IN THE SUPREME COURT OF THE STATE OF ALASKA

RUSSELL PETERSON, JR.	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
STATE OF ALASKA,	)	
	)	
Respondent.	)	Supreme Court No.: **S-14233**
	)	

Trial Court Case No.: 1JU-10-569 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HONORABLE PHILIP M. PALLENBERG, JUDGE

BRIEF OF APPELLEE STATE OF ALASKA

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ALASKA STATUTES:

AS 23.40.110(a)(1), (5). Unfair Labor Practices.

(a) A public employer or an agent of a public employer may not

(1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080 ;

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

AS 23.40.210(a). Agreement; Cost-Of-Living Differential.

(a) Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. The agreement shall include a pay plan designed to provide for a cost-of-living differential between the salaries paid employees residing in the state and employees residing outside the state. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the state shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the state reflects the difference between the cost of living in Alaska and living in Seattle, Washington. The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency.

COURT RULES

ALASKA RULES OF CIVIL PROCEDURE:

Rule 26(b)(1). General Provisions Governing Discovery; Duty of Disclosure.

b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons

having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 45(d). Subpoena.

(d) **Subpoena for Taking Depositions--Place of Examination.**

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the court for any judicial district of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subparagraph (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the judicial district in which the deposition is to be taken may be required to attend an examination at any place within the district, unless otherwise ordered by the court. A nonresident of the judicial district in which the deposition is to be taken, and a nonresident of the state subpoenaed within the state, may be required to attend at any place within the district wherein the nonresident is served with a subpoena, unless otherwise ordered by the court.

ALASKA RULE OF EVIDENCE:

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 privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(Added by SCO 364 effective August 1, 1979)

Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

Rule 503. Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

(1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the

successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of Crime or Fraud. If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

Rule 504. Physician and Psychotherapist-Patient Privilege.

(a) Definitions. As used in this rule:

(1) A patient is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) [Effective March 1, 1999.] A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient so to be, while similarly engaged, [OR] (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged, or (D) a person licensed as a professional counselor under the laws of a state or nation, or reasonably believed by the patient so to be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, by the patient's guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions. There is no privilege under this rule:

(1) Condition on Element of Claim or Defense. As to communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, of any party claiming through or under the patient, of any person raising the patient's condition as an element of that person's own case, or of any person claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or after the patient's death, in any proceeding in which any party puts the condition in issue.

(2) Crime or Fraud. If the services of the physician or psychotherapist were sought, obtained or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud.

(3) Breach of Duty Arising Out of Physician-Patient Relationship. As to a communication relevant to an issue of breach, by the physician, or by the psychotherapist, or by the patient, of a duty arising out of the physician-patient or psychotherapist-patient relationship.

(4) Proceedings for Hospitalization. For communications relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness, if the physician or psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(5) Required Report. As to information that the physician or psychotherapist or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection, or as to information or matters contained in or reasonably raised by a report submitted under AS 08.64.336, other than information that would establish the identity of a patient, unless the court finds that it is necessary to admit the identifying information in order to serve the interests of justice.

(6) Examination by Order of Judge. As to communications made in the course of an examination ordered by the court of the physical, mental or emotional condition of the patient, with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise. This exception does not apply where the examination is by order of the court upon the request of the lawyer for the defendant in a criminal

proceeding in order to provide the lawyer with information needed so that the lawyer may advise the defendant whether to enter a plea based on insanity or to present a defense based on the defendant's mental or emotional condition.

(7) Criminal Proceeding. For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

(Added by SCO 345 effective August 1, 1979; amended by SCO 850 effective January 15, 1988; by SCO 1108 effective January 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1337 effective March 1, 1999; and by SCO 1522 effective October 15, 2003)

Note: SCO 1108 incorporated changes in Evidence Rule 504(a)(3) made by the legislature in ch. 129 § 12 SLA 1992. This legislation added the language in subparagraph (a)(3), "or (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged."

SCO 1108 was entered for the sole reason that the legislature has mandated the above amendment. If ch. 129 § 12 SLA 1992 is invalidated by a court of competent jurisdiction, SCO 1108 shall be considered automatically rescinded.

Note to SCO 1337: Evidence Rule 504(a)(3) was amended by § 5 ch. 75 SLA 1998 to expand the definition of "psychotherapist" to include licensed professional counselors. Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 505. Husband-Wife Privileges.

(a) Spousal Immunity.

(1) General Rule. A husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent.

(2) Exceptions. There is no privilege under this subdivision:

(A) In a civil proceeding brought by or on behalf of one spouse against the other spouse; or

(B) In a proceeding to commit or otherwise place a spouse, the property of a spouse or both the spouse and the property of the spouse under the control of another because of the alleged mental or physical condition of the spouse; or

(C) In a proceeding brought by or on behalf of a spouse to establish the spouse's competence or

(D) In a proceeding in which one spouse is charged with:

(i) A crime against the person or the property of the other spouse or of a child of either, whether such crime was committed before or during marriage.

(ii) Bigamy, incest, adultery, pimping, or prostitution.

(iii) A crime related to abandonment of a child or nonsupport of a spouse or child.

(iv) A crime prior to the marriage.

(v) A crime involving domestic violence as defined in AS 18.66.990.

(E) In a proceeding involving custody of a child.

(F) Evidence derived from or related to a business relationship involving the spouses.

(b) Confidential Marital Communications.

(1) General Rule. Neither during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse.

(2) Exceptions. There is no privilege under this subdivision:

(A) If any of the exceptions under subdivision (a) (2) of this rule apply; or

(B) If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud; or

(C) In a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction; or

(D) In a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made; or

(E) In a proceeding under the Rules of Children's Procedure; or

(F) If the communication was primarily related to and made in the context of a business relationship involving both spouses or the spouses and third parties.

