

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of quashing the subpoena duces tecum
served upon JOHN B. HOGAN,

In the Matter of the

DECISION AND ORDER
Index No. 3626-08

Investigation by ANDREW M. CUOMO, Attorney
General of the State of New York, relating to

Certain School Districts

Supreme Court, Albany County,
Justice Gerald W. Connolly, Presiding

APPEARANCES:

DeGraff, Foy & Kunz, LLP
George Szary, Esq.
David F. Kunz, Esq.
90 State Street
Albany, NY 12207

Roemer Wallens & Mineaux LLP
James W. Roemer, Esq.
13 Columbia Circle
Albany, NY 12203

Hon. Andrew Cuomo
Attorney General of the State of New York
Attorney for Respondent
Darcy M. Goddard, Esq. - Asst. Attorney General
Douglas J. Goglia, Esq. - Asst. Attorney General
The Capitol
Albany, New York 12224-0341

Connolly, J.:

Before the court is the Application of John B. Hogan ("Applicant") for the quashing of a subpoena served in the matter of the Investigation by Attorney General Andrew W. Cuomo relating to certain school districts. The subpoena commands that, "...pursuant to the laws of the

State of New York including New York Executive Law §63 (12) and New York Finance Law §190 ["False Claims Act"]...", Applicant produce a broad spectrum of documents concerning his employ and/or business and financial relationships over the course of his professional career, particularly concerning his employ and compensation while with his law firm, Hogan Sarzynski, and for various School Districts he worked for over the course of his career.

The Applicant, an attorney with a practice in Binghamton, New York, was an attorney for several school districts in the Binghamton area throughout his career beginning in 1967, and began collecting pension benefits from the New York State Retirement System based upon such employ in January, 2000. He brings the instant Application on the grounds, *inter alia*, that the challenged subpoena is overbroad, violative of principles of both statutory limitations and equity, vague and unduly burdensome, and without sufficient and supportive factual predicate.

The Attorney General opposes the application, averring that the subpoena was issued in the context of an investigation into potentially fraudulent employment arrangements and pension fraud relating to public school systems and certain lawyers and pursuant to the statutory authority of: (i) a request from the Commissioner of Education pursuant to Executive Law §63 (3); (ii) Executive Law §63 (12) and, (iii) New York State Finance Law Section 190 ("False Claims Act"). The Attorney General states that preliminary investigation has revealed that Applicant was listed as a putative employee of multiple public school districts simultaneously at various times during the years 1967-2000, while also maintaining a separate full-time private law practice. Applicant, according to the Attorney General, upon the aggregation of his numerous annual public salaries, had a final average salary (for computation of his state funded pension) of \$138,693.46 annually, in addition to whatever monies he collected in connection with the

aforementioned private practice. The Attorney General argues that the April 3 subpoena is tailored to the circumstances of the instant investigation, which, of necessity, requires extensive information regarding the financial arrangements, hours and work performed for all relevant entities, both private and public.

Applicant's Claims

Applicant alleges that the instant subpoena should be quashed as: (i) the Attorney General is without authority to investigate allegations involving New York State retirement benefits unless in receipt of a request pursuant to New York State Executive Law §63 (3) from the New York State Comptroller; (ii) any investigation into alleged fraud or illegality pursuant to Executive Law §63 (3) or (12) is time barred; (iii) any investigation into offenses referenced in the False Claims Act is time barred, or void as the False Claims Act is not retroactive, and the alleged acts occurred prior to the effective date of same; (iv) there is insufficient factual predicate for the issuance of the subpoena; and (v) the subpoena is overbroad, vague and unduly burdensome.

Executive Law §63 (3) and Exclusive Authority of the Comptroller

The authority of the Attorney General to prosecute fraud or other wrongdoing is circumscribed by statute, and the Attorney General can only conduct criminal investigations in areas where it has specific statutory authority to do so (*see People v. Romero*, 91 NY 2d 750 [1998]). The Attorney General has not received a request from the Comptroller pursuant to §63 (3) for an investigation into the within alleged abuses of the statewide pension system, though it has received such a request, dated February 19, 2008, from Richard Mills, State Commissioner of Education.

