

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Supreme Judicial Court
No. OE-123

IN THE MATTER OF THE PROBATION DEPARTMENT
OF THE TRIAL COURT

MEMORANDUM AND ORDER

By order dated May 24, 2010, this court appointed an independent counsel to conduct a "prompt and thorough administrative inquiry into alleged improprieties with respect to the hiring and promotion of employees within the Probation Department, as well as other practices and management decisions within the Probation Department that have been called into question." The order granted the independent counsel the power to subpoena witnesses and to administer oaths. Thomas M. Petrolati has moved to quash a subpoena served on him on August 12, 2010. For the reasons described below, the motion is denied.

Background.¹

The order appointing the independent counsel followed a series of articles published in the Boston Globe newspaper about the hiring and promotion practices within the Probation Department. The Boston Globe reported that hiring and promotion in the Probation Department were affected by political influence,

¹This background information is taken from the parties' submissions.

including campaign contributions made to elected officials. The Boston Globe article identified Representative Thomas M. Petrolati (petitioner) as a legislator who has benefited from hiring practices in the Probation Department. See An Agency Where Patronage is Job One, Boston Globe, May 23, 2010. Based on the information appearing in the Boston Globe article and other information gathered to date, the independent counsel concluded that the petitioner was likely to have information concerning hiring and promotion decisions made within the Probation Department, and subpoenaed him to testify and to produce certain materials. The petitioner has moved to quash the subpoena, arguing that (1) the subpoena exceeds the independent counsel's authority and this court's powers of general superintendence because the petitioner is not an employee of the judicial branch, and (2) enforcement of the subpoena would constitute an encroachment by the judicial branch on both the executive and legislative branches of government in violation of art. 30 of the Massachusetts Declaration of Rights. In the alternative, the petitioner argues that, even if lawful, the court should nonetheless quash the subpoena on the grounds that it is not "necessary or desirable" to the court's exercise of its powers of superintendence under G. L. c. 211, § 3, second par.

Discussion.

The Justices appointed the independent counsel under the

court's powers of superintendence to investigate the hiring and promotion practices in the Probation Department, as well as other Probation Department management decisions that have been called into question. The independent counsel reports only to the court. As agreed by the petitioner, such an investigation is clearly within the court's inherent and statutory powers of general superintendence over the judicial branch.

The court's powers of general superintendence rest on multiple sources of authority, among them "the inherent common law and constitutional powers of this court, as the highest constitutional court of the Commonwealth, to protect and preserve the integrity of the judicial system and to supervise the administration of justice [and from] the supervisory powers confirmed to this court by G. L. c. 211, § 3."² Matter of

²In relevant part, G. L. c. 211, § 3, provides: "The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

"In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, . . . and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration"

DeSaulnier (No. 1), 360 Mass. 757, 759 (1971). See First Justice of the Bristol Div. of the Juvenile Court v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep't, 438 Mass. 387, 397 (2003), quoting Opinion of the Justices, 279 Mass. 607, 613 (1932) ("Although inherent powers may be recognized by statute, they exist independently, because they 'directly affect[] the capacity of the judicial department to function' . . .").

The Legislature, in enacting G. L. c. 211, § 3, recognized and confirmed the authority of this court to ensure the fair and efficient administration of justice, and to "issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration." Consequently, apart from our inherent constitutional authority, we have statutory authority to authorize the independent counsel to subpoena testimony under oath of persons outside the judicial branch who independent counsel has reason to believe possess information pertinent to his inquiry into alleged improprieties within the Probation Department.³ To conclude otherwise would make it

³ Similar practices were employed in a previous investigation by a special master and commissioner appointed by the court to investigate alleged improprieties with respect to preferential treatment of attorneys by certain judges. See Report of Special Master and Commissioner in the Matter of the

impossible for the court properly to investigate alleged misconduct within the judicial branch in any instance where nonjudicial branch employees may have been involved or have information relevant to the inquiry. Nothing in G. L. c. 211, § 3, limits the court's power to issue subpoenas only to employees of the judicial branch and we do not read such limitation into any portion of the statute.

The petitioner also claims that enforcement of the subpoena would represent an impermissible incursion by the court into the constitutional authorities and responsibilities vested in the executive and legislative branches in violation of art. 30.⁴ There is no merit to the petitioner's claim that by enforcing the

Boston Municipal Court Department of the Trial Court (BMC) (February 4, 1991). That investigation also followed a series of articles in the Boston Globe newspaper; the articles concerned certain perceived practices at the BMC, including the appearances of six politically connected attorneys. The special master took oral testimony under oath from fifty-five witnesses, including court personnel, "the District Attorney for Suffolk County, his first assistant, [twelve] present and past assistant district attorneys who work or worked in the BMC jury-of-six sessions, each of the six attorneys identified in the Boston Globe series of articles in conjunction with the BMC and additional attorneys, court personnel, police officers and other witnesses." The six attorneys identified in the article were then-current and former members of the General Court and a legislative counsel.

⁴ Article 30 of the Massachusetts Declaration of the Rights states: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

subpoena, the court would be improperly assuming the prosecutorial duties of the executive branch. As stated, the independent counsel is investigating a department of the judicial branch over which the court has supervisory authority. That the independent counsel may obtain information about possible misconduct committed by nonjudicial branch employees that is related to conduct within the judicial branch in no way encroaches on the authority of the executive branch to investigate, indict, or prosecute criminal conduct. The order appointing the independent counsel asks him only to conduct an administrative inquiry and to report his findings, conclusions, and recommendations, including his recommendations with respect to indications or findings of misconduct, if any, on the part of any employee of the judicial branch. "While there can be no doubt that art. 30 demands a separation of the governmental powers entrusted to the three branches of government in this Commonwealth . . . it does not prevent one branch from assuming those functions which would aid its internal operations without unduly restricting the endeavors of another coordinate branch" (citation omitted). Opinion of the Justices, 372 Mass. 883, 892 (1977).

The petitioner's claim that enforcing the subpoena would encroach on the Legislature's authority to supervise the conduct

of its members also lacks merit.⁵ The independent counsel is not seeking to "supervise" the conduct of a legislator, but to determine whether a particular legislator has information relevant to his inquiry. The goal of the independent counsel's inquiry is to inform the judiciary's conclusion regarding its own branch of government.

The petitioner additionally argues that even if lawful, the subpoena should nonetheless be quashed until the court considers, either on the current record or on a record expanded by an interim report from independent counsel, whether it is "necessary or desirable" under G. L. c. 211, § 3, second par. Such a determination is not required where, as here, the proposed testimony is plainly within the scope of the administrative inquiry ordered by this court.

For the foregoing reasons, the motion is denied.

By the Court,


Clerk

Entered: *September 1, 2010*

⁵The petitioner has claimed in addition that the subpoena may also violate the speech and debate clause contained in art. 21 of the Massachusetts Declaration of Rights. The petitioner and the independent counsel agree that this claim is premature, and the independent counsel has represented that he does not intend to ask questions that run afoul of this clause.