(Added by SCO 364 effective August 1, 1979; amended by SCO 823 effective August 1, 1987; by SCO 1269 effective July 15, 1997; and by SCO 1522 effective October 15, 2003)

Note to SCO 1269: Evidence Rule 505(a) was amended by § 70 ch. 64 SLA 1996. Section 13 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 506. Communications to Clergymen.

(a) Definitions. As used in this rule:

(1) A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in that individual's professional character as spiritual adviser.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The authority so to do is presumed in the absence of evidence to the contrary.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 507. Political Vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 508. Trade Secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 509. Identity of Informer.

(a) Rule of Privilege. The United States, the State of Alaska and sister states have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished by the informer.

(c) Exceptions.

(1) Voluntary Disclosure -- Informer a Witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the prosecution.

(2) Testimony on Merits.

(i) If a party claims that a government informer may be able to give testimony necessary to a fair determination of the issue of guilt, innocence, credibility of a witness testifying on the merits, or punishment in a criminal case, or of a material issue on the merits in a civil case to which the state is a party, and if the government invokes the privilege, the party shall be given an opportunity to show that the party's claim is valid.

The judge shall hear all evidence presented by the party and the government, and both sides shall be permitted to be present with counsel during the presentation of evidence, subject to subdivision (c) (2) (ii) of this rule.

(ii) If the government requests an opportunity to submit to the court, by affidavit or testimony or otherwise, evidence concerning the information possessed by an informant, which submission might tend to reveal the informant's identity, the judge shall permit the government to make its submission without disclosure to the other party. Neither the attorney for the government, nor the other party or the other party's attorney may be present when the judge is examining the in camera submission. Although the submission generally will consist of affidavits, the judge may direct that witnesses appear before the judge, without the government or the other party present, to give testimony.

(iii) If the judge finds that there is a reasonable possibility that the informant can give the testimony sought, and if the government elects not to disclose the informant's identity, the judge shall, either on motion of a party or sua sponte, dismiss criminal charges to which the testimony would relate if the informant's testimony is material to guilt or innocence. In criminal proceedings in which the informant's testimony is not material to guilt or innocence and in civil proceedings the judge may make any order that justice requires.

(iv) Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

(3) Legality of Obtaining Evidence.

(i) When a defendant challenges the legality of the means by which evidence was obtained by the prosecution and the prosecution relies upon information supplied by an informer to support its claim of legality, if the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible the judge may require the identity of the informer to be disclosed. In determining whether or not to require disclosure, the judge shall hear any evidence offered by the parties and both the defendant and the government shall have the right to be represented by counsel.

(ii) If the judge determines that disclosure of the informant's identity is necessary, upon request by the prosecution the disclosure shall be made to the court alone, not to the defendant. The judge may, if necessary, examine the informant or other witnesses about the informant, but such examination will be in camera and neither the defendant nor the prosecution shall be present or represented.

(iii) If disclosure of the identity of the informer is made to the court and not to the defendant, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the prosecution.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

ISSUE PRESENTED FOR REVIEW

May an employee who has sued his former employer withhold relevant information in discovery by asserting a "union testimonial privilege," despite the fact that no such privilege currently exists under Alaska law, and despite the mandate of Alaska Rule of Evidence 501, which limits the creation of new evidentiary privileges?

STATEMENT OF THE CASE

I. Introduction

Mr. Peterson asks this Court to take the unusual step of creating a new evidentiary privilege for communications between an employee and his union — a union testimonial privilege. [Pet. Br. 3] No other jurisdiction has adopted such a privilege. Because new evidentiary privileges obscure the search for truth, because Alaska Rule of Evidence 501 limits the creation of new privileges, and because the proposed privilege would undermine important public policy goals, this Court should decline to adopt this new privilege.

Mr. Peterson sued his state employer for wrongful termination, and the state sought Mr. Peterson's union file in discovery pursuant to the Alaska Rules of Civil Procedure. [Exc. 001-008, 050] The subpoena for the union file was reasonably calculated to lead to the discovery of evidence which would establish that the state did not breach its duty of good faith and fair dealing in terminating Mr. Peterson and that Mr. Peterson failed to exhaust his administrative remedies.[1] Without access to Mr. Peterson's union file, the state will not be able to prove that Mr. Peterson failed to

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[1] *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

fully pursue the grievance procedure provided in his collective bargaining agreement. [Tr. 033-039]

Mr. Peterson's union communications are not subject to any existing evidentiary privileges.[2] Courts refuse to extend the attorney-client privilege because the union representative is not a lawyer to the individual member during a labor dispute.[3] And when Mr. Peterson's private counsel inserted himself into the grievance process, the union and the private counsel did not enter into a joint representation of Mr. Peterson, nor was the union acting as an agent of Mr. Peterson's private counsel, because the union represents all of its members during a dispute.[4] [Tr. 020-021] Accordingly, Mr. Peterson may not withhold the requested documents unless this Court creates a new evidentiary privilege.

This Court possesses a limited authority to create new privileges. Alaska Rule of Evidence 501 limits the creation of new common-law privileges — since its enactment in 1979, this Court has not created a new common-law privilege.[5] Moreover, a union testimonial privilege would undermine important public policy objectives --- for instance, it would undermine the exhaustion doctrine by making it

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2 Alaska R. of Evid. 501-509.

3 *Walker v. Huie*, 142 F.R.D. 497, 501 (D. Utah 1992).

4 *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175-6 (7th. Cir. 1995) *citing Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th. Cir. 1982).

5 SCO 364 effective August 1, 1979. The last common-law privilege was adopted in *Allred v. State*, 554 P.2d 411 (Alaska 1976) and it was the psychotherapist-patient privilege.

impossible for an employer to prove that an employee failed to exhaust the grievance process provided by a collective bargaining agreement. This Court should permit the legislature to debate the policy implications of such a new privilege or seek public input before adopting this unique privilege, as the legislature has yet to enact a statute which even implies the creation of such a privilege.[6] No court has adopted a union testimonial privilege applicable to civil litigation.[7] And privileges that are similar to the union testimonial privilege, such as the lay advocate privilege, do not apply in the labor relations context because labor relations statutes do not equate union representatives to attorneys.[8]

Finally, due process does not require the union testimonial privilege. State employees are afforded multiple opportunities to be heard both before and after the State terminates their employment. [Exc. 125, 128, 001-008] And the rules of discovery

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[6] Administrative Rule 44(e) permits this Court to adopt a new privilege but should submit notice to interested parties under this rule.