Executive Law §63 (3) provides:

“upon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of insurance, superintendent of banks, commissioner of taxation and finance, commissioner of motor vehicles, or the state inspector general, or the head of any other department, authority, division or agency of the state, investigate the alleged commission of any indictable offense or offenses in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department, and to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both, including but not limited to appearing before and presenting all such matters to a grand jury.”

The subpoena at issue, on its face and via the submissions and arguments of both sides, clearly requests information relevant to the work and remuneration of Applicant during his time with various school districts and BOCES. The Commissioner of Education’s oversight responsibilities for the operation of schools (Education Law §305) confers a connection to, and legitimate interest in, any alleged systemic fraud being perpetrated upon such entities to the detriment of said entities’ finances and responsibilities. As such, the subpoena has been issued under valid statutory authority unless Applicant’s argument that the State Constitution vests exclusive authority to administer the Retirement and Social Security Law in New York State in the State Comptroller (*citing, inter alia, Campanelli v. McCall*, 288 AD 2d 680 [3rd Dept. 2001]), to the preclusion of 63(3) request authority of other interested designees, is correct.

Applicant argues that Retirement and Social Security Law §74(b), which grants the Comptroller “...exclusive authority to determine all applications for any form of retirement or benefits provided for in this article”, coupled with case law upholding such exclusive authority, prohibits the Attorney General from pursuing the instant investigation without a Executive Law

§63 (3) request from the Comptroller¹. The Applicant has provided no case law directly on point for such argument, and the Court will not so hold, particularly in the instant context². Retirement and Social Security Law §74(b) does not, by its language, confer “exclusive authority” upon the Comptroller for all matters which, in any construction, could reference an individual’s retirement benefits³, but solely for the determination of an application for such benefits. Executive Law §63(3), which contemplates multiple governmental officials’ authority to request (and thereby authorize) the commencement of an Attorney General’s investigation into “...offenses in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department...” (emphasis added), makes no reference to “exclusive authority” of any of those governmental officials to make such request in any particular area.

Moreover, even were the Attorney General to identify alleged fraud and institute a successful criminal prosecution, the provisions of Retirement and Social Security Law §74(b)

¹The Applicant herein argues that such “exclusive authority” also prohibits the investigation by the Attorney General under the purported authority of the False Claims Act and Executive Law §63 (12).

²See, Anheuser-Busch v. Abrams, 71 NY 2d 327, 335 (1988), wherein the Court of Appeals declined to quash a subpoena based upon Petitioner’s arguments that case law had established a rule of “per se legality” of the investigated action:

“We conclude, therefore, that no rule of per se legality must inexorably be gleaned from the case law or the statutory language. In the absence of such a rule, we hold that the Attorney-General is authorized to conduct an investigation to test the legality of petitioners’ practices.”

³While Campanelli does note that it is well settled that the Comptroller is charged with the Administration of the Retirement and Social Security Law, it does not hold that such charge is exclusive of the conduct of any investigation into possible fraudulent, illegal or criminal activity which might involve retirement benefits; as noted by the Attorney General, the Comptroller has no prosecutorial authority.

regarding the Comptroller's exclusive authority over the final determination of any retirement benefits would still apply. It is also beyond dispute that the Comptroller, who has no prosecutorial authority, need not, and could not, be a party to any criminal action brought by the Attorney General against Applicant, and the Attorney General need not be a party to any proceeding between the Comptroller and Applicant regarding Applicant's eligibility for retirement benefits; any such final determination by either governmental official would be separately made (see Cook v. City of Utica, 88 NY 2d 833, 835 [1996] (holding that Comptroller determination re: eligibility for retirement benefits not binding on Municipalities for purposes of General Municipal Law §207-a, and noting that municipalities are not parties to proceedings before Comptroller)).

