

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

Docket No. CO-77-284-126

-and-

MARK PRESS AND RIDGEFIELD PARK
EDUCATION ASSOCIATION,

Charging Parties.

SYNOPSIS

The Commission affirms a written ruling of a Commission Hearing Examiner (H.E. No. 78-15) denying a petition to quash a subpoena duces tecum which was issued during an unfair practice hearing. The Ridgefield Park Board of Education, having been granted special permission to appeal the Hearing Examiner's ruling, contested the subpoena on the grounds that the documents sought were protected from production by federal and state laws and administrative regulations relating to the confidentiality of school student records. Additionally, the Board urged that the federal and state regulations created a testimonial privilege which allows the student to refuse to answer questions about his or her school records.

Affirming the Hearing Examiner, the Commission ruled the subpoenaed documents were relevant to the unfair practice charge, neither federal or state statutes or regulations created the testimonial privilege urged by the Board, and that both federal and state laws and regulations permitted production of the records in question in compliance with a subpoena and/or court order.

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Appearances:

For the Respondent, Parisi, Evers and Greenfield, Esqs.
(Mr. Irving C. Evers, Of Counsel)

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

DECISION ON SPECIAL PERMISSION TO APPEAL

On January 4, 1978 the Chairman of the Commission granted a motion made by the Ridgefield Park Board of Education ("Board") for special permission to appeal the November 18, 1977 ruling of Hearing Examiner Edmund G. Gerber which denied the Board's petition to quash a subpoena duces tecum issued during unfair practice proceedings involving the Board and Mark Press and the Ridgefield Park Education Association ("Charging Parties"). We now consider the Board's interlocutory appeal of the Hearing Examiner's written determination (H.E. No. 78-15).

The Board submitted a request for oral argument on this matter which was received on January 18, 1978. The Commission's Rules, although not prohibiting it, do not envision oral argument or hearings on motions made to the Commission; rather, N.J.A.C. 19:14-4.6(b) provides that "...the Commission shall consider the appeal on the papers submitted to the Chairman, or such

further submissions as it may require." The Commission is satisfied that the record before it is completely sufficient. Therefore, the Board's request for oral argument is denied.

The subpoena issued by the Hearing Examiner at the request of the Charging parties is directed to Respondent Board, its Superintendent of Schools Charles Juris, and one Lawrence Massey, who is a member of Respondent Board and who had been a student in the Ridgefield Park system. The subpoenaed documents are described as, "All pupil records of Lawrence G. Massey within the possession and custody of Respondent." Respondent resists the subpoena on the grounds that federal and state laws and regulations render such records confidential. Additionally, Respondent argues that such regulations create a testimonial privilege running to Mr. Massey who, it is argued, may refuse to answer questions concerning his school records. Mr. Massey, at a hearing before Hearing Examiner Gerber, did refuse to answer questions on this subject.

The Hearing Examiner held that neither the federal nor state regulations created a testimonial privilege and he directed that Mr. Massey answer questions concerning his performance as a student in the district. As to the records themselves, the Hearing Examiner found that both the federal statutes and the state regulations did permit the release of student records upon presentation of a valid subpoena and/or court process.

Before considering Respondent's arguments concerning a testimonial privilege and the confidentiality of a student's record, we consider whether or not the subpoena is otherwise valid. ^{1/} The standards for the validity of a subpoena duces tecum were set forth in State v. Cooper, 2 N.J. 540 (1949) where it was held "the subject of a subpoena duces tecum must be spec-

^{1/} Although neither the validity of the subpoena nor the relevance of the material sought to be produced has been challenged by the Board, in this appeal we nevertheless deem it appropriate to consider these issues in the course of ruling upon the instant matter.

ified with reasonable certainty and there must be a substantial showing that they contain evidence relevant and material to the issue." Id. at 556. See R. 1:9-2.

The subject of the subpoena herein, "All pupil records of Lawrence G. Massey," is sufficiently definite and certain. Any doubt as to what is meant by pupil records may be clarified by reference to N.J.A.C. 6:3-2.3.

