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GERALD W. CONNOLLY  
Judge

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Secretary

September 12, 2008

**VIA MAIL & FACSIMILE**

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Re: Albany County Supreme Court  
*In the Matter of...James W. Roemer, Jr., Index No. 3766-08*

Dear Counselors:

Enclosed is a Decision and Order with regard to the above referenced matter. The original together with all papers submitted is being forwarded to Attorneys Szary and Kunz for filing. A copy of the decision is enclosed for Attorneys Goddard and Goglia.

Very truly yours,

Catherine Nells Gunn  
Secretary to Judge

enc.

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ALBANY

In the Matter of quashing the subpoena duces tecum  
served upon JAMES W. ROEMER, JR.,

In the Matter of the

**DECISION AND ORDER**  
Index No. 3766-08

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:

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Hon. Andrew Cuomo  
Attorney General of the State of New York  
Attorney for Respondent  
Darcy M. Goddard, Esq. - Asst. Attorney General  
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Connolly, J.:

Before the court is the Application of James W. Roemer, Jr. 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, particularly concerning his employ and compensation with various local governmental entities, over the course of his professional career.

Mr. Roemer, an attorney with a practice in the Albany, New York, area, was an attorney for various local governmental entities throughout his career, beginning in 1970, and apparently began collecting pension benefits from the New York State Retirement System on such employ on or about February 2001. He brings the instant Application on the grounds that the challenged subpoena is without statutory authority, overbroad, burdensome and oppressive.

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 throughout New York State and pursuant to the statutory authority of Executive Law §63 (12) and New York State Finance Law Section 190 ("False Claims Act"). The Attorney General avers that such investigation was expanded in April 2008 to include such potential frauds at all forms of local governments, and that the Applicant's simultaneous employment by as many as six (6) local employers, while carrying on a full-time law practice, thereby earning a six-figure state-funded pension, by sheer number and circumstances raise significant questions as to whether his services to those governmental entities were rendered as an outside retained counsel rather than as an "employee". The Attorney General argues that the subpoena issued on April 11, 2008, is tailored to the circumstances of the instant investigation, which, of necessity, requires, *inter alia*, extensive information regarding the financial arrangements between the Applicant and his public employer clients and the 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) to perform such investigation from the New York State Comptroller; (ii) the Attorney General is barred from the instant investigation based upon the 'exclusive authority' of the Comptroller to make determinations regarding retirement benefits and the Comptroller herein has already reviewed and ruled upon the validity of his status as a public employee; (iii) any investigation into alleged fraud or illegality pursuant to Executive Law § 63 (12) is time barred, or barred for failure to make application to the Supreme Court; (iv) 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; (v) there is insufficient factual predicate for the issuance of the subpoena; and (vi) the subpoena is overbroad, vague and unduly burdensome.

#### Factual Predicate

The law requires that some factual basis be demonstrated to support a subpoena. In Mverson 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. Mverson 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]). 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 [1<sup>st</sup> Dept., 1987]).

In the instant application, the Attorney General has enunciated, *inter alia*, the following:

- (i) that Applicant was simultaneously reported as a full time or part time employee by as many as six public employers at a time between 1970 and 2000 while simultaneously maintaining a full time law practice.
- (ii) that there is reason to believe that Applicant did not provide the services for which he was compensated by the various public employers as an "employee", based upon a reference

in an Appellate Division, Third Department decision<sup>1</sup> reviewing cross motions for summary judgment in the Court below which litigation arose from the dissolution of Applicant's former law firm;

- (iii) that a former long-time employee of Applicant's firm has provided the AG with information that Applicant did not perform the majority of services for which he was compensated as an "employee" of the various public sector employers.

