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[2] In the Matter of RICHARD J. CONDON, in his official capacity as Special Commissioner of Investigation for the New York City School District, Petitioner, - against - PATRICIA SABATER, Respondent. Index No. 401175/12**

401175/12

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2012 N.Y. Misc. LEXIS 5503; 2012 NY Slip Op 32889U

November 30, 2012, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: prehearing, amicus curiae brief, teacher, sworn, subpoena ad testificandum, leave to file, required to testify, admissible, testifying, sequence, subpoena

JUDGES: [*1] CAROL E. HUFF, J.S.C.

OPINION BY: CAROL E. HUFF

OPINION

CAROL E. HUFF, J.:

Motions with sequence numbers 001 and 002 are consolidated for disposition.

In this special proceeding made pursuant to CPLR 2308(b) (Disobedience of subpoena -- non-judicial), petitioner, as Special Commissioner of Investigation for the New York City School District ("SCI"), moves to compel respondent to comply with a *subpoena ad testificandum* issued by SCI (sequence 001). Non-party New York State United Teachers ("NYSUT") moves for leave to file an *amicus curiae* brief (002).

The motion by NYSUT for leave to file an *amicus curiae* brief, which is not opposed, is granted.

Respondent Patricia Sabater is an assistant principal and tenured teacher at an elementary school in Brooklyn. SCI is charged, pursuant to Mayoral Executive Order No. 11 of 1990, with the authority to investigate alleged misconduct within the New York City Department of **[**3]** Education. SCI seeks Sabater's sworn testimony in connection with an investigation into allegations of the failure to report sexual harassment and unlawful touching committed by students upon students at the school. The investigation seeks to determine whether respondent failed to act on and report complaints **[*2]** made by two female students, in violation of Chancellor's Regulation A-831.

Sabater's attorney initially informed SCI that she would appear voluntarily to be interviewed under oath. The attorney then informed SCI that she would not appear. SCI issued a *subpoena ad testificandum* dated April 24, 2012, directing Sabater's appearance to testify, and it was agreed that she would appear on May 3, 2012. On May 3, Sabater appeared with counsel and was placed under oath. She answered background questions relating to her address, phone number and Department of Education file number, but refused to answer any additional questions, citing her rights under the holding in Board of Educ. of the City School Dist. of the City of New York v Mills, 250 AD2d 122, 680 N.Y.S.2d 683 (3d Dept

1998), lv. denied 93 NY2d 803, 711 N.E.2d 201, 689 N.Y.S.2d 16 (1999).

In Mills the Third Department affirmed the finding of the Commissioner of Education of the State of New York that the respondent teacher was entitled not to submit to sworn questions during a prehearing investigation, citing Education Law § 3020-a(3)(c)(I), which provides that an "employee shall not be required to testify" during his or her hearing. The Mills court found:

> Significantly, petitioner does **[*3]** not dispute that any information gathered during the prehearing investigation would be admissible at the disciplinary hearing. Therefore, even if an employee chose not to testify at the hearing, his or her prehearing statements to the SCI would be admissible as admissions against interest. Clearly this contravenes Education Law § 3020-a which provides a significant protection, that of shielding employees against testifying against themselves in a proceeding in which their job rights are in jeopardy.

250 AD2d at 126.

[4]** SCI argues that Mills was wrongly decided and that this Court should rule differently and compel the prehearing, sworn testimony of Sabater. He argues that the Education Law was amended to include the "employee shall not be required to testify" language after the charges were filed in the Mills case. That does not, however, affect the Appellate Division's interpretation of the statute. He further argues that General City Law § 20.21 should be given at least equal weight to Education Law § 3020-a, However, § 20.21 only provides generally that cities have power to subpoena witnesses in connection with investigations, while Education Law § 3020-a specifically excludes a class **[*4]** of persons from testifying against themselves. SCI also attempts to distinguish Sabater from the respondent in Mills because Sabater is an assistant principal. Education Law § 3020-a applies, however, to any "person enjoying the benefits of tenure," which Sabater does.

In People v Shakur, 215 AD2d 184, 185, 627 N.Y.S.2d 341 (1st Dept 1995), the First Department stated: "Trial courts within this Department must follow the determination of the Appellate Division in another Department until such time as this Court or the Court of Appeals passes on the question." Since neither the First Department nor the Court of Appeals has issued a ruling contrary to Mills, and petitioner has not sufficiently demonstrated the error of the Mills holding, the petition is denied.

Accordingly, it is

ORDERED that the motion (002) of NYSUT for leave to submit an *amicus curiae* brief is granted; and it is further

[5]** ADJUDGED that the petition (001) is denied and the proceeding is dismissed.

Dated: NOV 30 2012

/s/ Carol E. Huff

J.S.C.