SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

In the Matter of quashing the subpoena duces tecum served upon JOSEPH D. HILL,

Petitioner,

In the Matter of the Investigation by ANDREW M. CUOMO, Attorney General of the State of New York, relating to Certain School Districts,

Respondent.

DECISION/ORDER

Index No. 08-3209
RJI No. 55-08-01095

HON. MARY M. WORK
Assigned Justice

APPEARANCES:

ROEMER, WALLENS & MINEAUX LLP
By: JAMES W. ROEMER, ESQ.
Attorneys for Petitioner

DEGRAFF, FOY, KUNZ & DEVINE, LLP
By: DAVID F. KUNZ, ESQ.
Attorneys for Petitioner, Joseph D. Hill

HON. ANDREW M. CUOMO
ATTORNEY GENERAL OF NEW YORK STATE
By: DARCY M. GODDARD, ASSISTANT ATTORNEY GENERAL
By: DOUGLAS J. GOGLIA, ASSISTANT ATTORNEY GENERAL
Attorneys for Respondent

WORK, M., J.

Petitioner Joseph D. Hill moves pursuant to CPLR § 2304 for an order quashing respondent Andrew M. Cuomo's Subpoena Duces Tecum.

Respondent urges that each of petitioner's legal arguments were fully considered and rejected in a prior decision that denied a motion to quash filed on behalf of similar individuals. In the Matter of quashing the subpoena duces tecum served upon John B. Hogan, Index No. 3626-08 (NY Sup Ct. September 12, 2008, Connolly, J.).

The motion now before the Court was the subject of an application by the Attorney General to have it removed to Albany County pursuant to CPLR 602(b) to be decided by the

same judge who had been assigned the John B. Hogan matter. That application was denied by Justice Connolly, who stated in his decision, signed on September 12, 2008:

> The law requires that some factual basis be demonstrated to support a subpoena. In Myerson v. Lentini Bros. Moving and Storage Co., 33 NY2d 250, 256 [1973], the Court of Appeals stated, in pertinent part, that the agency asserting its subpoena power must show ". . . some basis for inquisitorial action," (*citing* to A'Hearn v. Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn., 23 NY2d 916 [1968]), though this showing does not need to reach a level of probable cause.
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> Based upon a review of the record and in the Court's discretion, the Court denies petitioners' instant motion. As noted by petitioners, each determination by the Court with respect to the motions to quash require an individual analysis of the admittedly separate factual bases of and separate circumstances surrounding the individual subpoenas and, while recognizing that common questions of law may exist among the motions, as each motion to quash will necessarily involve different questions of fact, the Court will not exercise its discretion to remove the instant motion to this Court.

The Court has thoroughly reviewed the decision of Justice Connolly and notes that the facts underlying his decision are significantly different than those that are now before this Court. He considered the issue of factual predicate for his decision in the following language:

> In the instant application, Applicant alleges that the Attorney General has no factual basis for the issuance of the instant subpoena. In the Affirmations of Assistant Attorney General Darcy Goddard[7], the Attorney General has enunciated, *inter alia*, the following bases[8]:

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[7]The Court notes that it has considered the supplemental affirmation from the Attorney General's Office which was filed more than a month after the initial submission of the Attorney General's opposition to the instant motion. The Court also notes that it has considered the Applicant's statute of limitations arguments which were submitted for the first time in the Applicant's opposition to the Attorney General's supplemental affirmation.

[8]The Court notes that the enunciated factual basis includes the Supplemental Affirmation of Darcy Goddard, dated June 27, 2008, which incorporates the factual allegations contained in the Assurance of Discontinuance. Though, as noted, the Settling Partners did not specifically adopt the factual allegations contained in the Assurance at paragraphs 1-11 and 18-19, Ms. Goddard's Supplemental Affidavit references such "findings" as additional details relevant to the Attorney

(i) the Applicant maintained a private practice of law while "employed" by various school districts;

(ii) the Applicant was simultaneously reported as a full time or part time employee by multiple school districts while maintaining a full time law practice;