Accordingly, the Court does not agree that the law supports Applicant's position that the Comptroller's exclusive authority to determine all applications for any form of retirement benefits provided for in the Retirement and Social Security Law translates to exclusive authority to determine whether the Attorney General may commence an investigation into allegations of illegality or fraud with respect to securing pension benefits.

Executive Law §63 (12)

Executive Law §63 (12) provides:

12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud"

or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

The Attorney General has the authority under Executive Law §63 (12) to investigate allegations of possible violations of the law, and this authority encompasses the ability to serve subpoenas (*see, e.g., In the Matter of American Dental Cooperative, Inc., v. Attorney-General of the State of New York*, 127 AD 2d 274 [1st Dept, 1987]). Applicant argues that Executive Law §63(12) authority does not exist in this matter as (I) the actions of the Attorney General in receiving the Executive Law §63 (3) request effectively acknowledges that independent authority pursuant to Executive Law §63(12) is insufficient or nonexistent in this matter⁴, (ii) the Attorney General has failed to "establish" repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in regard to his actions⁵, and (iii) the Attorney General has not made an application to the Court pursuant to Executive Law §63 (12) (which applicant argues the statute denotes a condition precedent to the authorized methods of Attorney General inquiry).

⁴Applicant has provided no law for the proposition that the Attorney General's investigative authorities under various statutes are exclusive of each other; nor has the Attorney General "acknowledged" that Executive Law §63(12) authority does not exist in this action.

⁵Applicant's circular argument notwithstanding, the Court is of the opinion, for the same reasons discussed in the analysis of an alleged Executive Law §63(12) requirement for a predicate Court application, that the sole factual predicate required for the issuance of an subpoena by the Attorney General in the context of an Executive Law § 63(12) investigation is that required by case law for the issuance of any Attorney General subpoena.

Executive Law §63 (12) Requirement of Application for Order

Applicant argues that Executive Law §63 (12) requires that the referenced application to the Supreme Court for an Order, *inter alia*, enjoining persistent fraud or illegality must be made prior to the issuance of any subpoena(s) as authorized in the final paragraph of the section. Such argument is based upon the prefatory phrase in such final paragraph "In connection with any such application...". The final sentence of the paragraph, however, which references the investigatory authorizations, states: "[s]uch authorization shall not abate or terminate by reason of any action or proceeding brought by the Attorney General under this section. Since the only "action or proceeding" available to the Attorney General under the section is the referenced application to the Supreme Court, the section clearly contemplates the Attorney General's authority to "...take proof and make a determination of the relevant facts and issue subpoenas..." prior to the formal application being made.⁶ Moreover, applicant's argument would require a finding that such paragraph, which confers the underlying investigative authority necessary to the Attorney General's proper exercise of its responsibilities under the statutory section, only can be utilized after the Attorney General has made a (presumably highly premature) determination and accusation that the accused party has committed fraud or other illegal acts. Accordingly, the Court does not find to merit to applicant's arguments with respect to the Attorney General's statutory authority pursuant to Executive Law §63(12).

Statute of Limitations and Retroactivity

⁶ Abrams v. Alliance for Progress, Inc., 136 Misc. 2d 1002, 1025, cited by Petitioner, is not inconsistent with this holding; Abrams, while referencing an apparent need to be "beyond the investigative stage...", states a subpoena may "issue only in connection with a proposed application for an injunction." (emphasis added)

False Claims Act

Applicant argues that as any action pursuant to the False Claims Act must be brought within the statute of limitations under State Finance Law §192 and, as he retired in 2000, such statute of limitations period has expired. The Attorney General argues in reply that the law holds that the “continuing fraud” doctrine as discussed in Hacker v. State Liquor Authority, 19 NY2d 177, 184-185 [1967] renders such argument inapposite. Assuming, without finding, that Applicant has committed fraud in the securing of his pension benefits, which benefits he has received and continues to receive on an ongoing basis, such continuous receipt may render an investigation pursuant to the False Claims Act timely under the continuing fraud doctrine (*see id.* at 184-185 [1967]; *see generally* People v. Rosich, 170 AD 2d 703 [2nd Dept., 1991], *app. denied*, 77 NY 2d 1000 [1991]). Accordingly, Applicant’s argument that the subpoena must be quashed as any potential claim pursuant to the False Claims Act is time-barred is without merit.