[7] Michael Moberly, *Extending A Qualified Evidentiary Privilege To Confidential Communications Between Employees And Their Union Representatives*, 5 Nev. L.J. 508, 568-569 (2004-2005). New York courts have arguably adopted the union testimonial privilege in limited circumstances. *Seelig v. Shepard* 152 Misc.2d 699, 699-700 (N.Y. Sup. Ct. 1991)(the case did not involve civil litigation); *See also, City of Newburgh v. Newman*, 70 AD.2d 362, 365-66 (3d Dept. 1979)(upholding an unfair labor practices decision of a labor relations board). Unlike courts in Alaska, New York courts have the authority to recognize new common law privileges and do not need to interpret whether statutory language and legislative history plainly demonstrate the legislature's intent to create a new privilege. *Am. Airlines, Inc. v. Superior Court*, 114 Cal.App.4th 881, 893 (Cal App. 4th 2004); Alaska Rules Of Evidence 501.

[8] *Am. Airlines, Inc. v. Superior Court*, 114 Cal.App.4th 881, 890 (Cal App. 4th 2004).

promote due process in that they ensure Mr. Peterson is not erroneously deprived of a property interest.[9]

The Court should decline to create a new evidentiary privilege for union communications, and thus should uphold the decision of the superior court allowing the state access to Mr. Peterson's union file.

II. Facts And Proceedings

Russell Peterson applied for a position as a Microcomputer/Network Technician II with the Division of Labor and Workforce Development ("the state") on January 16, 2007 and was hired on January 24, 2007. [Exc. 002-003] Unbeknownst to the state, Mr. Peterson falsified his employment application by certifying that he had never been convicted of a felony, when in fact he had been convicted of numerous felonies. [Exc. 016, 108, 110-111, 125] The employment application made it explicit that Mr. Peterson needed to disclose past felonies and applicants who fail to disclose are subject to termination. [Exc. 108-121].

In an odd twist of fate, it was Mr. Peterson's attorney, Mr. Mertz, who later tipped off the state to Mr. Peterson's undisclosed felony convictions. [Exc. 123-124] On June 1, 2009, Mr. Mertz sent a letter to Pat Shier, then Director of the State of Alaska Division of Retirement and Benefits. [*Id.*] In that letter, Mr. Mertz explained that Mr. Peterson had moved to Alaska in the late 1980's. [*Id.*] And that, in order to obtain

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[9] Alaska R. Civ. P. 26(b)(1). In this case, Mr. Peterson is not erroneously deprived of a property interest if he failed to exhaust administrative remedies. *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n. 16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

"a fresh start," Mr. Peterson used a name ("Joshua Warner"), date of birth, and social security number that were not his own. [*Id.*] Mr. Mertz explained that Mr. Peterson had worked for the state under this false identity during the 1980's and asked that the Division of Retirement and Benefits correct Mr. Peterson's Public Employment Retirement System tier and other longevity-related benefits to give Mr. Peterson credit for his work under the false identity. [*Id.*] The state began to investigate Mr. Peterson's claims, and learned that he had failed to disclose several out-of-state felony convictions when he applied for his job. [Exc. 125]

Upon discovering the falsification, and after holding a pretermination meeting, the State terminated Mr. Peterson's employment on August 21, 2009. [*Id.*]. Mr. Peterson, who was a member of the Alaska State Employees Association Union, Local 52, American Federation of State County and Municipal Employees, AFL-CIO ("the union"), sought reinstatement through the grievance process set out in the collective bargaining agreement between the union and the state.[10] [Exc. 125, 128]

The union represented Mr. Peterson through three steps of the grievance process. [Exc. 095-096, 125, 128] None of the union's explanations for the falsification convinced the state to change its position. [Exc. 128] At no time during the grievance process did the state or any of its representatives seek to review communications between Mr. Peterson and the union. [Exc. 095-096; Tr. 033-039]

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[10] The Public Employment Relations Act (PERA) requires state employers and unions to enter collective bargaining agreements. The collective bargaining agreement must include a grievance process that has binding arbitration as its final step. AS 23.40.210(a)(2010).

In March, 2010, the union decided not to seek arbitration of Mr. Peterson's grievance under Step IV of the grievance process. [Exc. 128] If Mr. Peterson disagreed with that decision not to seek arbitration, he was required to appeal it with the union internally, but the state believes that he never did so, and thus failed to exhaust his administrative remedies.[11] [*Id.*] This failure would be fatal to his right to pursue his contract claims against the state in civil court.[12]

One month later, on April 30, 2010, Mr. Peterson filed a wrongful termination lawsuit in superior court. [Exc. 001-008]. In the complaint, Mr. Peterson alleges breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and other ancillary causes of action. [*Id.*] Mr. Peterson claimed in his complaint that he exhausted his administrative remedies through the grievance process. [Exc. 004] Discovery ensued. [Tr. 184-187]

The state reviewed emails between Dick Isett (the union's business agent) and Benthe Mertl-Posthumus (the State's point person during the grievance process). [Exc. 128] Emails from Mr. Isett to Ms. Posthumous, which are hearsay, appear to indicate Mr. Peterson failed to appeal Mr. Isett's decision not to take this matter to arbitration. [*Id.*] Because Mr. Peterson's union file likely provides direct evidence of

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[11] *See, e.g., Crowley v. State, Dept. of Health and Social Services, Office of Children's Services*, Not Reported in P.3d, 2008 WL 5352309, 4 (Alaska 2011) (unpublished) (holding that an employee had a duty to appeal a business agent's decision not to seek arbitration to the union's grievance review committee in order to have exhausted administrative remedies).

