

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of

SUFFOLK COUNTY ETHICS COMMISSION,

Index No. 10-*30161*

Petitioner,

AFFIRMATION

to compel compliance with a subpoena duly
issued and served on

CHERYL A. FELICE,

Respondent.
-----X

STEVEN G. LEVENTHAL, an attorney admitted to practice in the courts of this State,
affirms under penalty of perjury that:

1. I am special counsel to the Suffolk County Ethics Commission and, as such I am familiar with the facts and circumstances of this matter; I make this affirmation based on my personal knowledge except where stated to be on information and belief and, as to those matters, I believe them to be true.

2. At all times mentioned, petitioner, Suffolk County Ethics Commission, was and is a government commission established and existing pursuant to the laws of the a County of Suffolk, authorized, among other things, to investigate alleged violations of local laws pertaining to ethics.

3. The Commission is authorized by law to hear, try and determine matters within its jurisdiction.

4. The Commission is empowered to issue subpoenas in connection with the matters that it is authorized to hear, try and determine. *See*, CPLR §2302(a).

5. Matters under investigation by the Commission are confidential. *See*, Suffolk County Charter §C30-4C(1).

6. At all times mentioned, respondent Cheryl A. Felice was, and still is, the president of the Suffolk County Association of Municipal Employees, Inc. (the “AME”).

7. Petitioner is presently investigating a sworn complaint alleging a possible violation of Article XXX (Code of Ethics) of the Suffolk County Administrative Code, sections A30-4 (Disclosure of confidential information) and A30-5 (Restrictions on future employment) based on the alleged engagement of a former County employee by the AME, and the rendering of post employment services by the former County employee to the AME.

8. A hearing before the Commission was scheduled to commence at 4:00 PM on March 23, 2010 at the Office of the County Attorney, H. Lee Dennison Building, 100 Veterans Memorial Highway, 6th Floor, Hauppauge, New York.

9. The testimony of respondent is material and necessary in order to ascertain all of the facts and circumstances concerning the alleged engagement of the former County employee by the AME, and the rendering of post employment services by the former County employee to the AME.

10. On March 4, 2010, the Commission issued a subpoena (the “Subpoena”) commanding respondent to appear before the Commission on March 23, 2010 at the Office of the County Attorney, H. Lee Dennison Building, 100 Veterans Memorial Highway, 6th Floor, Hauppauge, New York at 4:00 P.M, and at any adjourned or recessed date of the hearing, to be examined regarding the Commission’s investigation. A copy of the Subpoena, redacted to remove the identity of the former County employee, is attached hereto as exhibit “A”.

11. The Subpoena further required that respondent produce “any and all records referring or relating to... [the former County employee] in the possession of the AME or... [respondent] including but not limited to communications (including emails), responses, submissions, invoices, bills, and payments made to or received from said... [former County employee], during the period June 1, 2007 through the date [t]hereof.” *See*, exhibit “A”.

12. The March 23, 2010 hearing was adjourned to April 6, 2010, and respondent was notified that her testimony would be required at that time.

13. By letter dated March 25, 2010, respondent’s counsel confirmed the adjournment of the hearing to April 6, 2010 at 4:00 P.M.

14. By letter dated April 5, 2010, respondent’s counsel purported to assert the labor union leader privilege with respect to the disclosure of specific information that intrudes upon “...AME’s representational duties, specifically including negotiating a renewal collective bargaining agreement with the County.”

15. The privilege asserted by respondent’s counsel is supported by sparse authority, and would not apply to testimony by the respondent concerning the alleged engagement of a former County employee by the AME, and the rendering of post employment services by the former County employee to the AME because any such privilege “is strictly limited to communications between a union member and an officer of the union, and operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty.” City of Newburgh v. Newman, 70 A.D.2d 362 (3rd Dept. 1979); Seelig v. Shepard, 152 Misc.2d 699 (New York Co. 1991).

16. Moreover, even if such a privilege applied to the subject matter of the respondent's testimony, it would not justify her failure to obey the Subpoena because:

... a witness may rarely obtain an order quashing a subpoena ad testificandum in advance of the interrogation. The proper procedure requires that the subpoena be obeyed and objections to specific questions interposed. If the objections cannot be resolved informally, appropriate review can be sought on a record that permits an informed determination of the issues. 'Simply stated, privileges may not be asserted in advance of questions actually propounded'

Seelig, supra, citing New York State Commn. On Govt. Integrity v. Congrel, 156 A.D.2d 274, 280 (1st Dept. 1989), *appeal dismissed* 75 N.Y.2d 836 (1990); *also citing, Matter of Cunningham v. Nadjari*, 39 N.Y.2d 314 (1976); *also citing, People v. Slochowsky*, 116 Misc.2d 1069 (Kings Co. 1982); *see, Children's Village v. Greenburgh Eleven Teachers' Union Federation of Teachers, Local 1532*, 232 A.D.2d 356 (2d Dept. 1996).