False Claims Act - Retroactivity

Applicant also argues that there is no authority for the issuance of the subpoena pursuant to the False Claims Act as any actions by applicant in violation of the Act took place in 2000 and the statute, passed in 2007, is not retroactive.

As noted above, applicant’s receipt of pension benefits has continued to occur after the effective date of the False Claims Act and the issue of retroactivity is therefore without merit (*see* People v. Rosich, *supra* at 703 [1991]).

Additionally, given the fact-specific analysis required to make a statute of limitations determination, and the clearly non-final state of the investigation, such a finding by this Court

would be premature and without adequate factual basis. Further, as noted in applicant's papers, the retroactivity of the False Claims Act has not been specifically decided by the Court of Appeals, and, the applicant proffers no case law from any New York State Court so holding; in the absence of clear law on the issue, the Court will not bar the instant investigation at this early stage on such basis (*see Anheuser-Busch v. Abrams, supra*).

Executive Law §63 (12) Statute of Limitations

Applicant argues further that the six year statute of limitations of CPLR §213 would bar any investigation pursuant to Executive Law §63(12). However, Executive Law §63(12) authorizes Attorney General action and investigation "[w]henver any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business". It is well settled that the termination date of a continuing crime constitutes the commencement date of the criminal Statute of Limitations period (*see, e.g., People v. Eastern Ambulance Service, Inc.*, 106 AD2d 867 [4th Dept., 1984]); *see People v. Rosich, supra* at 703 [2nd Dept., 1991]. Moreover, even were any potential criminal claims against the applicant to be time-barred, the statute allows the Attorney General to cast a wider net than solely for criminal acts (...fraudulent or illegal acts...), and, as such, the Court's analysis pursuant to the False Claims Act would also apply herein. The Court will not at this point find that the Attorney General's investigation could not lead to a finding of fraud or illegality by Applicant in his continuing receipt of pension benefits.

Factual Predicate

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. A’Hearn holds that the showing to be made is related to the breadth of the inquiry and the extent of the investigation preceding the subpoena. Myerson held, in a review of subpoenas issued by the Commissioner of the Department of Consumer Affairs of New York City, not only that probable cause was not required, but also that the required level does not need to constitute a “strong and probative basis for the investigation” (Id. at 258). Myerson weighed the scope and basis for the issuance of the subpoena against the factual predicate for the investigation “...lest the powers of investigation, especially in local agencies, become potentially instruments of abuse and harassment” (Id.).

The Court of Appeals, in upholding a challenged subpoena which had been issued by the Commissioner of Accounts of the City of New York, stated “[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold”; in the same context, the Court appeared to speak strongly against over-analysis of the underlying factual basis of an investigation in the context of a motion to quash a subpoena issued at the beginning stages of said investigation (In re Edge Ho Holding, 256 NY 374, 382 [1931]). In cases specifically involving subpoenas issued by the Attorney General, it has been held that in evaluating the Attorney General’s justification for the issuance of a subpoena, there is a presumption that he is acting in good faith and that he is not required to disclose the details of his investigation (American Dental Cooperative, Inc v. Attorney Gen. Of New York, 127 AD 2d

274, 280 [1st Dept., 1987].

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 Goddard⁷, the Attorney General has enunciated, *inter alia*, the following bases⁸:

- (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

⁷The 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.

⁸The 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 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.

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 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.

