H.E. No. 83-42

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE BOARD OF HIGHER EDUCATION,

Respondent,

-and-

Docket No. CO-83-249-81

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT, AFT/AFL-CIO,

Charging Party.

Appearances:

For the State Board of Higher Education
Irwin I. Kimmelman, Attorney General
(Grey J. Dimenna, DAG)

For the Charging Party
Sauer, Boyle, Dwyer & Canellis, Esqs.
(George W. Canellis, Esq.)

DECISION AND ORDER ON RESPONDENT'S
PETITION/MOTION TO QUASH SUBPOENAS

On May 11 and May 13, 1983 the instant Hearing Examiner issued twenty four (24) subpoenas at the request of the Charging Party, which were duly served on the following named persons:

1. T. Edward Hollander, Chancellor of Higher Education
2. Eric Perkins, Esq., Special Assistant to the Chancellor
3. Laurence Marcus, Director, Office for State Colleges
4. Michael Fernandez, Special Assistant to the Council of State Colleges
5. William Harla, Deputy Attorney General
6. Grey J. Dimenna, Deputy Attorney General

College Presidents:

7. William Maxwell, Jersey City State College
8. George Potter, Ramapo College
9. Nathan Weiss, Kean College

10. Mark Chamberlain, Glassboro State College

11. David Dickson, Montclair State College

12. Peter Mitchell, Stockton State College

13. Harold Eickoff, Trenton State College

14. Seymour Hyman, William Paterson College

15. George Pruitt, Thomas Edison College

Chairpersons-Boards Of Trustees:

16. Herbert Winokur, Esq., Jersey City State College

17. Susan Nussbaum, Ramapo College

18. Doreen Bitterman, Kean College

19. Delbert S. Payne, Glassboro State College

20. Ernest May, Montclair State College

21. Robert F. Kelleher, Stockton State College

22. Erma Hoover, Trenton State College

23. Fred Lafer, William Paterson College

24. Eleanor Spiegel, Thomas Edison College

A Motion (Petition) to quash all of the twenty four (24) subpoenas was filed by the Respondent on May 26, 1983. On May 31, 1982 the Charging Party filed a response to the Petition/Motion To Quash Subpoenas, which sets forth in the form of an offer of proof what the Charging Party seeks to prove through each twenty four (24) subpoenaed witnesses. The Hearing Examiner has considered the legal arguments of the Respondent, together with its affidavits, and the Charging Party's offer of proof in its memorandum dated May 27, 1983 and resolves the dispute as follows.

The Chancellor of Higher Education

The Chancellor on March 18, 1983 issued a memorandum to the members of the State Board of Higher Education setting forth in some detail the rationale and purpose behind his recommendation that N.J.A.C. 9:2-4.8 be amended. The Respondent argues

that since the Chancellor made a "comprehensive explanation... there is clearly no prejudice to the charging party if the Chancellor fails to appear." (Brief, p. 4).

The Hearing Examiner does not view the matter so simply. If one examines the memorandum of March 18, 1983, supra, it appears that there are numerous questions that might be propounded to the Chancellor by way of seeking clarification for the basis of the memo and the Chancellor's intent in issuing it. Depriving the Charging Party of an opportunity to examine the Chancellor on the said memorandum would be to prejudice the Charging Party severely in its efforts to rebut the presumptive preemptive effect of an amendment to N.J.A.C. 9:2-3.8 in the eight areas set forth by the New Jersey Supreme Court in its decision in State College Locals v. State Board of Higher Education, 91 N.J. 18, 28, 29 (1982).

In this regard the Hearing Examiner relies upon a case cited by the Respondent wherein it is stated that the administrative head of a large executive department should not be called upon to give testimony "...unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it..." Wirtz v. Local 30, International Union of Operating Engineers, 34 F.R.D. 13 (S.D.N.Y. 1963). The Hearing Examiner does not find apposite the Sneaker Circus and Davis decisions, which stand for the proposition that where relevant documents are available and/or the testimony of other witnesses it is appropriate to quash a subpoena (Brief, p. 4).

Further, the Hearing Examiner does not perceive that the "mental processes" of the Chancellor will necessarily be probed by deposing him as witness because there appear to be many areas of inquiry regarding the March 18, 1983 memorandum, supra, that will be based on objective rather than subjective factors. When the Chancellor is examined as a witness, counsel for the Respondent will be free to object to any questions which he deems involve the probing of the mental processes of the Chancellor. If the objection is a proper one, it will be sustained by the Hearing Examiner at that

time. Since the Hearing Examiner does not perceive the "mental processes" of the Chancellor to be solely the issue herein involved the decision of the Appellate Division in New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div. 1969), certif. den. 54 N.J. 565 (1969) is not deemed pertinent.