[12] *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n.16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

Mr. Peterson's failure to exhaust that the state could use in its defense, the state issued a proper subpoena to the union on September 29, 2010. [Exc. 050] Neither the union nor the AFL-CIO ("the amicus") objected to production of the union file at the time of the request. But Mr. Peterson filed a motion to quash on October 11, 2010. [Exc. 034-085] Although Mr. Peterson never appears to argue the file is irrelevant to this litigation, he argues that the records should be protected by an evidentiary privilege. [*Id.*]

Mr. Peterson's motion to quash placed the state at a considerable disadvantage in obtaining discovery, which was initially set to close in December 2010. [Tr. 033-039] The state deposed Mr. Peterson and sought follow-up discovery, but still has not obtained direct evidence of whether Mr. Peterson exhausted his administrative remedies. [*Id.*][13] In March 2011, the superior court denied Mr. Peterson's motion to quash, noting that under Evidence Rule 501, a court may recognize new privileges only if compelled to by a constitutional right, by a statute, or by changes made to the evidence rules by this Court in its rulemaking authority. [Exc. 158-175]. Mr. Peterson petitioned for review, and his petition was granted.

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[13] There have been several developments of the factual record regarding exhaustion since the superior court briefing took place in this case. On remand, if the Court adopts a union testimonial privilege, serious questions remain regarding whether Mr. Peterson waived the privilege in this case by asserting at his deposition that it was futile for him to exhaust administrative remedies with the union given the union's statements to him.

STANDARD OF REVIEW

Rulings on discovery are reviewed for abuse of discretion.[14] In determining whether a case presents facts warranting the recognition of a new privilege, certain general principles apply.[15] Foremost among these is the maxim that the public has the right to hear every man's evidence in a court of law.[16] Courts start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and it is the party which seeks the exception from this principle that bears the burden of establishing a privilege.[17] New privileges suppress evidence and compromise the search for truth.[18]

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[14] *Christensen v. NCH Corp.*, 956 P.2d 468, 473 (Alaska 1998).

[15] *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332, 334 (E.D.N.Y. 1988). This standard applies to the extent Mr. Peterson is asking the Court to create a common-law privilege.

[16] *United States v. Bryan*, 339 U.S. 323, 331 (1950).

[17] *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332, 334 (E.D.N.Y. 1988).

[18] *See Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (privilege denied for confidential university peer review proceedings); *United States v. Gillock*, 445 U.S. 360 (1980) (privilege denied for state legislators); *United States v. Nixon*, 418 U.S. 683 (1974) (privilege denied in part for communications between President and his senior advisors); *Couch v. United States*, 409 U.S. 322 (1973) (accountant-client privilege denied). See also *In re Grand Jury*, 103 F. 3d 1140, 1147 (3d Cir. 1997) (circuit court refuses to recognize parent-child privilege).

ARGUMENT

I. The Union File Is Relevant And Discoverable Under The Alaska Rules of Civil Procedure

Under the Alaska Rules of Civil Procedure, the state is entitled to seek Mr. Peterson's union file.[19] The Court has stated that "discovery should normally proceed without judicial participation . . . 'in a manner demonstrating candor and common sense.'"[20] Alaska courts have adopted "a system of liberal pretrial discovery where parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action.[21] And "relevance for purposes of discovery is broader than for purposes of trial."[22] Accordingly, "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[23] Mr. Peterson does not appear to argue that his union file is not relevant or discoverable, absent a privilege. [Exc. 034-085] And the union file is relevant to more than Mr. Peterson's failure to exhaust administrative remedies.[24]

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19 Alaska R. Civ. P. 26(b)(1).

20 *Langdon v. Champion*, 745 P.2d 1371, 1373 (Alaska 1987).

21 *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

22 *Lee v. State,* 141 P.3d 342, 347 (Alaska 2006).

23 Civil Rule 26(b)(1).

24 Every employment contract in Alaska is subject to the implied covenant of good faith and fair dealing. *Smith v. Anchorage Sch. Dist.,* 240 P.3d 834, 844 (Alaska 2010). While lacking a precise definition, the covenant "generally requires employers to treat

Moreover, pursuant to Alaska R. Civ. P. 45(d), the union could have lodged an objection to the extent of the state's subpoena. Had an objection been lodged, the state could have worked with the union to narrow its requests and avoid areas of concern to the union. If the state thought the union was not providing all the documents it could, the state could have sought redress in superior court.[25]

II. The Union File Is Not Subject To An Existing Privilege Or Joint Privilege

Union representation during the grievance process does not form an attorney-client relationship between the union representative and the member. Attorney-client privilege in Alaska is governed by Evidence Rule 503, which applies to communications between a client and a "lawyer or the lawyer's representative." Courts routinely refuse to extend the attorney-client privilege to union representation

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like employees alike and act in a manner that a reasonable person would regard as fair. *Mitchell v. Teck Cominco Alaska, Inc.,* 193 P.3d 751, 760 (Alaska 2008). Thus, one question for trial is whether the state treated Mr. Peterson fairly during the grievance process. Mr. Peterson's union file could lead to the discovery that some of Mr. Peterson's explanations for his failure to report felonies surfaced only during the grievance process and not before. [Exc. 094-097] Moreover, if Mr. Peterson made false or misleading statements to his union, the file could establish that Mr. Peterson is not a credible witness which is always at issue in a trial. [*Id.*] If there are other grievances in the file involving Mr. Peterson, they would tend to show bias of potential witnesses. [*Id.*] The State's request is merely intended to flush out and develop these factual issues for trial. [*Id.*]

[25] *See McCoy v. Southwest Airlines,* 211 F.R.D. 381, 384-385 (C. Dist. Cal. 2002)(where a non-party witness objects to the scope of discovery, the nonparty can prevent disclosure by objection and the party seeking discovery must then obtain an order from the court directing compliance).

because the relationship between a union and its members is not that of a lawyer and a client.[26]

The union represents several interests during the grievance process, not just the interest of the member bringing the grievance. Once an employee bargaining unit designates a union, the members of that bargaining unit agree that the union is the exclusive representative of all the unit members.[27] The union advocates for the individual member during the grievance process and is obligated to do so.[28] But at times, the union must sacrifice the interests of individual employees for the sake of the larger bargaining collective in a unionized workforce.[29] The betterment of the entire unit is at stake in each and every grievance,[30] including Mr. Peterson's grievance. The union maintains considerable discretion over grievance matters.[31] The union's duty

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[26] *See Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992) (refusing to apply attorney-client privilege to union representative because he was not an attorney). *Rawlings v. Police Dep't of Jersey City*, 627 A.2d 602, 609 (N.J. 1992) (same).

