

P.E.R.C. NO. 2009-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LINDEN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2009-019

LINDEN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Linden Board of Education's petition to quash a subpoena served by the Linden Education Association in a scope of negotiations proceeding. The subpoena seeks discovery of a document prepared by the Board's counsel to the superintendent related to the increment withholding of a teacher. The Commission holds that when the superintendent placed the document in the teacher's personnel file and gave a copy to the teacher, he waived any attorney-client privilege.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Weiner Lesniak LLP, attorneys (Mark A. Tabakin, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys (Edward Cridge, on the brief)

DECISION

The Linden Board of Education has petitioned to quash a subpoena served on it by the Linden Education Association. The Association opposes the petition. We deny the petition.

By way of background, the Board withheld a teacher's increment. The Association filed a grievance and seeks to arbitrate the withholding. The Board filed a scope of negotiations petition and supporting brief seeking to restrain arbitration. We then received a letter from the Association's attorney indicating that the parties were jointly requesting that the scope petition be held in abeyance pending resolution of a dispute over the release of a report from the Board's attorneys to then-Superintendent Joseph Martino relating to the teaching

staff member. The report had been placed in the staff member's mailbox and personnel file and was apparently given to the Association, which apparently gave it to its then attorney. The Board's attorney demanded that the Association's then-attorney return the document, asserting that it was privileged and claiming that a failure to do so would constitute a violation of the Rules of Professional Conduct.^{1/} The Association's letter indicated that the Association claims that any privilege was waived.

The Association then requested a subpoena duces tecum seeking a copy of the report. The Board asserts that the report is marked "confidential attorney-client privilege" and was prepared by its attorneys in their role as general counsel to the Board and contains legal advice and recommendations relative to employment decisions facing the Board. It appears that Martino disclosed the report to the teacher involved in the incident discussed in the report and did not remove the report from the teacher's personnel file before providing the file to the Association. According to the Association, Martino's handwritten notes direct that the report be forwarded to the teacher and his personnel file.

^{1/} It is unclear whether the Association, its current attorney, or the teacher has a copy of the document.

The Board argues that the report is protected by the attorney-client privilege and thus is not subject to disclosure. The Board asserts that the disclosure was inadvertent, and not made by the Board, who as the firm's client, is the only "person" that can waive the privilege. The Board recognizes that the superintendent is the chief executive and administrative officer of the Board, but argues that without explicit authority from the Board, the superintendent cannot waive the Board's attorney-client privilege. It asserts that the Board never took official action to waive the privilege.

The Association argues that Martino's executive position as superintendent of schools empowered him to waive the attorney-client privilege. The Association further argues that as the document was addressed to Martino, and not the Board, it would be inconsistent to allow him to claim, but not waive, privilege as to the document on their behalf. Finally, the Association argues that Martino's disclosure of the document was not inadvertent since his handwritten notes direct that the document be forwarded to the teacher and his personnel file.

The attorney-client privilege is established by statute and court rule. United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 561 (App. Div. 1984); N.J.S.A. 2A:84A-20; Evid. R. 504. Where a public entity is the client, the privilege extends to communications between the entity and an attorney retained to

represent it. In re Grand Jury Subpoenas, 241 N.J. Super. 18, 28 (App. Div. 1989). However, a privilege can be waived by an agent of an entity acting within the scope of his or her authority. See Steward Equipment Co., Inc. v. Gallo, 32 N.J. Super. 15, 17 (Law Div. 1954).

The Board relies on In re Grand Jury Subpoenas for the proposition that, without explicit authority from the Board, the superintendent could not waive the Board's attorney-client privilege. We disagree.

In In re Grand Jury Subpoenas, the Sussex County Freeholders retained a law firm to serve as special counsel. The hiring resolution stated that the firm was to "render professional legal services in connection with the review of the present policies and procedures of the adjuster's office." In the course of performing its services, the law firm interviewed county employees, examined documents, and prepared reports to the Freeholder Board. One report was released to the public by a single freeholder. The Court found that the freeholder's premature release of the report did not constitute a waiver of the attorney-client privilege because the Freeholder Board did not authorize the distribution. The Court noted that the report was marked "privileged and confidential."

Unlike the individual freeholder in In re Grand Jury Subpoenas, the superintendent was the chief executive and

administrative officer of the Board at the time he disclosed the contents of the report. N.J.S.A. 18A:17-20. In receiving and disseminating the document from the law firm, he was acting within the scope of his authority about a matter pertaining to his official duties. We note that the Board does not dispute the Association's factual assertion that the report was addressed to the superintendent, not the Board; a fact strongly supportive of the superintendent's right to both claim and waive any attorney-client privilege.

There is nothing in the facts asserted by the Board that suggests that the disclosure was inadvertent or that the superintendent was acting outside his authority when he released the document to the teacher, placed a copy in his personnel file, and provided a copy to the Association. The fact that the document was labeled confidential goes only to its initial status, not its status after the superintendent waived any attorney-client privilege.

ORDER

The petition to quash the subpoena is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioner Watkins was not present.

ISSUED: March 26, 2009

Trenton, New Jersey