

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF
STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

-and-

SVFT, LOCAL 1797, AFT/CFST, AFL-CIO

-and-

SALVATORE DeFILIPPO, SR.

MAY 14, 1998

Case Nos. SPP-16,311
SUPP-16,312

APPEARANCES:

David Sullivan, Education Labor Relations Specialist
For the State of Connecticut
Department of Education

Attorney Barry Scheinberg
For SVFT, Local 1797, AFT/CFST, AFL-CIO

Salvatore DeFilippo, Sr., Pro Se
Complainant

PROCEDURAL ORDER REGARDING
COMPLAINANT'S MOTION TO COMPEL

On April 21, 1994, Salvatore DeFilippo, Sr. (the Complainant) filed separate but identical complaints with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the SVFT, Local 1797, AFT/CFST, AFL-CIO (the Union) and the State of Connecticut,

Department of Education (the Employer) had engaged and were engaging in practices prohibited by the Act Concerning Collective Bargaining for State Employees (the Act). Specifically, the Complainant alleged that the Union had breached its duty of fair representation and that the Employer had discriminated against the Complainant through harassment and wrongful termination. The cases were assigned Case Nos. SUPP-16,312 and SPP-16,311, respectively.

After the requisite preliminary steps had been taken, the parties appeared before the Labor Board for hearing on July 10, 12 and 13, 1995. At the July 12, 1995 hearing, the Complainant filed an Amended Complaint consolidating Case Nos. SPP-16,311 and SUPP-16,312.

On November 5, 1995, Complainant filed with the Labor Board a "Request for Production and Disclosure" directed to the Respondents. Complainant requested the Respondents produce and disclose the following material:

1. Complete File no. 90440050 from the Connecticut Human Rights of [sic] Complaint filed by Salvatore DeFilippo, Sr. including all correspondence and investigation reports.
2. Complete File no. 12-300-37-91 of the Grievant Salvatore DeFilippo, Sr. including all correspondence to and from the Labor Union Local 1797, Union Attorney Schineberg [sic], Grievant, including telephone call dates. All fees paid amounts paid and to whom paid.
3. Complete file from Labor Union Local 1797 including all correspondence, telephone dates, fees paid to whom and amounts to American Arbitration Association, Attorney Schineberg [sic], Grievant Salvatore DeFilippo, Sr. in reference to Grievant [sic] file no. 12-300-37-91.
4. Complete file and correspondence from Attorney Schineberg [sic] to Labor Union American Arbitration Association, Complainant and Peter Adomeit including Fees paid to whom amounts by whom, also telephone dates in reference to Grievants File 12-300-37-91.
5. Complete file, all correspondence, Telephone Dates, Fees paid, by [sic] to whom amounts to Local 1797, Attorney Schineberg [sic], American Arbitration Association and Grievant Salvatore DeFilippo Sr. from Arbitrator Peter Adomeit in reference to Grievants File 12-300-37-91.

On January 10, 1996 the Labor Board received the Union's response to the Complainant's Motion for Production and Disclosure, in which it raises numerous defenses to the disclosure of the requested materials. On February 9, 1996, the Complainant filed a "Motion to Compel" with the Labor Board, claiming that the Employer had not responded to his request

for documents and that the Union's response did not produce any documentation or information that the Complainant was seeking.

Before the Labor Board addresses the propriety of the materials requested by the Complainant, we note that there is no general right to engage in discovery before the Labor Board and, as such, there are no rules for disclosure contained in the Act or the related regulations. However, pursuant to section 5-273-56 of the *Regulations of Connecticut State Agencies*, the Labor Board is authorized to direct the production of papers or documents and to introduce into the record such papers or documents as the Labor Board determines may be necessary for a fair determination of the issues presented. In this case, we examine each of Complainant's requests to determine if any of the documents may be considered reasonably necessary to a fair determination of the case. In doing so, we consider questions of relevance and privilege.

The requested records and documents can be summarized as follows:

- (1) The Respondents' complete files concerning Case No. 9040050 filed with the Commission on Human Rights and Opportunities (CHRO), including but not limited to, all correspondence, notes, investigative reports, and records by or between the Union, the Employer, the Complainant or the CHRO.
- (2) The Respondents' complete files concerning Grievance No. 12-300-37-91, including all correspondence, notes and records, including phone records and bills for services, by or between the Union, the Employer, the Complainant, the American Arbitration Association (the AAA) and Arbitrator Peter Adomeit that concern or relate to the grievance.¹

As to the documents and records identified in paragraph (1) above, we find the information and materials requested may likely contain relevant and admissible evidence in the case before the Labor Board and consequently, can be considered necessary to a fair determination of the issues presented to the Labor Board. The CHRO file and related material will likely contain information regarding the Employer's reasons for Complainant's termination.

The Union, in its objection to the production request, represented that it has no such information in its possession because it was not a party to the proceedings, nor was it in any way involved in the case before the CHRO. It is axiomatic that a party cannot produce what it does not have in its possession or control. We find the Union's response to be full and adequate with regard to these materials.

¹ Although not specifically stated, it stands to reason that this request encompasses all materials related to or utilized in all steps of the grievance process, not simply the case before the AAA.

The Employer has not provided any response to the Complainant's request, but it was the responding party in the CHRO case at issue and is likely to be in possession of records pertaining thereto. The Labor Board hereby directs the Employer to produce any records in its possession as identified in paragraph (1) on page 3 herein, that are not subject to attorney/client privilege, in the manner provided for at the end of this order.

