

Index No. 109510/07
New York County Clerk

To argued by
ALAN G. KRAMS

**New York Supreme Court
Appellate Division—First Department**

In the Matter of a Motion to Quash a Non-Judicial Subpoena

VIRGINIA PARKHOUSE,

Petitioner-Appellant,

-against-

SCOTT M. STRINGER, Borough President of Manhattan, ROBERT TIERNEY, Chairman of
The New York City Landmarks Preservation Commission, ROSE GILL HEARN, Commissioner
of Investigation, KIM A. BERGER, Deputy Commissioner for Investigations, and
DEPARTMENT OF INVESTIGATION OF THE CITY OF NEW YORK,

Respondents-Respondents.

RESPONDENTS' BRIEF

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PRELIMINARY STATEMENT

Petitioner, Virginia Parkhouse, moved to quash a testimonial subpoena issued by the New York City Department of Investigation (DOI), which is investigating whether Ms. Parkhouse and a colleague intentionally or unintentionally misrepresented at a public hearing of the Landmarks Preservation Commission that they were speaking on behalf of two public officials, Manhattan Borough President Scott Stringer and Assembly Member Linda Rosenthal.

Parkhouse is appealing from an order of the Supreme Court, New York County (Cahn, J.), entered October 22, 2007, denying her motion to quash the subpoena and granting a cross-motion by DOI, its Commissioner, and Deputy Commissioner for an order compelling compliance with the subpoena.¹

QUESTION PRESENTED

When Parkhouse and a colleague from Landmark West! spoke at a Landmarks Preservation Commission hearing, they caused confusion about whether they were appearing as representatives of certain elected officials. Can DOI investigate this occurrence to ascertain if the Commission's

¹ Parkhouse's notice of appeal also purports to be on behalf of Landmark West!, Inc., her "assignee" (R.3). Since Parkhouse has a right to appeal the IAS Court's order, it is unnecessary to consider whether Parkhouse's claim is assignable.

hearing procedures should be changed, and did it properly subpoena Parkhouse to further that investigation?

STATEMENT OF FACTS

Petitioner Virginia Parkhouse is a representative of Landmark West!, Inc., and she appeared at an October 17, 2006, hearing of the New York City Landmarks Preservation Commission to speak in support of designating two stables on the Upper West Side as landmarks (44).² When she rose to speak, Parkhouse announced that she was "volunteering today to read the statement of Borough President Scott Stringer" (30). However, she did not read a statement prepared by Mr. Stringer for the hearing, but a letter he had sent to the Commission's Chair two months earlier. In that reading, Parkhouse altered the letter. As written, the letter mentioned the stables' architectural importance and concluded with the recommendation that the Commission "calendar these two buildings and protect an important part of the history of the development of the Upper West Side" (31).

When Parkhouse read the letter, as Stringer's "statement," she altered the text by eliminating the references to calendaring and adding the conclusion that the Commission should "protect the important history of the Upper West Side and landmark these buildings" (30) (underlined portion not in the

² Numbers in parentheses refer to pages in the Record on Appeal.

letter (48)). Parkhouse then submitted the letter to the Commission with her spoken alterations included as handwritten changes (36, 48).

The letter, even in its unaltered form, was not an accurate statement of Stringer's views as of the date of the hearing (38). One of the buildings had been partially demolished, destroying its "distinctive façade" (38). When Stringer learned this, he decided "that he would no longer support the landmarking of that building and sent no further communications to the [Commission] regarding the matter" (38).

At the same meeting, Lindsay Miller, another Landmark West! representative (35), inaccurately signed in as representing Assembly Member Linda Rosenthal (43). Like Parkhouse, Miller read an old letter--this one from July 2006--and changed the text so that instead of recommending that the stables matter be calendared, the Commission was told that Rosenthal wanted the stables "designate[d]" (42).

Parkhouse and Miller led others to believe that they were appearing as Stringer's and Rosenthal's representatives, respectively. An observer sent by Stringer's office was told at the meeting "that someone was speaking on Borough President Stringer's behalf" (38). Additionally, because Commission rules allow only one person to speak on behalf of a given public

official, Miller's appearance resulted in Rosenthal's actual representative not being allowed to speak (36).

Two days after the hearing, Landmark West!'s executive director wrote a letter responding to a phone call from Stringer's office (70-71). The executive director reiterated Landmark West!'s position regarding the stables and offered to correct the record at the Commission if Stringer's position had changed since August (71).

In late November, Jimmy Yan, Stringer's general counsel, complained to the Commission that Parkhouse had submitted Stringer's letter with "handwritten edits with the appearance that such submission was authorized" by Stringer (50). Mr. Yan said it was "highly inappropriate" and perhaps criminal (citing Penal Law § 190.25) for someone to "giv[e] the appearance" that she was Stringer's authorized spokesperson at the hearing (50).