With respect to the materiality of the records sought, the unfair practice charge filed by the Association alleges that the Board certified tenure charges to the Commissioner of Education against Mr. Press in November 1976 to discourage him and other employees of the Board from exercising rights guaranteed to them by this Act in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3). ^{2/} The basic incident which constitutes the allegations of the tenure charge involves a statement or speech made by Mr. Press at a September 1976 public meeting. The unfair practice charge alleges that this statement was made by Mr. Press in his capacity as President of the Association and as such was entitled to the protection of this Act. Moreover, the charge alleges that the tenure charges were made, not from educational concern for Mr. Press' ability or character as a teacher, but rather to discourage and punish him for his Association activity.

The statement made by Mr. Press contained references to Mr. Massey and also to Mr. Massey's alleged academic and disciplinary record while a student at Ridgefield Park High School. At various times in the speech, which has been admitted into evidence, Mr. Press, after making a statement concerning Mr. Massey while a student, stated, "The record will show that."

The tenure charges filed by the Board, which are also in evidence in this proceeding, make frequent reference to this September 1976 speech and particularly to the statements contained therein concerning Mr. Massey.

^{2/} These subsections prohibit employers, their representatives or agents from:

- (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.
- (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

While many of the tenure charges refer to an alleged unlawful inspection of the pupil records by Mr. Press, an allegation Charging Parties deny, Charge One filed with the Commissioner states that Mr. Press "lied" concerning his comments about Mr. Massey and further that Mr. Press knew that such statements were untrue. Charge Eighteen alleges that the statement made by Mr. Press about Mr. Massey's records are not in fact disclosed by such records. It is apparent then that the contents of Mr. Massey's school records are material at the very least to the above two tenure charges if not all of the charges which mention the September 1976 speech.

These tenure charges become relevant to the proceeding before Hearing Examiner Gerber since the ability of Charging Parties to prove the absence of and, conversely, Respondent to show the existence of, a valid educational reason for the employer's action, i.e. the certifying of charges, is relevant to whether such action is in violation of N.J.S.A. 34:13A-5.4(a)(3) under the standards we have developed for judging such conduct. ^{3/}

On a more basic level, the truth of the statement made by Mr. Press is relevant to whether or not the activity involved herein is entitled to the protection of the Act. ^{4/}

Accordingly, both the testimony of Mr. Massey concerning his performance as a student in Ridgefield Park and the actual records thereof in the possession of the Board are relevant and material to the issues of whether or not the statements made by Mr. Press about Mr. Massey's performance enjoy the protection of the Act and whether the Board had a reason unprotected by the

^{3/} See In re Haddonfield Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977).

^{4/} The relevance of this issue in the instant case was noted by the Special Assistant to the Chairman in his written decision denying a request for interim relief sought by the Association, P.E.R.C. No. 78-1, 3 NJPER 217 (1977). Additionally, Respondent's answer herein puts the truth or falsity of Mr. Press' statements in issue by alleging such statements were "defamatory." See also In the matter of the Tenure Hearing of Kathleen M. Pietrunti, 1972 S.L.D. 387; aff'd by State Board, 1973 S.L.D. 782; aff'd by N.J. Super. Ct., App. Div., 128 N.J. Super. 149; certif. den., 65 N.J. 573 (1974); cert. den. by U.S. Sup. Ct., 419 U.S. 1057, 42 L.Ed. 2d 654 (1974).

Act for preferring tenure charges against Mr. Press; i.e. was the Board's action motivated by a desire to discourage Mr. Press and other employees in the exercise of rights guaranteed them by the Act.

Having found the subpoena seeks documents described with specificity and which are relevant and material to the issues in this case, we turn to the claim of privilege by Mr. Massey and the confidentiality of his school record.

Respondent contends that both its claim of privilege for Mr. Massey and the alleged confidentiality of the records sought are grounded in the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232(g) (commonly known as the "Buckley Amendments") and administrative regulations enacted thereunder, 45 C.F.R. § 99.1 et seq., and in the administrative regulations adopted by the New Jersey State Board of Education, N.J.A.C. 6:3-2.1 et seq., under an authorizing statute. N.J.S.A. 18A:36-19.