[27] AS 23.40.110(a)(5).

[28] *Kollodge v. State*, 757 P.2d 1028, 1034 (Alaska 1988).

[29] *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175-1176 (7th. Cir. 1995) *citing NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

[30] *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965); *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

[31] *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 (7th. Cir. 1995) *citing Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th. Cir. 1982). *See Tedesco v. City of Stamford*, 610 A.2d 574, 582-83 (Conn., 1992) *citing Winston v. United States Postal Service*, 585 F.2d 198, 208 (7th Cir. 1978) (The union has a duty to discountenance disruptive and frivolous claims).

to the membership is critical when it decides not to take a dispute with management to arbitration, which can be expensive for the union.[32] This is not an attorney client relationship.

In an effort to bolster his claim that his union representative is an attorney, Mr. Peterson distorts the state's role in "requiring" union grievance proceedings. Mr. Peterson argues that "the State requires the employee pursue a mandatory grievance process before he can file suit." [Pet. Br. 2] He goes on to argue "the State has explicitly and emphatically decreed that attorneys may not represent employees in Mr. Peterson's situation, but only union officials may do so." [Pet. Br. 7, 4, 9] The state employer is not forcing Mr. Peterson into the grievance process. The Alaska Legislature requires state agencies to enter into collective bargaining agreements providing grievance procedures.[33] The state is required to recognize the union as the member's exclusive representative at all times, and work exclusively with the union during the grievance process.[34]

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[32] *See Kollodge v. State*, 757 P.2d 1028, 1036 (Alaska 1988) (the union did not breach its duty to fairly represent the member when it decided not to arbitrate, given that after careful review, the union felt it did not have a strong chance of prevailing at arbitration).

[33] AS 23.40.240; AS 23.40.110(a)(5); *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 977 (Alaska 2002)(plurality).

[34] *Id. See also* AS 23.40.210(a). The legislature determined that these rules best serve the State of Alaska by engendering harmonious and cooperative relations between state employers and its employees.

Mr. Mertz's assistance of Mr. Peterson during the grievance process does not create a joint privilege between the union and Mr. Mertz either. [Tr. 020-021] The presence of union representatives at meetings between attorneys and clients destroys the attorney-client privilege.[35] Labor law disfavors the involvement of privately retained counsel in the grievance process because it bypasses the union and undermines the strength of the union's exclusive representation.[36] Furthermore, the union is not Mr. Mertz's agent.[37] Thus, communications Mr. Mertz had with the union are not subject to a privilege.

III. The Court Has Limited Authority Outside Of Rulemaking To Create New Privileges

Because Mr. Peterson's union file is not protected by the attorney-client privilege, only a newly created union testimonial privilege would prevent its disclosure in discovery.[38] No Alaska court has recognized such a privilege, and no other jurisdiction

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35 *Atwood v. Burlington Indus. Equity, Inc.*, 908 F. Supp. 319, 323 (M.D.N.C. 1995).

36 *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1484 (9th Cir. 1985) *citing Malone v. United States Postal Service,* 526 F.2d 1099 (6th Cir. 1975); *Johnson v. United Steelworkers of Am.*, 843 F. Supp. 944, 947 (M.D. Pa. 1994). *See McLean Hosp.*, 264 N.L.R.B. 459, 472 (1982) (Representation by private counsel is not tantamount to union representation and it is not considered a shared activity of the union and the attorney when they communicate).

37 *Cf. American Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333-1334 (Alaska 1982) (statement of facts given by a prospective client to an attorney's agent is protected by the attorney-client privilege. The union is not an agent of Mr. Peterson's private counsel).

38 *Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska, 2008).

has created such an extensive privilege in civil courts.[39] This Court should decline to create a union testimonial privilege given its decision to codify the law of privileges in Alaska and to stop creating new common-law privileges, coupled with the strong public policy reasons against such a new privilege.

A. The Court has already decided not to adopt new privileges as a matter of common law

This Court decided in 1979 to limit the creation of new common-law evidentiary privileges by codifying the law of privileges.[40] The Court hired Professor Stephen Saltzburg of the University of Virginia School of Law to work with local practitioners to codify Alaska's privileges.[41] This Court has not adopted a common-law privilege since this project.[42] Under Alaska law, the Court through its rulemaking

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[39] New York courts have arguably adopted the union testimonial privilege in limited circumstances during management investigations into employee wrongdoing. *Seelig v. Shepard* 152 Misc.2d 699, 699-700 (N.Y. Sup. Ct. 1991); *City of Newburgh v. Newman*, 70 A.D.2d 362, 365-66 (3d Dept. 1979) (neither case involved civil litigation).

[40] In the 1970's, there was nationwide debate whether to cap the number of privileges in state and federal courts, or whether to allow individual courts to fashion common law privileges. Congress, for instance, enacted Federal Rule of Evidence 501, a rule that leaves the recognition of testimonial privileges in the hands of the courts to be developed as part of common law. Symposium, *Giving Codification A Second Chance – Testimonial Privileges And the Federal Rules of Evidence*, 53 Hastings L.J. 769, 770; 790 (2002).

