

Matter of Giustino

2007 NY Slip Op 33698(U)

November 5, 2007

Supreme Court, Nassau County

Docket Number: 2544-07/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____x

In the Matter of the Application of Anthony P. Giustino, Esq. To compel full compliance with a subpoena duly served upon the Nassau County Police Commissioner through his agent, Jason Dunkel, Esq. Regarding the Matter of Arbitration Between the Civil Service Employees Association by its Local 830 (Grievant Yvette Seeley) and the County of Nassau.

_____x

Index No. 012544/2007

Motion Seq. No.: 001

Motion Submitted: 8/20/07

The following papers read on this motion:

- Notice of Order to Show Cause/Supporting Exhibits.....X
- Affirmation in Opposition/Supporting Exhibits.....X
- Affirmation in Further Support of Order to Show Cause.....X

Petitioner seeks, by way of order to show cause, an order pursuant to CPLR §2308(b) compelling Nassau County Police Commissioner Lawrence Mulvey to comply with a subpoena previously served by petitioner upon then Commissioner James Lawrence directing him to appear and bring certain documents to the Nassau County Office of Labor Relations associated with a disciplinary proceeding filed by the Civil Service Employees Association, Inc. against a civilian employee of the Nassau County Police Department. Specifically, petitioner seeks production of a copy of a report/letter authored by the Nassau County District Attorney's Office and forwarded to the Nassau

County Police Department's then Commissioner Lawrence concerning its conclusion as to any potential criminal action concerning the same civilian employee subject to this disciplinary proceeding. On behalf of Commissioner Mulvey, the County of Nassau opposes this application. The motion is decided as hereinafter provided.

BACKGROUND

Petitioner is attorney of record for Civil Service Employees Association (hereinafter "CSEA") in a arbitration proceeding against the County of Nassau challenging the determination against civilian employee of the Nassau County Police Department named Yvette Seeley, a CSEA member. Hearings have been held as recently as July 3, 2007 with further hearings before an arbitrator anticipated. Yvette Seeley's employment with the Police Department was terminated for cause as a result of allegations of her collecting her full salary for days she was absent from work over a three year period. Through the County's collective bargaining agreement with CSEA, Ms. Seeley grieved her termination. One of the grounds of her grievance is her contention that her termination was untimely as the collective bargaining agreement provides, inter alia, that disciplinary charges may not be imposed on an employee more than one year after the occurrence of her misconduct unless the "misconduct would, if proved in a court of competent jurisdiction, constitute a crime." (See, Section 10.7 of Collective Bargaining Agreement)

In March 2007, petitioner served a subpoena duces tecum pursuant to CPLR

§7505 on then Commissioner Lawrence through his counsel for production of certain documents. All of the documents requested were provided except for a letter which had been redacted issued in November 2005 from then Nassau County District Attorney Denis Dillon to Commissioner Lawrence advising him of his offices decision to decline to proceed with any criminal prosecution of Ms. Seeley. Petitioner claims this letter may be "of dispositive importance to the issue of whether the termination was proper and valid" and is necessary to the pending arbitration proceeding. In opposing this application, the County argues that the letter falls within the purview of the public interest and law enforcement privileges and because it is irrelevant to the proceeding as the arbitrator has stated during the proceedings that he would not consider the letter even if it was entered into evidence and has declined to order the County to produce it.

DISCUSSION

The County's initial basis for opposing release of this letter, which contains the then District Attorney's position for declining to prosecute Ms. Seeley, is that disclosure would be improper as such a letter is a confidential communication between public officers engaged in the performance of their duties which should be privileged and thus shielded from production. Specifically, the County alleges that production of this inter-department governmental communication would have a "chilling effect" on such communications between officials and result in a loss of governmental investigatory discretion and compromise the public good.

Generally, the public interest privilege extends to “confidential communications between public officers and to public officers in the performance of their duties, where the public interest requires that such confidential communications or the source should not be divulged.” (Cirale v. 80 Pine Street Corp., 35 NY 2d 113). The privilege, however, is not absolute and its invocation is based upon “a fact-specific determination for a fact-discretion weighing court, operating in camera, if necessary.” (In Re World Trade Center Bombing Litigation, 93 NY 2d 1 [1999]). The agency claiming such governmental-public interest privilege must demonstrate the specific public interest that would be jeopardized by the release of such information. Once, however, it is shown that disclosure would be more harmful to the interest of the government than non-disclosure would be to the interest of the party seeking the information, the overall public interest on balance would then be better served by non-disclosure. (Cirale v. 80 Pine St. Corp., supra 35 NY 2d at 118). This court is required to balance the need of a civil litigant to secure information with the government’s duty to maintain public peace and welfare.

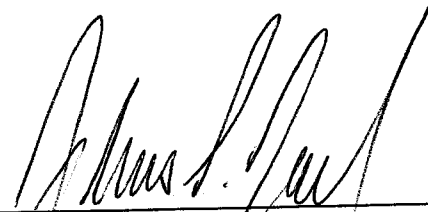
In addition to the public interest privilege, the County also invokes as a basis for opposing the release of this letter, the “law enforcement” privilege. The purpose of the law enforcement privilege is to prevent disclosure of law enforcement personnel and otherwise prevent interference with an investigation. (In Re Department of Investigation of the City of New York v. Myerson, 856 2d 481 (2d Cir. 1988)). The County in this instance, notwithstanding the District Attorney’s letter declining to

prosecute Ms. Seeley, advance the argument that the potential for criminal prosecution has not been entirely foreclosed and therefore there exists the possibility of compromising such a prosecution by release of such letter as the statute of limitations has not expired.

In view of the required balancing of the interest of the County and that of the petitioner in seeking the information contained in this November 2005 letter, which this Court must undertake, the Court cannot, based upon the papers before it, make a determination as to whether this letter should be disclosed without an in camera inspection of same. (Colgate Scaffolding & Equipment Corp. v. York Hunter City Services, Inc., 14 AD 3d 345 [1st Dept. 2005]). Accordingly, the Court hereby directs both counsel to appear at a conference before this Court on November 30, 2007 at 9:30 AM at which time counsel for the County of Nassau is hereby directed to produce the November 2005 letter in question for this Court to conduct an in camera examination and a determination as to its disclosure to petitioner.

This constitutes the Decision and Order of the Court.

Dated: November 5, 2007
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**