IN THE SUPREME COURT OF THE STATE OF ALASKA

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

Superior Court No. 1JU-10-569 CI

PETITION FOR REVIEW FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HON. PHILIP M. PALLENBERG, JUDGE

PETITIONER'S REPLY BRIEF

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Filed in the Supreme Court of the
State of Alaska this _____ day of
October, 2011

Marilyn May, Clerk

By:_____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

AUTHORITIES PRINCIPALLY RELIED UPON

Evidence Rule 501 [in relevant part]:

Rule 501. Privileges Recognized Only as Provided.

Except 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, no person, organization, or entity has a right to ...(3) refuse to produce any object or writing...

ARGUMENT

I. Most Jurisdictions that have Considered Similar Issues have found a Privilege.

The State claims that no jurisdiction has ever adopted a privilege like the one here. But in fact most jurisdictions that have considered the issue have adopted or recognized a privilege when the law allows (or, as here, requires) lay representation in employment hearings or where important confidential communications of union members with union officials was threatened:

Welfare Rights Org. v. Crisan, 661 P.2d 1073 (Cal. 1983);
City of Newburgh v. Newman, 421 NYS 2d 673 (1979);
Seelig v. Shepard, 578 N.Y.S.2d 965 (Supr. Ct. 1991);
District No. 1-PCD v. Apex Mar Co, 296 AD 2d 32 (N.Y. App. Div. 2002);
In Re Grand Jury Subpoenas, 995 F. Supp. 332, 336 (E.D. NY 1998);
International Union v. Garner, 102 F.R.D. 108 (M.D. Tenn. 1984);
Woods v. N.J. Dept of Education, 858 F.Supp. 51, 55 (D. N.J. 1993);
NLRB v. Jackson Hospital Corporation, 257 F.R.D. 302, 311-12 (D.D.C.2009);
Cook Paint and Varnish Co., 258 NLRB 1230 (1981);
Berbiglia, Inc., 233 NLRB 1476, 1495 (1977), aff'd 602 F.2d 839 (8th Cir. 1979);
U.S. Dep't of Treasury, 38 F.L.R.A. 1300, 1302 (1991);
N.H. Troopers Ass'n v. N.H. Dept of Safety, No. P-0754:2, PELRB Decision No. 94-94-74 (N.H. Public Employee Relations Board, 1994);
IBEW Local 77, 2003 WL 21658695 (Wash. Publ Employment Relations Comm'n, 2003).[1]

The fallacy in the State's argument is that it defines the "privilege" so narrowly, i.e., a privilege between union members and union lay advocates in litigation following an administrative process involving the union member's employment status. In fact, all the listed cases recognize the critical need for maintaining confidentiality in union member

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[1] There are also cases in which courts recognized a full labor relations privilege, which would encompass cases like the instant one, but in situations in which union bargaining strategy was involved, *Ill. Educ. Labor Relations Bd. v. Homer Cmty Consol. Sch. Dist.*, 547 N.E. 2d 182 (Ill. 1989); and *Patterson v. Heartland Indus. Partners*, 225 F.R.D. 204 (N.D. Ohio 2004), holding that the First Amendment Freedom of Association prevents the disclosure of confidential labor relations information.

relations when substantial member rights are at issue, and they all lead to the conclusion that this case – in which the State mandated a lay union advocate in a vital process to which due process rights attach – easily falls within the same logic.

II. This Court is Free to Adjudicate the Rights of the Litigant Before It.

The State argues that this court has made a policy decision not to recognize new privileges in case law, but only through formal rule changes. It claims that the Supreme Court has failed to recognize any new privileges through case law after the Rules of Evidence were promulgated in 1979. But in fact this court has done so four times since 1979:

> *Confidentiality privilege for non-attorneys working with attorneys*, American National Watermattress Corp. v. Manville, 642 P.2d 1330, 1333-4 (Alaska 1982);
>
> *Executive privilege*, Doe v. Alaska Superior Court, Third Judicial District, 721 P.2d 617 (Alaska 1986);
>
> *Conditional privilege for publication of defamatory material in employer-employee relationship*, Schneider v. Pay'NSave, 723 P.2d 619 (Alaska 1986);
>
> *Deliberative process privilege*, Capital Information Group v. Office of Governor, 923 P.2d 29 (Alaska 1996).