[41] Various back up documents to SCO 364 are illustrative of this process, and are attached as Appendix 1.

[42] The last common-law privilege was adopted in *Allred v. State*, 554 P.2d 411 (Alaska 1976) and it was the psychotherapist-patient privilege. *See B.H. v. State*, 1995 WL 17220341 (Alaska App. 1995) (unpublished opinion) (declining to adopt the parent-child privilege noting that new privileges should be adopted by changes to court rules).

function or the Legislature through statute balances the policy benefits of creating a new testimonial privilege against the threat that the new privilege will shield too much evidence from the trier of fact.[43] The Court will occasionally recognize more limited privileges but only if that recognition is required by a constitutional provision like the executive privilege doctrine.[44]

B. The Public and the Legislature must balance public policy when deciding the merits of this privilege

First, new testimonial privileges are disfavored because they suppress evidence and compromise the search for truth.[45] This is why the U.S. Supreme Court has repeatedly ruled against the recognition of new privileges beyond those already existing in common law.[46]

Beyond this, the legislature and the public must balance various interests when deciding the merits of a new privilege. Privileges create zones of silence which are disfavored.[47] And these zones of silence can have important unintended consequence to

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43 Symposium, *Giving Codification A Second Chance – Testimonial Privileges And the Federal Rules of Evidence*, 53 Hastings L.J. 769, 797 (2002). The Court should not consider the privilege under common law principles and instead await a proposal under its rulemaking function which allows for public comment under Administrative Rule 44(e).

44 *Doe v. Superior Court*, 721 P.2d 617, 622-623 (Alaska 1986); *Capital Information Group v. State*, 923 P.2d 29, 35-36 (Alaska 1996).

45 *Supra* note 18.

46 *Id.*

47 *Id.*

our society. For instance, anti-discrimination laws prohibit discrimination on the basis of sex, marital status, changes in marital status, pregnancy, parenthood, age, race, disability, color, or national origin.[48] The legislature expressly applied this prohibition to unions by making it unlawful for unions to aid and abet in such discrimination.[49] If the Court establishes a union testimonial privilege, the union would have to aid and abet a member's discriminatory conduct by keeping it secret unless the employee signs a waiver.[50] This would undermine Alaska's anti-discrimination laws.[51]

A union testimonial privilege would also undermine the significance of the grievance process, arbitration of labor disputes, and the principle of self-governing. Grievance procedures in collective bargaining agreements between unions and management are mandatory in the sense that they preclude the use of other judicial remedies[52] so that the labor disputes can be handled internally. And when grievance

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48 AS 18.80.220.

49 AS 18.80.260.

50 In *Am. Airlines Inc. v. Superior Court*, a plaintiff alleged that his union representative had information that would support his claims of racial discrimination. At deposition, the union representative refused to answer questions relevant to discrimination he had witnessed on the basis that his discussions with other employees about derogatory remarks were protected by a union representative-union member evidentiary privilege. The court denied the privilege noting that such a privilege could severely compromise investigations into claims of harassment, discrimination, and unlawful conduct. *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th, 881, 890 (Cal App. 4th 2004).

51 *Id.*

52 *Barnica v. Kenai Peninsula Borough School Dist.*, 46 P.3d 974, 977 (Alaska 2002)(plurality).

procedures have arbitration as a final step, that system promotes harmonious and cooperative government employer-employee relations.[53] The grievance process encourages the early resolution of disputes by discussion and conciliation before disputes escalate to unmanageable proportions.[54] For these reasons, courts typically give primacy to contractual grievance/arbitration clauses.[55] Mr. Peterson prevents the union and the state from weighing the merits of his grievance by not exhausting his administrative remedies, and he should not be allowed to withhold evidence of his failure to exhaust.[56]

C. Courts in other jurisdictions have sometimes created privileges by statutory implication but only if an underlying statute truly makes no sense absent a privilege

Sometimes courts recognize new privileges when their creation is implied in statute,[57] but the Alaska Legislature has not implied the creation of a union testimonial

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53 *Id.* at 978.

54 *Id.*

55 *Id.*

56 These policy concerns outweigh the unfounded concerns cited by Mr. Peterson. [Pet. Br. 24-28] First, Mr. Peterson is entitled to the state's internal documents if no privilege attaches. [Pet. Br. 27] Moreover, concerns over the privacy of collective bargaining strategies are unfounded. [Pet. Br. 27]. The union may petition the Alaska Labor Relations Agency (ALRA), a quasi-judicial executive branch agency, for redress if that were to occur. AS 23.40.110(a)(1);120-140. ALRA could issue a cease and desist letter, thereby prohibiting that conduct. *Alaska Comm. Colleges' Federation of Teachers, Local No. 2404 v. Univ. Of Alaska*, 669 P.2d 1299, 1305 (Alaska 1983). The union grievance proceedings will continue to function even if the union file is not subject to a privilege in subsequent litigation raised by the former employee. [Pet. Br. 28]

57 *Welfare Rights Organization v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983).

privilege in any statute. The Alaska Legislature at times creates civil court privileges and when it does so, its intention is crystal clear.[58]

Mr. Peterson relies on *Welfare Rights Organization v. Crisan*, a case in which a California court recognized a privilege as implied in statute.[59] The statute provided that an applicant for welfare benefits could be represented by counsel or by an "authorized representative" at an administrative hearing regarding the denial or termination of benefits.[60] In *Crisan*, the state subpoenaed the records of an authorized representative before the administrative hearing.[61] The California Supreme Court held that the subpoena request was improper because the statute creating the right to a hearing required, by implication, that communications with an authorized representative be privileged for purposes of the hearing.[62] *Crisan* did not establish a court privilege for such communications, only a privilege for purposes of the administrative hearing created by the statute.[63] And *Crisan* did not create a new evidentiary privilege as a matter of

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58 *See* AS 09.25.300 (public official or reporter privilege for official duties); AS 24.55.260 (ombudsman and their staff for official duties); AS 09.25.400 (domestic violence/sexual assault victim communications with counselors are subject to a privilege).