Assembly Member Rosenthal also complained, noting that her designated staff member was prevented from speaking because someone else had already purported to speak for her (45). She urged the Commission to reconsider "its current policy on submission of testimony" (46).

In February 2007, the Commission sent a complaint to DOI, citing Parkhouse's and Miller's "misrepresentations" at the Commission's hearing (35). DOI asked to interview Miller, and

she appeared at their offices (38). However, after Miller learned that DOI wanted to place her under oath and record the interview, her counsel "stated that he would not allow [her] to be interviewed in that manner and invoked her right to remain silent" (38).

Parkhouse would not come to DOI voluntarily and was subpoenaed (26). Her counsel sent DOI a letter requesting that the subpoena be revoked because (i) as a private citizen not doing business with the City, Parkhouse was beyond DOI's subpoena power; and (ii) the subpoena amounted to unconstitutional harassment in violation of Parkhouse's First Amendment rights (24-25).

DOI declined to withdraw the subpoena (28). Its answering letter outlined the agency's broad authority to investigate City affairs and explained that DOI was "investigating an allegation that . . . Parkhouse incorrectly claimed to be representing the views of Manhattan Borough President Stringer with respect to certain matters pending at that time before the [Commission]" (28).

Petitioner moved to quash the subpoena (17-18), and DOI, its commissioner, and deputy commissioner cross-moved for an order compelling compliance (32-33). The Court denied the motion to quash and granted the cross-motion to compel (16).

OPINION BELOW

After describing the relevant events and the parties' contentions (5-10), the IAS Court explained that an agency issuing a non-judicial subpoena need show only that the subpoenaed information bears some reasonable relationship to an agency's authorized investigation (10).

The Court rejected Parkhouse's claim that DOI could not subpoena her testimony, concluding that the agency is empowered to subpoena anyone "when the commissioner has grounds to believe that the person has information relevant to the subject matter under investigation" (11). The Court said that DOI is authorized to make investigations "which have a legitimate and reasonable relation to the operation of the executive branch of the City's government" (11-12). If an investigation is permissible and the subpoenaed person has relevant information, it is of no moment that the witness is not a City employee (12).

The decision went on to explain why the investigation was within DOI's authority and why Parkhouse's testimony was properly sought. Since DOI has broad power to investigate the functioning of City agencies, the Court said the agency was legitimately interested in the Landmark Preservation Commission's concern that it accurately ascertain the views of public officials on pending matters (12-13). The decision

pointed out that Parkhouse "voluntarily testified at a public hearing" that spawned an investigation about "the manner in which witnesses at that hearing identified themselves, and purportedly presented the position of particular governmental officials on the issue under consideration" (12).

Turning to Parkhouse's claims of unconstitutional harassment, the Court noted that "she is a main witness to what occurred at the hearing" and could be questioned "regarding the circumstances of her testimony" (13). The record does not contain evidence of "'malice' or 'rancor' by the public officials toward her, or any evidence of retaliation. If the DOI's inquiry turns out to be unduly protracted or intrusive into petitioner's affairs, without some further showing by DOI of usefulness in its investigation," Parkhouse could then "renew her motion to quash, or make another appropriate application" (14).

Petitioner's free speech claim was found "unpersuasive and meritless" (14) because DOI is not retaliating against Parkhouse for her views but is

investigating whether or not she intentionally misrepresented that she was expressing views on behalf of, and with the endorsement of, an elected official. . . . The First Amendment does not protect citizens when they falsely purport to represent the views of public officials or others. Thus, there is no First Amendment right being abridged.

(14).

ARGUMENT

THE ORDER APPEALED FROM SHOULD BE
AFFIRMED BECAUSE PARKHOUSE
POSSESSES INFORMATION THAT IS
RELEVANT TO A LAWFUL DOI
INVESTIGATION.

"[A]n agency asserting its subpoena power must show its authority, the relevancy of the items sought, and some basis for inquisitorial action." Myerson v. Lentini Bros. Moving & Storage Co., 33 N.Y.2d 250, 256 (1973).

DOI has authority to investigate whether hearing procedures at the Landmarks Preservation Commission should be changed to ensure that witnesses "are in fact representing who they claim to represent" (39). The Legislature has empowered cities "[t]o investigate and inquire into all matters of concern to the city or its inhabitants, and to require and enforce by subpoena the attendance of witnesses at such investigations." Gen. City Law § 20(21). The City Charter provides that DOI's commissioner is "authorized and empowered to make any study or investigation which in his [or her] opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, . . . or efficiency of any agency." N.Y.C. Charter § 803(a). Investigations culminate in a "written report or statement of findings" that is forwarded to the agency that requested the investigation. Id.