In none of those cases did the court indicate any hesitation to consider and rule on the privilege questions before it. Indeed, the introductory sentence of Evidence Rule 501 indicates that privileges based on the federal and state constitutions are in addition to the privileges enumerated in the Rules, as they must be since this court has a duty to enforce

rights protected by the constitutions. The State urges the court to refuse to give relief to actual parties whose constitutional rights have been violated, in favor of a lengthy rulemaking process for future cases. This court has never chosen to ignore the rights of litigants in front of it, and the State has given no reasons why it should do so now.

III. The State Already has the Discovery Tools to Learn the Facts at Issue.

The State claims that recognition of a privilege between a litigant and his lay advocate would make it "impossible" to learn the facts regarding exhaustion of administrative remedies. Yet a privilege would not prevent the State from making ordinary discovery of relevant facts. And the main fact the State now claims it must prove – that Mr. Peterson did not take the last possible step in the administration process, of appealing to the union's board after his union advocate decided not to demand arbitration – has been admitted from the start. Indeed the State, in its deposition of Mr. Peterson, asked him whether he had appealed his advocate's refusal to take the matter to arbitration to the union's board, and received a full answer describing both the fact that he had not done so and the reasons it would have been futile. [TR 292-297, App. A] In short, the underlying facts are discoverable and have already been discovered. The State has shown no compelling need to invade advocate-client confidentiality in order to find out more. What the State really is after is confidences shared between a client and his advocate.

The State admits in its brief that it is actually fishing for anything else that may be helpful to it, such as whether "...Mr. Peterson's explanations for his failure to report felonies surfaced only during the grievance process...and [whether] Mr. Peterson made false

statements to his union...and if there are other grievances in the file involving Mr. Peterson..." [Respondent's brief, p. 10, fn. 24]. Obviously the State could have asked about such facts through normal discovery, without demanding to see the communications between Mr. Peterson and his advocate. While the State is free to do discovery to find out facts, there is nothing that would justify wiping out the confidentiality of a litigant with his advocate, merely so that the other side can fish for something that might be helpful.

In short, the State can discover all relevant facts through normal discovery without any need to invade the communications between client and advocate, a relationship in which Mr. Peterson, along with all union members, have an expectation of privacy.

IV. Due Process is Not Optional in this Litigation

The State claims that due process is not even required at this stage, i.e., in litigation, because the State gave Mr. Peterson due process already, in the administrative phase. In that phase, the State says, it benevolently refrained from demanding the private communications between Mr. Peterson and his advocate. So it doesn't matter that now that privacy is being invaded.

This creative argument fails because it would deny due process, i.e., the critical right to private communications with one's advocate, if at any point in the process a litigant knew that at some later point all his private communications could be revealed to the State. As the California Supreme Court said in *Crisan, op.cit.*, the legislature cannot have intended that the only advice a lay advocate could give his client is, "don't talk to me."

Moreover, this court has never held that in either of the two phases of union

member litigation – the administrative process or the court process –due process is optional. Both phases are vital to an employee's rights. The State's broad claim that by according due process in only some isolated parts of the process, it is excused from offering due process in other parts, implicates the whole scheme under which the State requires public employees to go through both phases, and in which it prohibits attorneys from participating in the first phase. It is not necessary for this court to decide now whether due process is denied by the State's imposition of a rule disallowing attorney representation in the administrative phase, but the breadth of the State's claim that it does not need to provide due process in the courtroom phase if it grants it in the administrative phase is sweeping. We urge the court to decide for the Petitioner on narrow grounds, i.e., that he has a right to confidentiality with his union lay advocate; but the State's argument does raise the question of whether it is even constitutional to require an employee to go through a process in which lawyers are prohibited and lay advocates are not allowed to maintain client confidentiality.

V. Confidentiality Between Grievant and Advocate Promotes Fair and Efficient Process.

The State argues that the "grievance process" would be damaged if it cannot invade the confidentiality of a public employee's communications with his advocate. The opposite is the case. As it is, there is substantial skepticism among state employees about whether the administrative process is anything but a time-consuming charade with an outcome that is preordained in almost all cases. If the employee knows that he cannot speak openly to his own advocate, it is all the more likely that that employee will consider the administrative process to be a farce, intended by the State to delay resolutions and force workers to seek

employment elsewhere or just forget about seeking an objective adjudication of grievances.