#### Simultaneous Employ

The Attorney General references Applicant's simultaneous employ by "as many as six (6) public employers, while carrying on a full-time private law practice", as a factual predicate for the instant subpoena/investigation on the grounds that, while private sector professionals can, under appropriate circumstances, properly be designated part-time "employees" of public employers, the number and circumstances of such arrangements at a time between 1970 and 2000 raise significant questions as to whether such Applicant's service was employment. The Attorney General, in support of such assertion, attaches a copy of a 1997 newspaper article examining Applicant's pension. Applicant, in response, notes that his employ with the Village of Altamont was continuous from 1970 to 1993, and that he entered into part-time employment arrangements with a total of six (6) localities between April, 1993 and April, 1995. The Attorney General has not disputed such assertion. While the simultaneous "employ" by a number of different employers while carrying on a private law practice may constitute, under certain circumstances, sufficient factual predicate to justify the exercise of the Attorney General's

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<sup>1</sup>Featherstonhaugh v. Roemer, 274 AD 2d 646 [3rd Dept., 2000].

subpoena powers, as discussed below, the Attorney General has not provided sufficient information regarding the time frame of said employment relationships to justify the breadth of the instant subpoena.

#### Appellate Court Decision

In Featherstonhaugh v. Roemer, 274 AD 2d 646, 647, the Appellate Division, Third Department, in reviewing cross motions for summary judgment in the Court below (which litigation arose from the dissolution of Applicant's former law firm) noted: "[f]rom 1988 to 1991, the P.C. contracted to provide legal services to the City of Schenectady, the City of Saratoga Springs, the Town of Colonie, Sullivan County and Schoharie County. Notably, during this period, services to these municipalities were primarily provided by employees of the P.C. other than Roemer. In or about 1993, Roemer renegotiated each of the municipal contracts so that a portion of the contract fee was paid to the P.C. and the balance of the fee was paid personally to Roemer as an employee of each municipality. Roemer did not inform the P.C.'s shareholders of this new arrangement (except as to Schoharie County) and did not present the new contracts to the P.C.'s board of directors for approval. Roemer allegedly used the P.C.'s personnel, support services and other facilities for all municipal work he performed. The Court further noted, in the decision, that the Firm had been founded in 1984.

It would appear, from the decision, that, at a minimum, work for the various municipalities performed by the firm from 1988 to 1991 (when there were apparently retainer agreements, rather than employment agreements) was performed by employees other than Applicant, and an allegation was made in the context of the litigation to the effect that Applicant used the law firm's personnel for the municipal work performed after the commencement of his

“employ” with each county. A Motion for Summary Judgment and/or opposition thereto must be supported by an adequate factual basis (CPLR §3212 (b); State v. United States Fid. & Guar. Co., 221 AD2d 849 [3<sup>rd</sup> Dept., 2005]; Schultz v. Von Voight, 86 NY2d 865 [1995]). As the Third Department Decision references an allegation, in the context of the review of the cross motions, that the work for which Applicant was compensated as an “employee” of the various public sector employers done by other employees of the firm, it is reasonable to accept that such allegation would not have been referenced by the Court in the absence of a legally sufficient basis in the record to do so.

Moreover, the decision also references an allegation that the Applicant renegotiated contracts with the City of Schenectady, the City of Saratoga Springs, the Town of Colonie, Sullivan County and Schoharie County which had previously provided for contractual work so that a portion of the contract fee was paid to the Firm and the balance of the fee was paid personally to Applicant as an employee of each municipality. Such action, if it occurred, could be 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 (if same occurred) 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. If all indicia of employment (or non-employment) remained the same after the change in status from contractual work to employ, as seems the case

from the referenced Appellate decision, such could constitute proof that Applicant's employee designation in 1993 from the referenced localities was simply one of convenience, and possibly in knowing violation of the law with regard to the earning of such benefits.