17. That same day, April 5, 2010, I responded to the letter of respondent's counsel and advised that:

There is no risk that [AME]'s specific negotiating plans and strategies will be disclosed as a result of Ms. Felice's appearance before the Suffolk County Ethics Commission. Investigations conducted by the Commission are confidential as a matter of law. *See*, Suffolk County Charter §C30-4C(1). Further the County Attorney has recused herself in connection with this matter, and I have been retained to serve as special counsel to the Commission. No attorney employed by the County Attorney's office is assigned to handle this matter.

18. My letter further stated that: "In the event Ms. Felice intends to assert the labor union leader privilege in connection with documents demanded for production in the subpoena, please provide a privilege log pursuant to CPLR §3122(b)."

19. In a telephone conversation on April 5, 2010, respondent's counsel agreed to produce his client for an informal discussion with the Commission on at 4:00 PM on April 6, 2010.

20. By letter dated April 6, 2010, respondent's counsel stated that "Ms. Felice's appearance schedule for 4 pm on this date is without waiver of any objection to providing testimony and producing documents and she hereby reserves all her rights with respect thereto... Notwithstanding the foregoing, Ms. Felice and I intend to appear at the appointed time and place."

21. On April 6, 2010, respondent and her counsel appeared before the Commission for an informal discussion.

22. By letter dated June 2, 2010, I advised respondent's counsel that a formal hearing was scheduled to take place on June 24, 2010 at the Office of the County Attorney, H. Lee Dennison Building, 100 Veterans Memorial Highway, 6th Floor, Hauppauge, New York at 2:00 P.M., and that respondent's testimony would be required at that time.

23. My letter also requested that respondent produce a privilege log pursuant to CPLR §3122(b).

24. On June 16, 2010, I contacted respondent's counsel and advised him that the June 24, 2010 hearing had been adjourned.

25. On June 28, 2010, I advised respondent's counsel by letter that a hearing in this matter was scheduled to take place on July 28, 2010 at the Office of the County Attorney, H. Lee Dennison Building, 100 Veterans Memorial Highway, 6th Floor, Hauppauge, New York at 3:00 P.M., and that respondent's testimony would be required at that time.

26. In my letter, I renewed the Commission's request that respondent produce a privilege log pursuant to CPLR §3122(b).

27. By email on July 21, 2010, respondent's counsel advised me that respondent would not appear at the July 28, 2010 hearing.

28. Respondent failed and refused to obey the Subpoena, did not appear before the Commission on July 28, 2010, and has not produced a privilege log.

29. The testimony and documents of respondent are material and relevant to the Commission's investigation and the failure to receive the testimony and documents will seriously prejudice the Commission in the conducting of its investigation.

30. On August 30, 2010, I notified respondent's counsel by fax of the time and place at which the within Order to Show Cause would be presented. A copy of my notice to respondent's counsel is attached as exhibit "B".

31. No previous application has been made for the relief requested herein.

WHEREFORE, petitioner demands judgment and an order compelling Cheryl A. Felice to appear before the Suffolk County Ethics Commission at a hearing to be held at the Office of the County Attorney, H. Lee Dennison Building, 100 Veterans Memorial Highway, 6th Floor, Hauppauge, New York on September 22, 2010 at 4:00 P.M., and at any adjourned or recessed date of the hearing, to give testimony and produce documents as set forth in the Subpoena, for \$50.00 in costs pursuant to CPLR §2308(b), and for such other and further relief that the Court deems proper.

Dated: Roslyn, New York
August 30, 2010

LEVENTHAL AND SLINEY, LLP
Attorneys for Petitioner

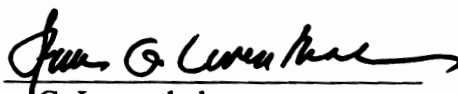
By: 
Steven G. Leventhal
15 Remsen Avenue
Roslyn, New York 11576
(516) 484-5440

EXHIBIT A

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

TO: CHERYL FELICE
c/o ASSOCIATION OF MUNICIPAL EMPLOYEES
30 ORVILLE DRIVE
BOHEMIA, NEW YORK 11716
(631) 589-8400

GREETINGS: YOU ARE COMMANDED to appear before the SUFFOLK COUNTY ETHICS COMMISSION, at the OFFICE OF THE COUNTY ATTORNEY, H. LEE DENNISON BUILDING, 100 VETERANS MEMORIAL HIGHWAY, 6TH FLOOR, HAUPPAUGE, NEW YORK 11788 at 4:00PM on TUESDAY, MARCH 23, 2010 and at any adjourned date or time thereof, to testify with respect to the following matter:

The engagement of [REDACTED] whether as consultant, strategist, employee, independent contractor or any other relationship, by the Association of Municipal Employees (AME), and the rendering of any services by [REDACTED] to the Association of Municipal Employees during the period June 1, 2007 through the date hereof.