(iii) that Applicant's law partners ("Settling Partners") have entered into an "Assurance of Discontinuance" of an investigation premised upon generally the same facts and circumstances of the instant investigation, wherein the settling partners have agreed to take all steps necessary to effectuate the rescission of all pension credits that they accrued through State of New York Employees' Retirement System, pay the State $100,000 and cooperate fully in the Attorney General's investigation and any civil or criminal prosecution of Applicant;

(iv) that in 1993 Applicant, in a letter to the Chenango Forks Central School District regarding his "employee" relationship there, suggested that said district continue to give his Firm a "retainer" which would be paid to Applicant in the form of salary, contributions for retirement and Social Security and Health Insurance, and that if payment in such form were not acceptable, the retainer amount required by his firm would increase;

(v) that in or around 1987, Sherburne Central School District agreed to pay Applicant a "salary" on behalf of numerous school districts as part of a "Legal Services Alliance" arranged by Applicant, pursuant to which Applicant sent a letter to the Superintendents of the school districts noting that they had ". . . graciously agreed to modify the retainer to name me individually as the attorney for the school district and pay the retainer directly to me as an employee." Applicant's employee "salary" from each of the individual school districts pursuant to said agreement was $6600.00 per year;

(vi) that in or around 1992, Hancock Central School District agreed to include Applicant on its payroll as a putative "employee" in connection with another "Legal Services Alliance" of school districts arranged by Applicant. Applicant's "salary" from

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General's factual predicate, and such "findings" will thus be considered by the Court, to the extent they constitute more than unsupported factual allegations by the Attorney General.

such alliance, as paid by the Hancock Central School District on behalf of all participants, was approximately $43,000.00 per year. This "salary" for Applicant was reported by the Hancock Central School District to the New York State Employees' Retirement System;

(vii) that at Applicant's suggestion, he was retained as an independent contractor to perform the same work, by at least one of the school districts on the day after his "retirement," for purposes of the New York State Employees' Retirement System, and

(vii) that Applicant and the Settling Partners had acted as independent contractors with the School Districts and BOCES, as there was no supervision, control or direction of how any of the attorneys performed their work, as there were no dedicated offices or staff at the "employers" for the attorneys, and as the "employers" did not set fixed hours for any of the attorneys to conduct their legal work.

To the extent that this decision does not follow the legal reasoning of the Hogan matter, the Court notes that the decision of a concurrent court is not binding on this Court. (Siegel, NY Practice, 4th Ed. §449, p. 758).

Those subject to a non-judicial subpoena duces tecum may always challenge the subpoena in court pursuant to CPLR § 2304 on the ground that the subpoena calls for irrelevant or immaterial documents or subjects the witness to harassment (Myerson v. Lentini Bros. Moving & Storage Co., Inc., 33 N.Y.2d 250, 256 [1973]). Such challenges rest on the ancient law that governmental agencies may not conduct an unlimited and general inquisition into the affairs of persons within their jurisdiction solely on the prospect of possible violations of law being discovered, especially when such inquisition involves issuing subpoenas duces tecum (Matter of Levin v. Murawski, 59 N.Y.2d 35, 40 [1983]; Matter of A'Hearn v. Committee on Unlawful Practice of Law of New York County Lawyers' Assn., 23 N.Y.2d 916, 918 [1969]). Notwithstanding the broad statutes that empower the Attorney General to conduct investigations, even the Attorney General does not have an arbitrary and unbridled discretion as to the scope of what is investigated (Matter of A'Hearn v. Committee on Unlawful Practice of Law of New York County Lawyers' Assn., 23 N.Y.2d 916, 918 [1969]).

Petitioner is seventy-eight years old, retired from state service in 1988, and, in1991, successfully applied to the Employee Retirement System (ERS) for retirement benefits. Petitioner has been receiving those benefits since 1991. Petitioner asserts that the information upon which he was granted retirement was provided by his employers. The facts underlying his application for, and receipt of benefits were undisputed by the Attorney General. They were set forth in petitioner's affirmation in support of the motion to quash in paragraphs 4 through 12. Petitioner stated:

> 4. In the early 1950's I was employed in the New York State Legislative Office of Majority Leader Arthur Wicks as a part-time legal research assistant. For my employment with that Office I received two (2) full years of credit in the New York State and Local Employees' Retirement System (ERS).
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> 5. I was enrolled in the retirement system in 1961 by my then-employer when I was employed as a part-time confidential law clerk to Supreme Court Justice Louis Bruhn. I was employed in that capacity until 1968. At the time, I was employed on an annual salary of $9,869.53 and was enrolled as a member of Tier I.
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> 6. In or about 1970, I was appointed as an employee of the Kingston City School District to the part-time annually salaried position as school attorney. I served in that capacity until approximately 1974.
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> 7. In or about 1977, I was appointed as an employee of Ulster County BOCES to the part-time annually salaried position as school attorney. I only rendered services to BOCES and did not render services to constituent school districts and thus, BOCES did not reimburse the constituent school districts. The annual salary at the time of my appointment was approximately $2,400.00 per year.
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> 8. I remained an employee of BOCES until approximately 1988. My annual salary during the last year of my employment was $7,600.
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> 9. During the time period of 1977 through 1988, I was also engaged in the private practice of law as a sole practitioner with an office located in Kingston, New York.

10. I left my BOCES employment in 1988 and did not perform any further work for the BOCES.

11. Approximately three years after my retirement, I submitted an application for retirement to the New York State and Local Employees' Retirement System (ERS). The Comptroller accepted my application and deemed me retired effective June 28 ,1991. Thereafter, I began receiving monthly benefits from the ERS.

12. I continue to receive a monthly benefit for my retirement from the Comptroller. Neither the Comptroller nor the ERS have taken steps to diminish or impair my constitutionally protected right to receive the benefits from my membership in the retirement system. For the calendar year 2007, I received a total net yearly benefit of $6,039.40.

Petitioner urges that respondent is abusing respondent's subpoena powers to investigate fraudulent conduct pursuant to Executive Law § 63(3) & (12) and State Finance Law § 190. Petitioner claims that respondent has no reasonable belief that petitioner committed fraud and knows that petitioner cannot be successfully charged, much less prosecuted for fraud based on events that transpired twenty to thirty years ago. Petitioner charges that respondent is attempting to use counterfeit criminal claims as a pretext for coercing petitioner and other professionals who have worked part-time for municipalities to give up their retirement benefits, enter into civil settlements, and pay penalties simply in order to end respondent's baseless harassment. Petitioner further asserts that the supposedly criminal subpoenas have been served more than 17 years after the initial determination for the improper purpose of reopening, reinvestigating, and stripping away petitioner's retirement by retroactively applying respondent's opinion that part-time professionals should be prohibited from receiving any retirement benefits.

When a subpoena is challenged, the respondent public agency or officer asserting subpoena power must meet three simple requirements to earn the courts' approval of the subpoena: there must be authority, relevancy, and some basis for inquisitorial action (Matter of A'Hearn v. Committee on Unlawful Practice of Law of New York County Lawyers' Assn., 23 N.Y.2d 916, 918 [1969]). While courts often focus on a single requirement, the Court notes that

these three requirements are inevitably linked to the challenged subpoena as well as to each other. For example, where the issue being adjudicated is whether the respondent possesses "authority" to issue a particular subpoena to an individual, in addressing the "authority" requirement, the courts will find that the respondent has statutory authority to issue the particular subpoena to the particular recipient because the respondent's actions are a reasonably relevant part of conducting a reasonable investigation of a matter for which the respondent has both authority and a reasonable basis to investigate (Matter of Reckess v. New York State Com'n on Quality of Care for the Mentally Disabled, 7 N.Y.3d 555 [2006]). Similarly, the second and third requirements confirm that the respondent is acting within the proper scope of its "authority" by seeking items that are reasonably related to the subject matter under investigation, as well as showing that there is both a reasonable public purpose for the underlying investigation and that there is a factual basis underlying the investigation (Matter of Levin v. Murawski, 59 N.Y.2d 35, 40 [1983]; Myerson v. Lentini Bros. Moving & Storage Co., Inc., 33 N.Y.2d 250, 256 [1973]; Matter of A'Hearn v. Committee on Unlawful Practice of Law of New York County Lawyers' Assn., 23 N.Y.2d 916, 918-919 [1969]; Matter of La Belle Creole Int., S.A. v. Attorney General of State of NY, 10 N.Y.2d 192, 196 [1961]).