59 *Welfare Rights Organization v. Crisan*, 661 P.2d 1073, 1077 (Cal. 1983).

60 *Id.*

61 *Id.* at 1074.

62 661 P.2d 1073, 1077 (Cal. 1983).

63 *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th 881, 889 (Cal App. 4th 2004). The *Crisan* holding would be akin to creating a testimonial privilege for Mr. Peterson during the grievance process with the union.

judicial policy; rather, it held that the legislature impliedly created the privilege because the statute equated "authorized representative" with "counsel."[64]

Courts have rejected the extension of *Crisan* to labor relations laws because those laws do not equate union representation to counsel. In *McCoy v. Southwest Airlines*, plaintiffs in a civil wrongful termination suit sought the union testimonial privilege, arguing that a union representative is equal to a lay advocate.[65] The federal court correctly noted that it could not provide such a privilege in a civil proceeding absent a specific statute to that effect, like the one in *Crisan*.[66] The court made a fundamental distinction; when a statute equates lay advocacy to counsel, the legislature has created an unfair trap if it does not provide a privilege between the representative and the claimant.[67] But because no such inducements were present in the labor relations statutes in *McCoy* for purposes of civil litigation, the court did not recognize the privilege.[68] Similarly, in *Am. Airlines Inc. v. Superior Court*, the court held that even if a statute creates some form of representation, the statute does not create an evidentiary privilege in all forums.[69] The privilege has to be implied in the words of the

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64 *Id.*

65 *McCoy v. Southwest Airlines*, 211 F.R.D. 381, 387 (C. Dist. Cal. 2002).

66 *Id.*

67 *Id.*

68 *Id.*

69 *Am. Airlines Inc., v. Superior Court*, 114 Cal.App.4th, 881, 888

statute.[70] In *Crisan,* the statute expressly pertained to authorized advocates before a tribunal under a narrowly drawn legislative administrative hearing scheme.[71] On the other hand, labor relations statutes only have general declarations of public policy that employees have the freedom to designate representatives "to negotiate the terms and conditions" of employment.[72] That general language, the court reasoned, does not create any specific proceedings or hearings from which it can be inferred the existence of an all encompassing privilege.[73]

This Court should also decline to create a union testimonial privilege based on the reasoning in *Crisan*, because no Alaska statute equates union representatives with counsel.

(Cal App. 4th 2004).

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 890. The amicus advances a similar argument; that because union members must be free to engage in union activities under AS 23.40.110(a)(1) and because the Alaska Labor Relations Agency (ALRA) has the authority to curtail unfair labor practices, this Court may create a union testimonial privilege. [Am. Br. 2-3] Unlike in *Crisan*, PERA does not establish a statutory privilege, because it says nothing about lay advocacy or civil court privileges. AS 23.40.070-260. This Court interprets PERA under its plain meaning and cannot stretch its provisions to include the union testimonial privilege. *Univ. of Alaska Classified Employees Assoc, et. al. v. Univ. of Alaska*, 988 P.2d 105, 108 (Alaska 1999). Moreover, the amicus arguments were not made by Mr. Peterson to the trial court and have been waived. *Millette v. Millette,* 177 P.3d 258, 267 (Alaska 2008) ("It is well established that issues are waived for purposes of appeal if not adequately raised [in the trial court].").

IV. Other Jurisdictions Have Declined To Adopt The Union Testimonial Privilege

Courts sometimes find that communications between a union and its members are confidential within forums devoted exclusively to the resolution of labor-management disputes.[74] However, once the union concludes its representation and the member either pursues civil litigation or is summoned to a criminal court proceeding, courts find that the member cannot withhold evidence on the basis of a union testimonial privilege.[75]

The cases Mr. Peterson cites recognize a privilege only while the union is actively representing the member in a forum devoted to the resolution of labor-management dispute. [Pet. Br. 11-19] For instance, in *Cook Paint & Varnish Company*, a private employer sought details of the union steward's conversations with various employees shortly before the employee's grievance went to arbitration.[76] Unlike in *Cook Paint & Varnish*, in this case the state only subpoenaed the union file after the

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74 *See* Michael Moberly, *Extending A Qualified Evidentiary Privilege To Confidential Communications Between Employees And Their Union Representatives*, 5 Nev. L.J. 508, 568-569 (2004-2005).

75 *See e.g. Patterson v. Heartland Industrial Partners, LLP*, 225 F.R.D. 204, 207 (N.D. Ohio 2004)(rejecting the assertion of an "NLRA union privilege" during pretrial civil discovery); *In re Grand Jury Subpoena*, 926 A.2d 280, 284 (N.H. 2007)(rejecting a union privilege argument during a grand jury proceeding); *In Re Grand Jury Subpoenas Dated January 20, 1998*, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) (declining to create a new common law union testimonial privilege under Federal Rule of Evidence 501); *American Airlines Inc., v. Superior Court*, 114 Cal.App.4th 881, 889 (Cal App. 4th 2004) (rejecting the union testimonial privilege); *McCoy v. Southwest Airlines*, 211 F.R.D. 381, 387 (C. Dist. Cal. 2002) (same).

76 *Cook Paint and Varnish Company*, 258 N.L.R.B. 1230, 1231-32 (1981).

union refused to take the grievance to arbitration and after Mr. Peterson filed his lawsuit. Similarly, the other cases Mr. Peterson cites involve a request for information while the union still represented the member either in a forum devoted to the resolution of labor-management disputes or pursuant to a management investigation.[77]

Because the State did not request discovery from the union or Mr. Peterson during the grievance proceedings, the cases Mr. Peterson cites do not support the creation of a union testimonial privilege in this case.