As to the documents and records identified in paragraph (2) on page 3 herein, we find that the portion of the information requested that is not protected by privilege may be necessary to a fair determination of the duty of fair representation issue before the Labor Board as well as the issue of illegal discrimination by the Employer.

The Union has already provided the following information:

--A filing fee of \$125.00 was paid by the Union on behalf of the Complainant relating to the grievance complaint.

--The Union compensates its attorney based on an annual retainer, without specific fees related to any one activity.

The Union further represented that it was not involved in the pursuit of the Complainant's grievance before the AAA and possesses no file documents, records or correspondence regarding this proceeding other than those presented to the Labor Board as exhibits marked for identification (Exhibits 45, 49, 50, 51 and 52). Finally, the Union objected to the disclosure of the remaining information as privileged and confidential.

The Union asserted that correspondence and communications between the Union and its attorney are not subject to disclosure because they constitute confidential communications protected by the attorney/client privilege. We agree. The common law rule of privileged communications has been stated as follows: "Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his insistence permanently protected from disclosure by himself or by the legal advisor." 8 *Wigmore, Evidence* §2292, p. 554 (McNaughton Rev. 1961). Although the attorney/client privilege has not been codified in Connecticut statutes, the common law rule has been upheld in Connecticut courts, *Rienzo v. Santangelo*, 160 Conn. 391, 395, 279 A.2d 565 (1971); *Bersani v. Bersani*, 41 Conn. Sup. 252 (1981), and set forth in the rules of court at § 1.6(a) of the *Connecticut Rules of Professional Conduct*². Administrative

² Rule 1.6(a) provides:

"A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (a), (b), (c) and (d)." (The exceptions referred to in paragraphs

proceedings are subject to the same testimonial privileges as judicial proceedings. *McMann v. SEC*, 87 F.2d 377,278 (2nd Cir. 1937). Under § 1.13 of the *Connecticut Rules of Professional Conduct*, when an attorney represents an organization, such as a union, the attorney is primarily responsible and obligated to represent the organization, not the individual members of that organization. In this case, Attorney Scheinberg primarily represented the Union, not the Complainant. This is so even though Scheinberg may have acted on behalf of the Complainant and the Union during the grievance proceedings where their interests were the same. *Griesemer v. Local 1393*, 103 LRRM 3039 (E.D.Pa. 1980). Therefore, all communications made in confidence between the Union and Attorney Scheinberg are protected from disclosure by § 1.6 of the *Connecticut Rules of Professional Conduct*.

The Labor Board finds all remaining correspondence, records, documents and notes described in paragraph (2) on page 3 herein, to be relevant and discloseable. It appears that the Union directed its response concerning these materials to documents pertaining to only the arbitration proceedings before the AAA, a small portion of the grievance process. Since we find that the request is directed to the entire grievance proceeding and that the information in that process is relevant to the issues presented to this Labor Board, we hereby direct the Union to disclose all records and documents identified in paragraph (2) on page 3 herein, except those items protected by the attorney/client privilege, as discussed above. What has already been introduced as evidence need not be reproduced.

The Employer is also directed to produce all records and documents identified in paragraph (2) on page 3 herein, which are not protected by the attorney/client privilege as specifically set forth in the following order.

ORDER

By virtue of the power vested in the Connecticut State Board of Labor Relations by the State Employee Relations Act, is hereby **ORDERED** that the Union and the Employer produce the following documents, subject to the attorney/client privilege, as applicable:

(1) The Employer's complete files concerning Case No. 9040050 filed with the Commission on Human Rights and Opportunities (CHRO), including but not limited to, correspondence, notes, investigative reports, and records by or between the Union, the Employer, the Complainant or the CHRO.

(2) The Union's and the Employer's complete files concerning Grievance No. 12-300-37-91, including correspondence, notes and records, including phone records and bills for services, by or between the Union, the Employer, the Complainant, the American Arbitration Association (the AAA) and Arbitrator Peter Adomeit

(a)(b)(c) and (d) involve instances where criminal acts are contemplated by the client or the attorney.)

that concern or relate to the grievance, including, but not limited to all materials related to or utilized in all steps of the grievance process.

The Union and the Employer are directed to produce all documents and information to the Labor Board at its office located at 38 Wolcott Hill Road, Wethersfield, Connecticut on or before the sixtieth (60th) day following the date of issuance of this order.

Upon request, the Labor Board will make all documents and information available to the parties for inspection and copying at a mutually convenient time. The formal hearing regarding this matter shall resume not earlier than thirty (30) days following production of the above described documents.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Antonia C. Moran
Antonia C. Moran
Chairman

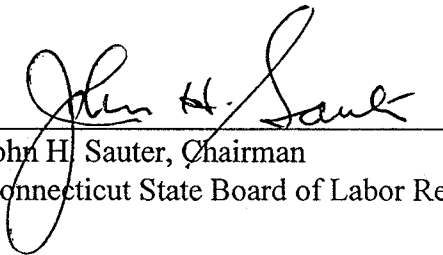
CERTIFICATION

I hereby certify that the foregoing was mailed postage prepaid on this 14th day of May, 1998 to the following:

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John H. Sauter, Chairman
Connecticut State Board of Labor Relations