The Attorney General cites to four cases decided by the Appellate Division, Third Department as a factual basis for the instant subpoena, when taken in conjunction with Applicant's personal and public employment history. In those cases, Barbiero v. New York State Employee's Retirement System, 92 AD2d 1078 [3rd Dept., 1983], Brosnahan v. New York State Employee's Retirement System, 174 AD2d 954 [3rd Dept., 1991], Mancuso v. Regan, 190 AD2d 948 [3rd Dept., 1993], and Young v. McCall, 253 AD2d 997 [3rd Dept., 1998], the Appellate Division, upheld, upon review, Comptroller determinations that lawyers ostensibly working, or having worked, as employees for various governmental agencies were actually independent contractors, based on individual reviews of employment indicia, including, but not limited to, the facts, *inter alia*, that the attorney's work was generally not supervised, that they used their own offices and personal staff and, with the exception of Brosnahan, payroll deductions were not made from their salary.⁹

⁹Each of the above-cited decisions makes clear that the review is case-specific and that the reviews involved determinations by the Appellate Court that the Comptroller's determinations were rational or supported by substantial evidence. Further, the Brosnahan Court noted that there was an evidentiary basis from which it could be readily inferred that petitioner was an employee, including his receipt of health insurance coverage, office supplies, stationary and a telephone credit card, as well as the fact that payroll deductions were taken from his paycheck.

As pointed out by the Attorney General, there has been, for some time, case law which makes clear, at a minimum, that attorneys may not be simply considered public employees for pension purposes based solely upon a designation as such by the public employer, and the Attorney General has enunciated sufficient facts to form a predicate for an investigation into whether, with knowledge of such law and a lack of employee status in his particular circumstances, Applicant fraudulently took action to gain such designation with regard to any of his alleged positions of public employ. The simultaneous multiple positions of "employ" and the low "salaries" paid by the various "employers" (*see, e.g., Brosnahan*, "modest salaries belie full-time employment") are more consistent with independent contractor status than employee status. The actions of Applicant in "retiring", and immediately subsequent thereto, recommencing one of the "employment" positions as an independent contractor, as well as the "retainer" references variously made by Applicant in the context of his discussion of his "employee" relationships with the school districts is consistent with a potentially fraudulent action in simply designating the work completed as "employment" or "contractual" based upon the relative benefit of such designations to Applicant, rather than an actual assessment of the proper designation of such work. While the Court recognizes that, given the state of the law in regard to such analysis, the possibility exists that such a back and forth designation may be legally accomplished, the final determination of such legality does not lie with the Court at this early stage of the investigation. It is sufficient that, given all of the circumstances herein, the actions taken are factually relevant to the Attorney General's basis for inquiry. In short, if all indicia of employment (or non-employment) remained the same after Applicant's "retirement", or would have remained the same had Applicant's offer to take a "retainer" of greater than the amount paid by the School

Districts for his salary and benefits, such could constitute proof that his employec designation was simply one of convenience, and possibly in knowing violation of the law with regard to the earning of such benefits. Further relevant is the allegation of the Attorney General, supported by references to letters written by Applicant, that such actions were taken by the School Districts at Applicant's instigation.

Based upon the facts as alleged in the record before the Court, the Applicant's assertions that a factual predicate has not been established are without merit.

Relevancy and Materiality (Scope)

Applicant also challenges the instant subpoena as overbroad (where it seeks documents back to 1967), vague and unduly burdensome¹⁰. The subpoena makes specific demands for, in essence, all documents concerning, related to, or generated in connection with Applicant's aforementioned employment, financial or business relationships with any School District or BOCES, documents demonstrating compensation or employment benefits received in connection with such relationships, documents concerning the cessation of such relationships and documents concerning his membership in the State Employees Retirement System or Teacher's Retirement System and any other retirement benefits received.