V. Due Process Concerns Do Not Require A Union Testimonial Privilege

Mr. Peterson argues that due process requires this Court to create a union testimonial privilege. [Pet. Br. 20-24] This Court should decline to consider this argument because it was inadequately raised in the superior court; due process was so

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[77] *U.S. Department of Treasury*, 38 F.L.R.A. 1300, 1303 (1991) (employer sought a union steward's interactions with the member while the union was still representing the employee); *Int'l Bhd. Of Elec. Workers v. Pub. Util. Dist. 1*, Dec. 7656-A, 2003 WA PERC LEXIS 46 (Wash. Pub. Employment Relations Comm'n June 11, 2003) (employer made the request while a grievance was ongoing); *N.H. Troopers Ass'n v. N.H. Dept. of Safety*, PELRB Decision No. 94-74, 5 (August 31, 1994)(an employer committed an unfair labor practice by ordering union representatives to disclose information while the threat of disciplinary action and investigation remained); *City of Newburgh v. Newman*, 70 A.D.2d 362, 366 (N.Y.A.D. 1979) (The questioning of a union official as to his observations and communications with a member facing disciplinary proceedings was held to deter members from seeking advice, so the practice was banned); *Seelig v. Shepard*, 152 Misc.2d 703 (N.Y. Sup. Ct. 1991) (a New York trial court modified an administrative subpoena where the state employer had yet to take any action against a union member). *Ill. Educ. Labor Rel. Bd. v. Homer Cmty. Consol. Sch. Dist., No. 208,* 547 N.E.2d 182, 183-84; 186 (Illinois 1989)(The court, through a combination of statute and common law, ruled that collective bargaining strategy notes were subject to a privilege in a hearing before The Illinois Educational Relations Board).

under-briefed that Judge Pallenberg did not even address the argument in his ruling.[78] But even if this Court does consider the argument, it fails because there is no threat to Mr. Peterson's due process rights as he is being afforded a fair trial on his claims in superior court.

The Court employs the three-part balancing test from *Matthews v. Eldridge* for determining due process requirements.[79] First, the court considers the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[80]

The risk of erroneous deprivation of Mr. Peterson's employment interest if the privilege is not recognized is low.[81] Under the current procedures, Mr. Peterson has been afforded three important opportunities to be heard; all of which provide checks

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78 *Millette v. Millette*, 177 P.3d 258, 267 (Alaska 2008) ("It is well established that issues are waived for purposes of appeal if not adequately raised [in the trial court]."). *State v. Public Safety Employees Ass'n* --- P.3d ----, 2011 WL 3241866 (Alaska 2011) *citing Barnett v. Barnett*, 238 P.3d 594, 598 (Alaska 2010).

79 *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

80 *Id.*

81 Mr. Peterson does not have a right to state employment but he has a sufficient property interest in his state employment to evoke due process concerns. *Nichols v. Eckert*, 504 P.2d 1359, 1363 (Alaska 1973).

against erroneous deprivation. First, the state, the union, and Mr. Peterson held a pretermination meeting before the state terminated his employment. [Exc. 125] After that meeting, where Mr. Peterson was afforded an opportunity to be heard why he falsified the application, the state decided to terminate Mr. Peterson's employment. [*Id.*] Then, the grievance process ensued, further protecting against erroneous deprivations of Mr. Peterson's employment property interests.[82] Mr. Peterson had an opportunity to be heard and represent his interests through the less formal and less expensive grievance process, which is handled by his union.[83] Third, Alaska law places no impediment on an employee's right to obtain direct review of the employer's decision to terminate the employee even after the union fairly refuses to take the dispute to arbitration.[84] Thus, Mr. Peterson is afforded one last due process check to make sure the state did not violate the covenant of good faith and fair dealing in terminating his employment interest.[85]

The additional safeguard Mr. Peterson seeks — an evidentiary privilege — is not required by due process. Mr. Peterson, by filing this lawsuit, has put the union

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82 *See Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) (three-step grievance and arbitration procedure provided employee with due process).

83 *See Tedesco v. City of Stamford*, 610 A.2d 574, 582-83 (Conn., 1992).

84 *Casey v. City of Fairbanks,* 670 P.2d 1133, 1138 (Alaska 1983).

85 Under federal law, Mr. Peterson would never be able to assert his contract claims in a court of law unless the union breached its duty to fairly represent him during the grievance process. *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) (three-step grievance and arbitration procedure provided employee with due process); *Vaca v. Sipes,* 386 U.S. 171, 191 (1967).

grievance process squarely at issue.[86] The State is being sued for breach of good faith and fair dealing. [Exc. 001-008] One of the issues for trial is whether the state breached its duty of good faith and fair dealing during the grievance process, and the union file goes directly to this issue. [*Id.*] Additionally, the privilege sought would protect Mr. Peterson from his failure to exhaust his administrative remedies. The requested privilege is an attempt to obtain an advantage by keeping truth and evidence away from the trier of fact which is not an appropriate due process safeguard, especially after it is the employee who initiates this type of lawsuit; not the state.

Finally, under the third part of the *Matthews v. Eldridge* analysis, the Court must consider the Government's interest in not creating this privilege.[87] Contract claims require exhaustion of remedies.[88] If union members can evade the final stages of the grievance process, thereby depriving the state and the union a full opportunity to resolve a dispute, litigation costs will go up. Cases that could otherwise be disposed of at summary judgment will needlessly turn into jury trials where the union member's version of exhaustion will remain unchallenged to the trier of fact.

The risk of erroneous deprivation of Mr. Peterson's employment interest does not merit the creation of a new testimonial privilege in this case.

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86 *Supra* note 24.

87 *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009); *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976).

88 *Grant v. Anchorage Police Dept.*, 20 P.3d 553, 557 n. 16 (Alaska 2001) *citing Knight v. Am. Guard & Alert, Inc.* 714 P.2d 788, 791-92 (Alaska 1986).

The Government's interest in upholding the sanctity of the grievance process is a substantial factor weighing against this new privilege.

CONCLUSION

The Court should not create a new common-law privilege in order to keep relevant evidence away from the State. The Court should affirm the decision of the trial court below.

DATED this 21st day of September, 2011.

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