VI. The State's Statement of "Facts" is Biased and Aimed at Prejudicing the Court

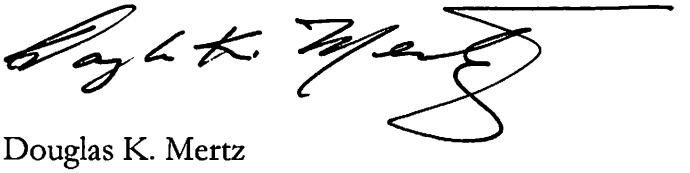
Finally, we note that the State's characterization of the facts is an unbalanced ad hominem attack on Mr. Peterson, by setting out highly contested factual claims as if they were true. There are serious fact issues regarding whether Mr. Peterson had *any* convictions for felonies as an adult; whether a Department of Labor employee instructed him not to put down convictions from thirty years earlier on his job application; whether the State knew about his record as a young person, investigated it, and told him it was not a problem, two years before this job action against him; whether the same State that now claims surprise by his use of another name during part of his life prosecuted him twelve years ago for using the other name instead of his own. On the other side, the State ignores the fact that he has been a solid citizen and member of the community since leaving his home in another state to start a new life thirty years ago, and that he was steadily employed, using his own name, until the State brought up facts that it had known about and excused for years. In short, the court should not be swayed by a one-sided recitation of the background facts that should be left to the jury to consider.

Conclusion

The State's brief fails to show any substantial case law that would allow the State to invade the private communications between a litigant and his advocate. The fact that the State itself mandates that the litigant use a lay advocate and not an admitted attorney is itself

questionable, but to then use that requirement as a wedge to invade private communications vital to due process should not be allowed. The trial court's order should be reversed and the case sent back for trial.

Respectfully submitted this 7th of October, 2011.



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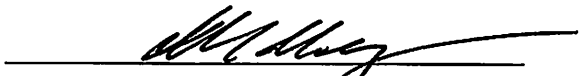

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

RUSSELL PETERSON, JR.,)
)
Plaintiff,)
)
v.)
)
STATE OF ALASKA,)
)
Defendant.)
)

Case No. 1JU-10-1569 Civil

DEPOSITION OF RUSSELL PETERSON, JR.

Pages 1 through 333, Inclusive

Taken: Tuesday, November 16, 2010

Place: Juneau, Alaska

APPENDIX A

Page 290

people, four people -- five, four -- I've said in front of three people that I don't really know some embarrassing stuff. And it's like -- and then guess what? There is going to be five more people that have to talk about it, and five more.

And you know what? I'm good to go. If I have to stand up in a front of a courtroom and tell everybody what happened to me, and why, bring it. Because you know what? It doesn't change the fact that this is wrong. It's wrong. All -- and all I wanted to do was the right thing, Mr. Ptacin. Ask Pat. I tried to do the right thing. And I said, "Hey" -- I mean -- I'm sorry. I'm so sorry.

Q. No, it's okay.

A. I didn't have control right there for a second, and I'm sorry.

This is -- it's sad to me. It's really sad, because I know people that are at JAMHI. You know what? I have to call a few people tonight and tell them that nothing you tell those people is sacred. Nothing. (Witness crying.) It doesn't matter if it's your priest, your union, your lawyer.

That's what this is about to me,

Page 291

and it's not going to stop with just this. I can't let it. Not you guys. There is a thing with the union now. It's -- and if I have to spend my time doing that, I'm comfortable up on the hill. And if I -- and I've never come down -- and I've never left there without -- because it's always about the right thing. If you go up the hill -- that's still my belief, that if you go next door to the building and you're right -- and that's what Tim Kelly taught me -- that if you go -- if you're real, if you're sincere with your thing, whatever you're going there for, you will prevail. And that -- and that's what this is all about.

And I may have made some mistakes, but -- and, you know, whatever. I'm just a little disappointed that JAMHI, you know, had to sell me out. So, you know.

MR. MERTZ: Let's see if John's got some more questions.

THE WITNESS: I'm sorry.

Q. Yeah. That's okay.

I don't want to talk too much about the union grievance process, because we've got issues there, but --

A. Yeah.

Page 292

Q. -- can you at least tell me -- and, again, just stop it if you, you know -- do you recall why -- and I'll show you. This is all I have so far. I've got an e-mail from Dick Isett to Mertl, or Benthe Mertl-Posthumus.

A. I got a good recording if you want it.

Q. What's the recording of?

A. The one of Dick saying, "Everything's going to be great." And I had a meeting with -- it was a message he left on my phone.

MR. MERTZ: Okay. That's separate from what he's talking about.

THE WITNESS: Okay.

