

P.E.R.C. NO. 78-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-284-126

MARK PRESS AND RIDGEFIELD PARK
EDUCATION ASSOCIATION,

Charging Parties.

SYNOPSIS

The Chairman of the Commission grants a motion for special permission filed by the Board to appeal the written ruling of a Hearing Examiner in which the Hearing Examiner refused to quash a subpoena duces tecum.

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EDUCATION ASSOCIATION,

Charging Parties.

Appearances:

For the Respondent, Parisi, Evers & Greenfield, Esqs.
(Mr. Irving C. Evers, of Counsel)

For the Charging Parties, Goldberg, Simon & Selikoff, Esqs.
(Mr. Theodore M. Simon, of Counsel)

ORDER ON SPECIAL PERMISSION TO APPEAL

The Ridgefield Park Board of Education (the "Board"), by motion dated November 23, 1977, seeks special permission to appeal the written ruling of Hearing Examiner Edmund G. Gerber (H.E. No. 78-15, November 18, 1977) which denied the Board's petition to quash a subpoena duces tecum issued during unfair practice proceedings between the Board and Mark Press and the Ridgefield Park Education Association (the "Charging Parties").

The subpoena served on September 27, 1977 sought the production by the Board of the school records of Lawrence Massey, who is a member of the Board. At a hearing before Hearing Examiner Gerber on the same date, Mr. Massey refused to answer a question concerning these same school records under a claim of privilege allegedly grounded upon federal and state statutes and administrative regulations promulgated by the State Board of Education.

In his written ruling the Hearing Examiner, holding the claimed privilege did not exist, directed Mr. Massey to answer questions concerning his school records. He denied the petition to quash, finding that the production of the records sought would not violate federal or state laws or regulations.

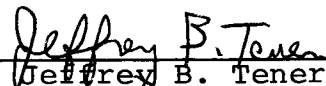
The Board has filed a timely motion for Special Permission to Appeal the Hearing Examiner's ruling, pursuant to N.J.A.C. 19:14-4.6. Upon review of the Board's submissions in support of its motion and the submissions made by the Charging Parties in opposition thereto, it appears to the undersigned that the Board's appeal of the Hearing Examiner's interlocutory ruling should be heard by the Commission.

ORDER

The Board's motion for special permission to appeal is granted and the matter is hereby referred to the Commission for determination.

The November 18, 1977 decision of Hearing Examiner Edmund G. Gerber, H.E. No. 78-15, is hereby stayed pending further order of the Commission.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
January 4, 1978

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

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-284-126

MARK PRESS AND RIDGEFIELD PARK
EDUCATION ASSOCIATION,

Petitioner.

Appearances:

For the Ridgefield Park Board of Education
Parisi, Evers & Greenfield, Esqs.
(Irving C. Evers, of Counsel)

For Mark Press and Ridgefield Park Education Association
Goldberg, Simon & Selikoff, Esqs.
(Theodore M. Simon, of Counsel)

DECISION ON MOTION TO QUASH A SUBPOENA DUCES TECUM

At a hearing in this matter before a Hearing Examiner of the Public Employment Relations Commission ("Commission") on September 27, 1977, the Petitioner Mark Press and Ridgefield Park Education Association, served a subpoena duces tecum upon the Respondent Ridgefield Park Board of Education requiring the production of the records of one Mr. Massey, a member of the Respondent Board. The Respondent moved to quash the subpoena on the ground that complying with the same would be violative of both Federal and State law, specifically 20 U.S.C. § 1232G and N.J.S.A. 18A:36-19, N.J.A.C. 6:3-2.1. At the hearing Mr. Massey refused to answer a question regarding those same school records under a claim of privilege pursuant to the above statutes and regulations.

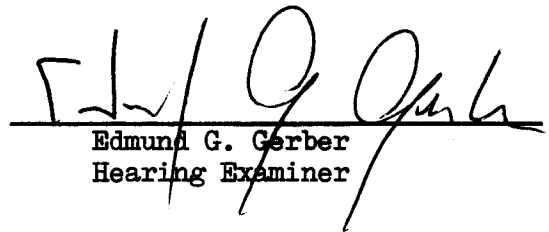
Taking the latter problem first, neither the Federal statute nor the State regulations create a privilege. Both refer only to educational institutions and agencies. They grant no right of privilege but, rather, are designed to curb abuses which might arise from the public's unlimited access to such documents. There is nothing in either statute which shields an individual from testifying about his own school performance. ^{1/} Accordingly, I will order Mr. Massey to answer questions concerning his high school records.

As to the question of the subpoena duces tecum, the validity of this agency's subpoena power in unfair practice proceedings has been affirmed by the Superior Court, Appellate Division, in Newark Board of Education v. Newark Teachers Union, Local 881, 152 N.J. Super. 51 (App. Div. 1977). 20 U.S.C. § 1232G(b)(2)(B) provides that the sanctions imposed on a school, institution or agency "shall not apply when records are released in compliance with a lawfully issued subpoena upon condition that the parents and students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency." ^{2/} Accordingly the Board's compliance with the subpoena will not be violative of Federal law. As to State law, here again there are specific provisions for the release of student records. However,

^{1/} It is well settled that all privileges are to be strictly construed since they go to the suppression of truth. In re Murtha, 115 N.J. Super. 380 and State v. Briley, 53 N.J. 498.

^{2/} The statute further provides that "whenever a student has attained 18 years of age the permission or consent required of and the rights accorded to the parents of the student shall thereafter be required of or accorded to the student."

They are more strict. The rules promulgated by the Commissioner of Education, N.J.A.C. 6:3-2 et seq., provide that a school board may only release records to those "organizations, agencies and individuals outside the school upon presentation of a court order." (Subsection 5(d)(9)). The rule apparently does not grant a board of education the right to release student records on the basis of a subpoena.^{3/} The Board of Education cannot be expected to act contrary to the plain language of the Commission's Rules. Nonetheless, it would seem that a court of law can issue an order compelling the release of these records in question. See N.J. Court Rules 1:9. Accordingly, although the subpoena is not self-executing a court of law can apparently convert such subpoena to an order in compliance with the Commissioner of Education's regulations. The order to quash is accordingly denied.


Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
November 18, 1977

^{3/} It is noted that the Rules promulgated by the Commission seem at first blush seem to contradict the intent of the statute, N.J.S.A. 18A:36-19, which clearly allows inspection of pupil records. It is assumed that these Rules were enacted to comply with the Federal statute. In this one area the Commission created an even stricter standard than required by Federal law.