You are further required to bring with you any and all records referring or relating to [REDACTED] in the possession of the AME or yourself including but not limited to communications (including emails), responses, submissions, invoices, bills, and payments made to or received from said [REDACTED] during the period June 1, 2007 through the date hereof.

If you fail to comply with this subpoena, the Suffolk County Ethics Commission shall move to compel your appearance and compliance in the Supreme Court of Suffolk County in accordance with New York Civil Practice Law and Rules Section 2308(b). The Supreme Court has the power to impose a penalty on you, award damages and to issue a warrant directing a sheriff to compel your appearance before the Commission.

YOU ARE HEREBY REQUESTED NOT TO DISCLOSE THE EXISTENCE OF THIS SUBPOENA. ANY SUCH DISCLOSURE COULD IMPEDE THE INVESTIGATION AND THEREBY INTERFERE WITH THE ENFORCEMENT OF THE LAW.

Dated: March 4, 2010



Thomas G. Nolan, Chairman
Suffolk County Ethics Commission
Office of County Attorney
H. Lee Dennison Building
100 Veterans Memorial Highway, 6th Floor
Hauppauge, New York 11788

Notice: If this case should not be called on the day mentioned in this subpoena, you are directed to attend from day to day until you are discharged.

EXHIBIT B

LEVENTHAL AND SLINEY, LLP

ATTORNEYS AT LAW
15 REMSEN AVENUE
ROSLYN, NEW YORK 11576
TELEPHONE: (516) 484-5440
FACSIMILE: (516) 484-2710

STEVEN G. LEVENTHAL
BENEDICT L. SLINEY

HENRY T. NGUYEN
CHRISTINE H. PRICE

Sender's e-mail: sleventhal@ls-llp.com

August 30, 2010

Via fax only: (212) 571-7124

Gary Silverman, Esq.
O'Dwyer & Bernstein, LLP
Paul O'Dwyer Way
52 Duane Street
New York, New York 10007

Re: In the Matter of the Application of Suffolk County Ethics
Commission v. Cheryl Felice

Dear Mr. Silverman:

Please be advised that at 2:00 PM on August 31, 2010, an order to show cause will be submitted to the Clerk of the Suffolk County Supreme Court at 400 Carleton Avenue, Central Islip, New York.

The relief sought will be an order compelling Cheryl Felice to appear before the Commission at a hearing to be held at the Office of the County Attorney, H. Lee Dennison Building, 100 Veterans Memorial Highway, 6th Floor, Hauppauge, New York on September 22, 2010 at 4:00PM, and at any adjourned or recessed date of the hearing, to give testimony and produce documents as set forth in the subpoena issued by the Commission on March 4, 2010.

Please advise the undersigned as to whether you intend to appear in opposition to the application.

Very truly yours,



Steven G. Leventhal

LEVENTHAL AND SLINEY, LLP

ATTORNEYS AT LAW
15 REMSEN AVENUE
ROSLYN, NEW YORK 11576
TELEPHONE: (516) 484-5440
FACSIMILE: (516) 484-2710

STEVEN G. LEVENTHAL
BENEDICT L. SLINEY

HENRY T. NGUYEN
CHRISTINE H. PRICE

DATE: August 30, 2010

TO: Gary Silverman, Esq.
O'Dwyer & Bernstein, LLP
(212) 571-7124

FROM: Steven G. Leventhal

RE: In the Matter of the Application of Suffolk County Ethics
Commission v. Cheryl Felice

MESSAGE:

Total Pages: 2 (including cover)

HP Officejet 7310
Personal Printer/Fax/Copier/Scanner

Log for
Leventhal
516-484-2710
Aug 30 2010 1:17PM

Last Transaction

<u>Date</u>	<u>Time</u>	<u>Type</u>	<u>Identification</u>	<u>Duration</u>	<u>Pages</u>	<u>Result</u>
Aug 30	1:17PM	Fax Sent	12125717124	0:36	2	OK