Unidentified Informant

The Attorney General has further provided, by way of the Affirmation of Ms. Goddard, an allegation that a former long-time employee of Applicant's firm has provided the AG with information that Applicant did not perform the majority of services for which he was compensated as an employee, that such work was performed by other members of the Firm in the same way in which work was done for other firm clients, and Applicant's salaries from the employers were deducted from his share of the firm proceeds. The Attorney General has offered to provide the identity of this individual *in camera*, pursuant to the law as held in American Dental, *supra* at 280. Presumably, such offer is also based upon the Court's holding in Myerson, *supra* at 260, where the Court rejected as sufficient basis for a particularly broad subpoena "... the alleged receipt of "numerous complaints" by the Commissioner, the nature and relevancy of which the Special Term could not judge." Here, the Attorney General has asserted via a sworn affirmation by an attorney under the penalty of perjury the nature and relevancy of the information received as well as the general source of the information, and that the disclosure of the name of the person giving the information could compromise the ongoing investigation of Applicant. The Court notes the presumption of good faith to which the Attorney General is entitled in the instant evaluation (*see American Dental*, *supra* at 280), and the fact that the instant subpoena is issued upon more factual basis than simply an unnamed informant (*see above*). The Court, under the instant circumstances, does not require the identity of the of the informant be provided in order to find sufficient basis for the subpoena, though, in cases relying more solely

upon such information from an unidentified source, the actual identity of such individual might be required to establish sufficient factual basis.

### Subpoena

The instant subpoena demands extensive information for the time period January 1, 1971 to the present<sup>2</sup>. However, the factual predicate provided to the Court by the Attorney General, taken in a light most favorable to the Attorney General, only provides information sufficient to serve as a basis for inquisitorial action for the period including and after 1984 (the date, per the Appellate Division decision, of the founding of the law firm of which the unidentified informant was an employee), or, in the alternative, 1988 (the date referenced in the Appellate Division decision as the commencement of the Applicant's relationship with some of the relevant localities). Absent further factual predicate, the information that the Applicant carried on a career as a private sector attorney while designated an employee of the Village of Altamont from 1970 until 1984, without more, is insufficient factual predicate to justify the demand for information relative to that time frame in the instant subpoena, and the subpoena must therefore be quashed as without factual basis (for that period) and therefore overbroad (*see D'Alimonte v. Kuriansky*, 144 AD 2d 737, 739 [3d Dept, 1988]: "We cannot countenance a subpoena which seeks materials that clearly are irrelevant to the matter at hand").

Based on the foregoing, the Court hereby grants Applicant's instant motion to quash the subpoena. In light of the foregoing, the Court need not address the other contentions of the parties.

This shall constitute both the decision and order of the Court. All papers, including this decision and order are being returned to the Applicant. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable

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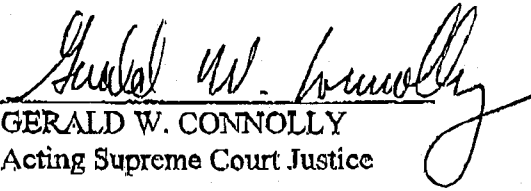
<sup>2</sup>At oral argument on July 3, 2008, the Attorney General withdrew requests (1) and (2) of the subpoena.

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

Papers considered:

1. Order to Show Cause dated May 9, 2008; Affirmation to Quash Subpoena of James W. Roemer, Jr. dated May 8, 2008 with accompanying exhibits; Affidavit of George J. Szary in Support of the Order to Show Cause dated May 8, 2008 with accompanying exhibits; Memorandum of Law dated May 8, 2008;
2. Affirmation of Darcy M. Goddard dated May 15, 2008 with accompanying exhibits; Memorandum of Law In Opposition to Petitioner's Motion to Quash dated May 16, 2008;
3. Reply Memorandum of Law dated May 19, 2008; Reply Affidavit of George J. Szary in Support of the Order to Show Cause dated May 19, 2008.
3. Supplemental Affirmation of Darcy M. Goddard dated June 27, 2008 with accompanying exhibits;
4. Affirmation of James W. Roemer, Jr. dated July 3, 2008; Petitioner's Supplemental Memorandum of Law dated July 3, 2008; Supplemental Affidavit of George Szary dated July 3, 2008;
5. Letter of July 8, 2008 from the Office of the Attorney General;
6. Letter of July 10, 2008 from George Szary of DeGraff Foy.