Finally, the Hearing Examiner rejects the Respondent's contention that to compel the Chancellor to appear as a witness would be an improper and unnecessary interference with the administration of the government of the State of New Jersey. The nature of the Chancellor's prospective testimony has been considered in some detail above. The role of the instant Charging Party as "plaintiff" is not merely that of any "plaintiff" filing a complaint against an agency head, but rather involves the Charging Party as representative of employees employed by the State Board of Higher Education, of which the Chancellor is the Chief Executive Officer. It was the Chancellor who issued the memorandum of March 18, 1983, which is the focus of the Complaint. Thus, he is not an agency head of the type described by the court in Union Savings Bank, etc. v. Saxon, 209 F. Supp. 319 (D.D.C. 1962), which prompted the court there to comment "...that ordinarily the head of an agency has little or no knowledge of the facts in the case." In the instant case the Chancellor would appear to be a fountain of knowledge with respect to the facts upon which the instant Unfair Practice Charge is based. Accordingly, the Hearing Examiner refuses to quash the subpoena of T. Edward Hollander, Chancellor of Higher Education. 1/

The Deputy Attorneys General

The Hearing Examiner has no problem in quashing the subpoenas issued to William Harla

1/ The Hearing Examiner distinguishes the Commission's decision in State & UMDNJ, P.E.R.C. No. 83-157, issued this day, since the only known relevant document, the Chancellor's March 18, 1983 memo, is already in evidence (C-1). However, consistent with State & UMDNJ, supra, the Charging Party will be required to call and examine all of its witnesses prior to calling the Chancellor, at which point a Petition to Quash may be renewed.

and Grey J. Dimenna, Deputy Attorneys General, who are involved in the subject matter of the instant proceeding. The attorney-client priviledge appears clear and each would be barred from testifying in the absence of a waiver by the client, the Chancellor of Higher Education. Accordingly, the petition/motion to quash the subpoenas of Harla and Dimenna is granted.

The Staff Of The Department Of Higher Education

The Charging Party appears to have made a valid offer of proof as to Perkins, Marcus and Fernandez, employees on the staff of the Department of Higher Education, for the following reasons: Perkins drafted the regulation in question and can certainly testify as to who provided the input for his drafting and why the draft appears in the form that it does and, also, its impact on ongoing negotiations. Marcus and Fernandez appear to have been privy to information and input from the College Presidents at a February 15, 1983 meeting of the Council of State Colleges where, apparently, certain of the College Presidents voiced serious concerns about the implementation of the proposed regulation in issue. They, too, may have knowledge of the reasons behind the effort to amend the regulation.

The Hearing Examiner rejects the Respondent's contention that because Perkins, Marcus and Fernandez have no decision-making authority any testimony that they would provide would be irrelevant. Accordingly, the Hearing Examiner refuses to quash the subpoenas of Perkins, Marcus and Fernandez.

The College Presidents

It appears to the Hearing Examiner that some of the College Presidents may be privy to information regarding the events that led up to the issuance by the Chancellor of his memo of March 18, 1983. The problem is that the Charging Party has subpoenaed all nine College Presidents. It would be unduly burdensome, in the opinion of the Hearing Examiner, for all nine College Presidents to be required to appear and testify in this proceeding.

Accordingly, the Hearing Examiner will quash all but three of the subpoenas issued

to the nine College Presidents. The designation of the three Presidents to be subpoenaed is left to the discretion of the Charging Party, upon notice to the Hearing Examiner within seven (7) days hereof. At that time the Hearing Examiner will issue a supplemental order quashing six of the subpoenas to/of the College Presidents by name.

The Chairpersons Of The Boards Of Trustees

The Hearing Examiner agrees with the Respondent that any testimony of the Chairpersons of the Boards of Trustees of the nine State Colleges would be clearly irrelevant. This is particularly true in view of those subpoenas, supra, which the Hearing Examiner has not quashed. It appears that if the Charging Party cannot make its proofs with these witnesses it clearly will gain nothing by examining any or all of the Chairpersons of the Boards of Trustees. Accordingly, all of nine of these subpoenas are quashed.

ORDER

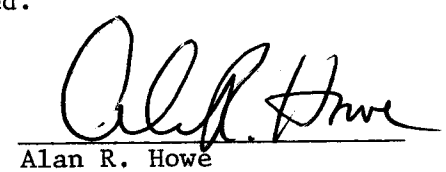
1. The Petition/Motion to Quash the subpoena of T. Edward Hollander is denied.

2. The Petition/Motion to Quash the subpoenas of William Harla and Grey J. Dimenna is granted.

3. The Petition/Motion to Quash the subpoenas of Eric Perkins, Laurence Marcus and Michael Fernandez is denied.

4. The Petition/Motion to Quash the subpoenas of the nine College Presidents is granted to the extent of six, the names of those to be subpoenaed will be set forth in a supplemental order.

5. The Petition/Motion to Quash the subpoenas of the nine Chairpersons of the Boards of Trustees of the nine State Colleges is granted.



Alan R. Howe
Hearing Examiner

Dated: June 2, 1983
Newark, New Jersey