Given petitioner's charge that the subpoena issued by respondent is an abuse of process, the third requirement is clearly of the most interest. As noted previously, governmental agencies abuse their subpoena powers when they employ subpoenas as a means for conducting a "fishing expedition" into the affairs of a person within their jurisdiction solely on the prospect of possible violations of law being discovered. The courts will quash subpoenas seeking information that is "utterly irrelevant to any proper inquiry" Matter of La Belle Creole Int., S.A. v. Attorney General of State of NY, 10 N.Y.2d 192, 196 [1961]) or where "the futility of the process to uncover anything legitimate is inevitable or obvious" (Matter of Edge Ho Holding Corp., 256 NY 374, 382 [1931]). It goes without saying that the courts will not hesitate to quash subpoenas that are an abuse of process for the purpose of coercing conduct that the agency has no legitimate basis requesting or for some other improper purpose.

Respondent purports to have issued the subpoena in question as part of his investigation into fraudulent employment arrangements and pension fraud committed by petitioner based on

complaints received from state and local officials. Nevertheless, it is clear that the alleged complaints are not sufficient and respondent's subpoena to petitioner is utterly irrelevant to any proper criminal inquiry and cannot possibly net any possible violation of law or legitimate basis for prosecution. Instead of addressing the alleged "complaints," the Court begins by noting the utter unlikelihood of any valid prosecution for fraud. Respondent attempts to avoid the applicable statutes of limitation by urging that petitioner could be guilty of a continuing crime based upon continuing to receive a pension. While the Court does not dismiss the theoretical possibility of such a prosecution, the Court notes that respondent cites no case in which a "continuing fraud" consists solely of the receipt and cashing of pension checks that are intentionally directed to the defendant.

Acknowledging for the purposes of the argument that a fraud prosecution is theoretically possible, the Court notes that to be successful the authorities would be required to establish that the retiree intentionally provided false information when applying for the pension or conspired with someone else to provide false information that served as the basis for ERS determining the retiree's eligibility for benefits. Notwithstanding the fact that respondent already possesses the records of both the ERS and Ulster County Board of Cooperative Educational Services (Ulster BOCES), respondent has failed to point to any incorrect factual statement contained in any document prepared by petitioner or Ulster BOCES, much less a possibly fraudulent statement.

The Court rejects respondent's suggestion that even in the absence of fraudulent conduct, petitioner should be punished for not realizing that he could not be an "employee" of Ulster BOCES or Kingston CSD when he only worked part-time and also had a private legal practice on the side. Respondent has failed to present any legal support for that proposition. There is also no factual support for respondent's position because respondent has failed to present the Court with any evidence of ERS's rules during the 1970's, 1980's, or 1990's, much less establish that ERS had adopted a position that barred all part-time professionals who also had outside employment. Contrary to respondent's claim that the law was settled against part-time employment, it is apparent that ERS was knowingly awarding service credit to attorneys who, like petitioner, were part-time municipal employees with outside legal practices based on the years of service reported by their employers (Matter of Young v. McCall, 253 A.D.2d 997 [3rd Dept., 1998]).

The Court next rejects respondent's effort to blur the line between a criminal investigation and an administrative initiative to review old decisions. Respondent attempts to distract attention from the absence of any fraud, false statements, or other criminal conduct by petitioner that would justify a criminal investigation by substituting the possibility that there was an administrative error. Respondent declares that "the fundamental inquiry of this investigation [is] whether Hill was properly classified as an 'employee' when he provided legal services to Ulster BOCES or Kingston CSD." Respondent also declares that there are facts that have led respondent "to believe that Hill may not have been a true 'employee,' as opposed to outside retained counsel, of either Ulster BOCES or the Kingston CSD." Respondent's purported belief that an error was made by ERS in 1991 does not justify the subpoena. Respondent's belief that petitioner did not meet the requirements for being a true employee is not the equivalent of a reasonable belief that petitioner committed fraud in applying for retirement benefits. The question of whether ERS's 1991 determination was correct is not a criminal matter and does not justify respondent's use of his subpoena powers.