Q. Yeah. But it says --

A. I have two, if you want to hear them.

Q. We'll wait on that.

It says, "Hello, Benthe. Mr. Peterson has not appealed my decision not to arbitrate his grievance. The union hereby withdraws Union Case" -- and then it goes on to list it.

And this is all the information that I have about your union grievance process, going to the union to talk about what happened. (Handing.)

Page 293

A. Oh. Oh. And I asked him for arbitration over and over. I don't know really what -- I don't know really what that is. I don't know. It -- you talk about stuff, but --

Q. Did you -- and, again, stop if you want me to stop, but --

A. I'm sorry.

Q. -- did the union send you any kind of letter saying that you had an ability to file or to --

A. Maybe.

Q. -- go for --

A. I know he told me that it would be pointless, because he said, "We're the people -- we're the people that make that decision, and I'm telling you right now that it's pointless. But you can -- if you don't believe me, you can file a grievance, file an appeal. You can arbitrate. You can file for arbitration. You can file an appeal for our decision, but it's going to be pointless, because we're the people who make up the decision," and ---

Q. So you actually had a conversation with --

A. Many, yeah.

Page 294

Q. -- with Dick about this very issue?
A. Yeah. Yeah. In fact, he told me that it was all going to be all pretty much settled. That's a good recording or message that he left. "I had a great meeting with this Mertl-Posthumus" --
MR. MERTZ: Okay. Now, he's asking you about something else.
THE WITNESS: Okay.
MR. MERTZ: It's the question of whether to press the state for an arbitration.
THE WITNESS: He told me to forget it.
MR. MERTZ: And then after Dick had decided they wouldn't ask for arbitration, then there is what he told you about whether you should appeal.
THE WITNESS: Yeah. Yeah. He said, "Don't -- don't -- you can appeal this arbitration, but you can't" --
Q. Did you do that through a phone call, a talk with Dick?
A. Oh, I'm sure it was on the phone, because I never saw him.
Q. You never did that in e-mail or

Page 295

anything?
A. Doubtful.
Q. He never sent you an e-mail?
A. He sent me lots -- well, a few e-mails, but --
Q. And you consider all of these conversations between you and Dick are privileged?
MR. MERTZ: Well, he's obviously willing to tell you about it. And this particular one, about the futility of that final appeal, is something you ought to know, which is why I'm not making an objection.
Q. Right. Right. And that's what I need to know.
A. Yeah. He said --
Q. What's the --
A. -- don't -- he said, "You can do it." He made it sound like -- you know what, honestly? He sounded -- he didn't sound like Josh Lovett, but it was the same pretense, like -- no, it was completely -- I'm sorry. Scratch that. It was completely different.
But in the same tone, he said, "You can appeal it, but we're the ones that make the decision if it's going to be approved." And so

Page 296

why bother?
Q. Do you have any notes from this or any --
A. No. I remember it, though, because he said -- he explained --
Q. Do you have any -- do you have anything, paperwise, that would confirm this?
A. I can look, but I don't think -- I don't think so.
Q. You folks have the union records. I don't. I've never seen them. And --
A. Oh, that's what I heard.
MR. PTACIN: Is there a way to get through this stuff, do a priv. log or anything for -- at least on this issue?
MR. MERTZ: Yeah. My recollection is that there is nothing in writing about this, other than that e-mail to Benthe that you mentioned. But I'm going to look.
MR. PTACIN: Okay.
MR. MERTZ: And if there is something, I'll give it to you.
THE WITNESS: I'll look too. I'll look tonight. I save --
MR. MERTZ: See if you've got

Page 297

anything. Tell me if you find anything, and I'll look through the records.
THE WITNESS: Okay.
MR. MERTZ: And if there's something, you'll get it.
MR. PTACIN: At least on this issue, yeah.
THE WITNESS: Yeah.
MR. PTACIN: At least get that far.
THE WITNESS: Yeah. Because I remember him telling me that it was pointless. But he was like kind of weird about it, because he said, "But you can go ahead and do that anyway," (enunciating) you know, in his Dick Isett voice.
MR. PTACIN: Yeah. We'll mark that in, just for good measure.
(Exhibit 11 duly marked.)
BY MR. PTACIN:
Q. As far as union questions, I'll just -- hold that open, waiting for the judge to rule on those issues for now.
A. Yeah. I don't mind.
Q. Now, unemployment. In one of your responses, you'd mentioned that you had been taking some unemployment --