As discussed above and as stated in Anheuser-Busch, Inc. v. Abrams, 71 NY 2d 327, 331-332 [1988], the Court of Appeals has held that "[a]n application to quash a subpoena should be granted [only] where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. In defending

¹⁰At oral argument in this matter on July 3, 2008, the Attorney General withdrew requests (1) and (2) of the subpoena, and the Court will not consider said provisions in the instant analysis.

his inquiry, the Attorney-General enjoys a presumption that he is acting in good faith and must show only that the materials sought bear a reasonable relation to the subject matter under investigation and to the public purpose to be achieved” (*internal quotations and citations omitted*).

It appears undisputed that the instant subpoena is cast in broad terms, and would, in all likelihood, be burdensome upon the applicant. The Court holds, however, that the information sought in the subject subpoena is relevant to *inter alia*, (I) the prerequisite determination of whether Applicant met the detailed “employee” criteria during each of the years for which he received retirement credit, and (ii) should such not be the case, whether any specific actions taken by Applicant in reference to the securing of the retirement benefits (e.g., failure to personally perform such work; specific legal advice given in his role as school attorney to the relevant entity regarding the propriety of his “employ” as opposed to retainer; or negotiations by Applicant with any school district as to his designation as an “employee”) were fraudulent or illegal. There is no demonstration at this time that Applicant is in possession of such documents, or, for that matter, that documents demonstrating any fraud or illegal acts by Applicant with his knowing assistance ever existed. However, given the scope of the investigation, which would, as noted in Brosnahan, entail as a prerequisite a determination as to whether Applicant, during each of the years for which he received retirement credit, qualified as an “employee” under the detailed criteria necessary, as well as the further requirement that there be some specific fraud or illegality (*see* Executive Law §63 (3) or (12); False Claims Act), to which evidence of Applicant’s actual work performed, compensation, retirement benefits, relationship cessation details, and prior employment with any school districts would be relevant, the Court cannot deem

the documentation required by the subpoena of Applicant, to the extent such exists, not “reasonably related” to the described investigation.¹¹ Further, in these unique circumstances, the Court holds that the subpoena, though extremely broad, does not seek materials that are utterly irrelevant to any proper inquiry (Abrams v. Thompson, 150 AD 2d 679 [2nd Dept., 1989]).

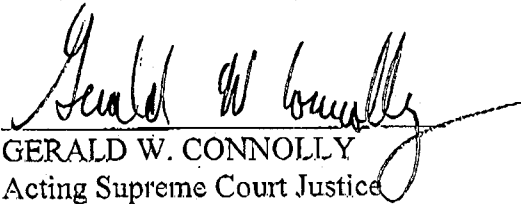
Based on the foregoing, the Court hereby denies Applicant’s instant motion to quash the subpoena.

This shall constitute both the decision and order of the Court. All papers, including this decision and order are being returned to the Office of the New York State Attorney General. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated at Albany, New York
September 12, 2008


GERALD W. CONNOLLY
Acting Supreme Court Justice

¹¹ In particular, the Court notes that, though the subpoenaed records date back to 1967, such is the year the Applicant began “employ” with the Chenango Forks Central School District, Applicant’s letter to said District of 1993 provides a sufficient factual predicate in light of all of the evidence provided, for the issuance of the subpoena for information regarding all of the years of such employ.

Papers considered:

1. Order to Show Cause dated May 2, 2008; Affidavit of James W. Roemer, Jr. dated May 2, 2008 with accompanying exhibits;
2. Affirmation of Darcy Goddard dated May 9, 2008 with accompanying exhibits; Memorandum of Law in Opposition to Petitioner's Motion to Quash dated May 9, 2008.
3. Reply Affidavit of David F. Kunz in Support of the Order to Show Cause dated May 12, 2008 with accompanying exhibits; Petitioner's Reply Memorandum of Law .
4. Supplemental Affirmation of Darcy M. Goddard dated June 27, 2008;
5. Supplemental Affidavit of George J. Szary dated July 3, 2008; Petitioner's Supplemental Memorandum of Law;
6. Letter from the Office of the Attorney General dated July 8, 2008.