The Court returns to the question of the "complaints" that allegedly spurred respondent's investigation. It has been held in cases in which improper conduct warranting investigation is possible that there also needs to be some basis for concluding that improper conduct actually occurred. Although a respondent is not required to demonstrate probable cause in order to meet the third requirement, a subpoena will be upheld by the Court only if there is a minimal threshold foundation establishing that the complaint underlying the investigation is authentic and that it is of sufficient substance to warrant investigation (Matter of Shankman v. Axelrod, 73 N.Y.2d 203, 207 [1989]; Matter of Levin v. Murawski, 59 N.Y.2d 35, 38 [1983]). The minimal threshold foundation necessary to establish the validity of the complaint underlying an investigation of the recipient of a subpoena is not as insubstantial as respondent supposes (Matter of Levin v. Murawski, 59 N.Y.2d 35, 40-41 [1983]; citing Matter of Nicholson v. State Comm. on Judicial Conduct, 50 N.Y.2d 597 [1980] [subpoena upheld where issued on written complaint by attorney together with a formal administrator's complaint and after an ex parte

judicial hearing to determine the basis for the investigation]; Matter of Napatco, Inc. v. Lefkowitz, 43 N.Y.2d 884 [1978] [subpoena quashed where issued on basis of advertisement and form solicitation letter]; Matter of Sussman v. New York State Organized Crime Task Force, 39 N.Y.2d 227 [1976] [subpoena quashed where no basis shown]; Myerson v. Lentini Bros. Moving & Stor. Co., 33 N.Y.2d 250, 259 [1973] [subpoena "of the broadest possible dimensions" quashed where only basis was receipt of "numerous complaints" not otherwise authenticated]; Matter of A'Hearn v. Committee on Unlawful Practice of Law of NY County Lawyers' Ass'n, 23 N.Y.2d 916 [1969] [subpoena upheld on bare showing of basis for committee's inquiry]).

Given that petitioner appears to have committed no fraudulent act, it is not surprising that respondent did not receive any substantial complaint of fraud committed by petitioner. Respondent alleges first that "the State Commissioner of Education referred this matter to OAG for criminal investigation and possible prosecution" and then that "the Ulster County Board of Cooperative Educational Services ['Ulster BOCES' or 'BOCES'] brought Petitioner Joseph D. Hill to the attention of OAG, stating that, although he was a private sector attorney at the time, Hill had been listed as an 'employee' of the Ulster BOCES from 1977 to 1988." In point of fact, there is no evidence that the Commissioner of Education even indirectly mentioned petitioner. Ulster BOCES certainly did not file a complaint against petitioner when it responded to respondent's subpoena asking for information regarding Ulster BOCES's part-time employees who also engaged in outside legal practice. In any event, the Commissioner of Education's and Ulster BOCES's communications with respondent did not contain sufficient substance to warrant an investigation of petitioner.

Respondent has failed to meet his burdens of establishing that there is a reasonable public purpose and a factual basis for investigating petitioner. Accordingly, petitioner's application is granted and respondent's subpoena is quashed.

This constitutes the decision and order of the Court. All papers, including this decision and order, are returned to the attorney for petitioner. The signing and mailing of this decision

and order to counsel shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

DATED: March 10, 2009
Kingston, New York

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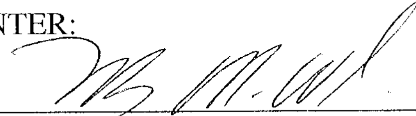

HON. MARY M. WORK
Acting Supreme Court Justice

Papers considered:

1. Notice of motion to quash a subpoena duces tecum dated June 26, 2008.

2. Affirmation in support of Joseph D. Hill dated June 25, 2008, together with Exhibits A and B annexed thereto.

3. Affirmation in support of James W. Roemer, Jr., Esq. dated 26, 2008, together with Exhibits A through E annexed thereto.

4. Memorandum of law in support of motion dated June 26, 2008.

5. Affirmation in opposition of Darcy M. Goddard, Esq. dated September 26, 2008, together with Exhibits A through C annexed thereto.

6. Memorandum of law in opposition to motion dated September 26, 2008.

7. Reply affirmation of Earl T. Redding, Esq. dated October 1, 2008.

8. Petitioner's reply memorandum of law dated October 1, 2008.