. Exc. 128 (e-mail from ASEA to State stating "Mr. Peterson has not appealed [the union's] decision not to arbitrate his grievance.").

Moreover, the State could easily obtain the information it says it needs by serving Peterson with an interrogatory or a request to admit concerning his efforts to exhaust contractual and internal union remedies. That is, the *fact* of whether Peterson sought to appeal the union's decision not to seek arbitration is not a communication "made for the purpose of facilitating the rendition of [grievance-related representative] services to the [employee]," Alaska R. Evid. 503(b), and therefore is not protected from discovery by the limited privilege. *See Upjohn*, 449 U.S. at 395-96 ("The protection of the privilege extends only to *communications* and not facts. A fact is one thing and a communication concerning that fact is an entirely different thing." (Internal quotation marks and brackets omitted)). Thus, even if clear evidence that Peterson did not appeal the union's decision not to take his grievance to arbitration were not already in the record, the State still could not show that it requires access to the ASEA's entire grievance file to ascertain this particular fact.

More generally, the State's effort to obtain its sought-after discovery constitutes an unfair labor practice under PERA and therefore the limited privilege should apply. If the State is permitted to discover confidential communications between Peterson and the ASEA, other public employees will be loath to participate in the PERA-mandated grievance and arbitration procedure for fear that

their statements to the union could later be used against them if they were to bring a suit in court. This result would undermine the Alaska legislature's purpose in enacting PERA of "promot[ing] harmonious and cooperative relations between government and its employees" through mandatory arbitration, AS 23.40.070. It would also wreak havoc on this Court's exhaustion requirement that aims to keep labor disputes in the grievance and arbitration procedure and out of court by applying "great deference to an arbitrator's decision," *Pub. Safety Employees Ass'n*, 235 P.3d at 201. If employees refuse to cooperate with union investigations, the union will be unable to gather the information necessary to decide whether to take cases to arbitration, ultimately leading to more cases in Alaska courts.

Finally, if the State were permitted to obtain its sought-after discovery, the ASEA's ability to enforce its collective bargaining agreement with the State would be substantially impaired, as its ability to investigate future grievances by interviewing employees would be restrained by its knowledge that any communications with employees during the investigatory process will be discoverable in subsequent litigation. This would leave the union without the ability "to settle the majority of grievances short of the costlier and more time-consuming step[]" of arbitration, placing a "dampening effect on the entire grievance procedure." *Vaca*, 386 U.S. at 192-93.

CONCLUSION

For the reasons stated, the superior court's order denying Peterson's motion for a protective order regarding his communications with union officials should be reversed.

July 18, 2011

Respectfully submitted,

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CERTIFICATE OF TYPEFACE AND POINT SIZE

Pursuant to Alaska Rule of Appellate Procedure 212(b) and Alaska Rule of Civil Procedure 513.5(c), I hereby certify that this Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner is typed in Times New Roman typeface in 13-point type.

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EXHIBIT

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July 12, 2011

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Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supreme Ct. No. S-14233

Dear Mr. Ptacin:

The Alaska Rules of Appellate Procedure state that "[a] brief of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R. App. P. 212(c)(9). This is to request the consent of the State of Alaska, Respondent in the above-captioned case, to the filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Respondent will consent to the filing of the AFL-CIO's brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Ginsburg

Respondent State of Alaska hereby consents to the filing of a brief *amicus curiae* in support of the Petitioner by the AFL-CIO.

John M. Ptacin
Counsel for Respondent

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Rogelio "Roy" A. Flores
Malcolm B. Futhey Jr.
Roberta Reardon
John W. Wilhelm

July 12, 2011

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801

Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supreme No. S-14233

Dear Mr. Mertz:

The Alaska Rules of Appellate Procedure state that "[a] brief of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R. App. P. 212(c)(9). This is to request the consent of Russell Peterson, Jr., Petitioner in the above-captioned case, to the filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Petitioner will consent to the filing of the AFL-CIO brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Gr[illegible]g

Petitioner Russell Peterson, Jr. hereby consents to the filing of a *amicus curiae* in support of the Petitioner by the AFL-CIO.