Starting with the claim of privilege, we concur with the Hearing Examiner that neither the Buckley amendments nor the New Jersey regulations create a testimonial privilege which excuses an individual from testifying about his or her school records. As noted by the Hearing Examiner, the courts have held that any testimonial privileges are to be construed strictly. The appropriate section of the New Jersey Rules of Evidence (N.J.S.A. 2A:84A-17 et seq.) make no reference to any privilege akin to that claimed by the Board for Mr. Massey. While such a privilege apparently exists in some other jurisdictions, it has come into being by express statutory enactment which speaks in terms of "testimony" concerning the contents of a student record. ^{5/} Even

^{5/} See e.g. M.S.A. 27A.2165 (Michigan) which provides:

Sec. 2165. No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has such records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from such records

(continued)

assuming for the moment that the confidentiality of the records bars their production by subpoena, Mr. Massey still may not refuse to answer questions concerning his school records. In State v. Cooper, supra, the Supreme Court held:

Even where the production of the record is not compellable by reason of privilege or otherwise, the subject matter of the record is provable by the party in need of the evidence...." As the person who has the legal custody of the register is not compellable by reason of privilege or otherwise, the subject matter of the record is provable by the party who stands in need of the evidence which that document affords is not to suffer from its absence at trial. *** If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting evidence of its contents as if its production were physically impossible." 2 N.J. 540, 555 (citations omitted)

Turning to the records themselves, the Hearing Examiner cites provisions in both the Buckley amendments (20 U.S.C.A. § 1232(g)(b)(2)(B)) and the New Jersey regulations (N.J.A.C. 6:3-2.5(d)(10)) ^{6/} which allow the release of pupil's records "in compliance with a lawfully issued subpoena" concerning the federal law and "upon presentation of a court order" respecting the New Jersey regulations. While the apparent purpose of both the Buckley amendments and the New Jersey regulations is to limit access to student records, both enactments contain, in addition to the above-noted provisions, a list of persons, institutions and agencies which are entitled to receive or examine pupil records for a variety of purposes.

As noted by the Hearing Examiner, this agency's subpoena power has recently been confirmed by the Appellate Division. Newark Board of Education v. Newark Teachers' Union, Local 881, 152 N.J. Super. 51 (1977). As we have previously determined that the subpoena in question herein is otherwise valid

5/ (continued)

or such communications; nor to produce such records or transcript thereof, except that any such testimony may be given, with the consent of the person so confiding or to whom such records relate, if such person is 21 years of age or over, or, if such person is a minor, with the consent of his or her parent or legal guardian.

6/ This provision is incorrectly cited in the Hearing Examiner's report as N.J.A.C. 6:3-2.5(d)(9).

on grounds of specificity and relevancy, compliance with the subpoena would not run afoul of the Buckley amendments.

While the New Jersey regulations speak in terms of a "court order" rather than a subpoena, it appears from comments made at the time these regulations were adopted that the State Board of Education may not have intended to place more stringent requirements on the release of student records than is contained in the federal statutes. A summary of N.J.A.C. 19:6.3-2.5 which was placed in the New Jersey Register (7 N.J.R. 251(c)) at the time it was newly adopted states, "These changes have been made to conform to the Federal regulations." However if a court order is required, the subpoena may be converted into an enforceable court order pursuant to R. 1:9-6(b), to comply with N.J.A.C. 19:6.3-2.5(d)(10).


Without passing upon the merits of the Charging Parties' case, we conclude that the interests at stake--the protection of a public employee's exercise of the rights contained in the Act without being subjected to a possible loss of his job or reduction in his salary (sanctions provided under the tenure hearing law)--constitute sufficient reason under the circumstances of this case to require the Board to produce a student's records at a hearing and to require the adult student to testify concerning his school record. ^{1/}

^{1/} While our determination herein has necessitated the making of judgments as to the relevancy of the documents sought, we point out that the production of documents by subpoena is not tantamount to the introduction of such documents into evidence. We do not intend to preclude either party from making any relevancy or other proper objection to the proposed introduction of any or all of the documents involved into evidence, nor do we usurp the Hearing Examiner's function to make rulings thereon or to otherwise regulate the course of the hearing and the manner of inspection of the documents as he deems appropriate. See, e.g. Newark Bd. of Educ., supra, at p. 62. We would, however, not be inclined to entertain further interlocutory appeals from the Hearing Examiner's rulings on grounds similar to those considered in this decision.

ORDER

The Hearing Examiner's ruling, H.E. No. 78-15, is hereby affirmed
in all respects.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst and Parcels voted for this decision.
Commissioner Hurwitz abstained. Commissioners Hipp and Hartnett were not
present.

DATED: Trenton, New Jersey
January 19, 1978
ISSUED: January 24, 1978