Douglas Mertz
Counsel for Petitioner

IN THE SUPREME COURT OF THE STATE OF ALASKA

Russell Peterson, Jr.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Supreme Court No. **S-14233**
	)	
State of Alaska,	)	
	)	
Respondent.	)	
	)	

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER BY WRITTEN CONSENT OF ALL THE PARTIES

Pursuant to Alaska Rule of Appellate Procedure 212(c)(9), the American Federation of Labor and Congress of Industrial Organizations moves for leave to file the accompanying brief, *amicus curiae*. Both petitioner Russell Peterson, Jr. and respondent State of Alaska have consented to the filing of this brief. The written consent of both parties is attached as an exhibit to this motion.

WHEREFORE, the AFL-CIO respectfully requests that this Court grant leave for the AFL-CIO to file the accompanying brief, *amicus curiae*.

July 18, 2011

Respectfully submitted,

Justin W. Roberts
(*Counsel of record*)
Alaska Bar # 0605023
3333 Denali Street, Suite 2000
Anchorage, AK 99503

Lynn K. Rhinehart
James P. Coppess
Matthew J. Ginsburg
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006

Michael Rubin
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108

EXHIBIT

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

July 12, 2011

John M. Ptacin
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supreme Ct. No. S-14233

Dear Mr. Ptacin:

The Alaska Rules of Appellate Procedure state that "[a] brief of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R. App. P. 212(c)(9). This is to request the consent of the State of Alaska, Respondent in the above-captioned case, to the filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Respondent will consent to the filing of the AFL-CIO's brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. Ginsburg

Respondent State of Alaska hereby consents to the filing of a brief *amicus curiae* in support of the Petitioner by the AFL-CIO.

John M. Ptacin
Counsel for Respondent

American Federation of Labor and Congr of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
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SECRETARY-TREASURER

ARLENE HOLT BAKER
EXECUTIVE VICE PRESIDENT

July 12, 201

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801

Re: *Russell Peterson, Jr. v. State of Alaska*,
Supreme Court of the State of Alaska, Supren No. S-14233

Dear Mr. Mertz:

The Alaska Rules of Appellate Procedure state that "[of an amicus curiae may be filed . . . if accompanied by written consent of all the parties." Alaska R . P. 212(c)(9). This is to request the consent of Russell Peterson, Jr., Petitioner in the above-caption se. to the filing by the American Federation of Labor and Congress of Industrial Organizations (CIO) of a brief *amicus curiae* in support of the Petitioner.

If the Petitioner will consent to the filing of the AFL-C brief, please so indicate by endorsing this letter in the space provided below.

Thank you for your consideration.

Yours truly,

Matthew J. C

Petitioner Russell Peterson, Jr. hereby consents to the filing of *amicus curiae* in support of the Petitioner by the AFL-CIO.

Douglas Mertz
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Justin W. Roberts, certify that on July 18, 2011, the foregoing Motion For Leave To File Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* In Support of Petitioner By Written Consent of All the Parties was served on all parties or their counsel of record by mailing a true and correct copy via first class United States mail to the addresses listed below:

Douglas Mertz
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319 Seward Street, Suite 5
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(907) 586-4004
Counsel for Petitioner

John M. Ptacin
Assistant Attorney General
State of Alaska
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 269-5073
Counsel for Respondent

Justin W. Roberts
Alaska Bar # 0605023
3333 Denali Street, Suite 2000
Anchorage, AK 99503

CERTIFICATE OF SERVICE

I, Justin W. Roberts, certify that on July 18, 2011, the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* In Support of Petitioner was served on all parties or their counsel of record by mailing a true and correct copy via first class United States mail to the addresses listed below:

Douglas Mertz
Mertz Law Office
319 Seward Street, Suite 5
Juneau, Alaska 99801
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Counsel for Petitioner

John M. Ptacin
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State of Alaska
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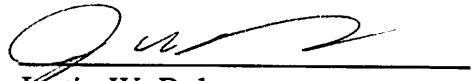
(907) 269-5073
Counsel for Respondent



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