Under this authority, DOI may investigate whether the Commission's hearing procedures are adequate to make sure that individuals claiming to speak as representatives of public officials are authorized to do so. Public hearings are a mandated element of the process for designating any property as a landmark. N.Y.C. Admin. Code § 25-303(a)(1)-(5). Special importance is attached to input from borough presidents, who are chosen by a cross-section of the larger community. The president of the borough where a proposed landmark is located must receive "an opportunity for comment, in advance of any hearing." N.Y.C. Charter § 3020(7). It is important to the integrity of the Commission's proceedings that public officials' representatives be reliably identified.

Since the investigation is for a proper purpose, DOI has subpoena power. When the agency is engaged in "any study or investigation authorized by" the Charter, the commissioner has "full power to compel the attendance of witnesses, to administer oaths and to examine such persons." Id. § 805(a).

DOI also satisfied the second and third elements for a valid subpoena, "the relevancy of the items sought, and some basis for inquisitorial action." Myerson, 33 N.Y.2d at 256. To justify "inquisitorial action," the subpoenaing agency need only show "some factual basis . . . to support the subpoena." Id. at 258. The strength of this showing varies depending upon "the

breadth of the inquiry and the extent of the investigation preceding the subpoena." Id. A limited request for information during the early stages of an inquiry requires only minimal support. See A'Hearn v. Comm. on Unlawful Practice of the Law of the N.Y. County Lawyers' Ass'n, 23 N.Y.2d 916, 918, cert. denied, 395 U.S. 959, 89 S. Ct. 2099 (1969) (finding a "bare showing . . . enough to initiate inquiry"). Courts will not attempt to assess an agency's need for subpoenaed material, only its relevance. N.Y.S. Comm. on Gov't Integrity v. Congel, 156 A.D.2d 274, 278 (1st Dep't 1989), appeal dismissed, 75 N.Y.2d 836 (1990). The question to be answered in making that determination "is simply whether the material sought is in some measure relevant to the proper objectives of the investigative body." Id. at 278.

Parkhouse's testimony is relevant. She was one of two Landmark West! representatives who appeared at the Commission's public hearing and read altered letters from public officials. Parkhouse's colleague even signed in as representing Assembly Member Rosenthal. When Parkhouse spoke, she announced that she was going to "read the statement of Borough President Scott Stringer," thus giving the impression that she was reading something he had prepared for presentation to the Commission (30).

These actions created confusion about Parkhouse's and Miller's status. Rosenthal's authentic representative was not permitted to speak because the Commission allows only one spokesperson per official, and Stringer's observer was told that someone was speaking for the borough president, even though Stringer had decided not to submit anything further about the stables.

Testimony from Parkhouse might explain whether she and Miller coordinated their efforts and planned their statements in advance. Whatever details Parkhouse can provide may help DOI offer recommendations designed to prevent future mix-ups about an individual's authority to speak for a public official. And should it turn out that there is evidence of an intent to mislead the Commission into relying on the speakers as agents of elected officials, that might be a basis for transmitting DOI's report to the district attorney. See N.Y.C. Charter § 803(c); Penal Law § 190.25(3).

In short, there was a sufficient basis for DOI to begin its inquiry and seek testimony from someone who obviously has pertinent personal knowledge.

None of Parkhouse's arguments warrant reversing the order appealed from. Her brief leads with the mistaken accusation that the IAS Court made a "fundamental error of fact" (App. Br. at 2) and "manipulat[ed] . . . the wording of [the]

last sentence of the Stringer letter" in a manner that "would properly draw a judicial reprimand" if an attorney did it (id. at 3). This assertion is based on the Court's supposed failure to include in its quotation from the letter language showing Stringer's support for landmarking the stables (App. Br. at 3-4). The argument sidesteps the main issue, which is not whether Parkhouse stated Stringer's views accurately, but whether she put herself forward as someone authorized to state Stringer's views at the hearing.

Moreover, the Court's decision accurately described how Parkhouse altered the end of Stringer's letter (7). There was no effort to hide the phrase urging the Commission to "protect an important part" of the West Side's history (31). Indeed, the Court quoted it in the paragraph preceding the one that so offended appellant (6).

Even more important, the Court accurately concluded that when Parkhouse replaced Stringer's request to calendar the stables matter with a call to landmark the stables, she "clearly changed the meaning of the letter" (7). While the letter supported protecting the stables, had Parkhouse read its reference to calendaring the stables application, it would have been apparent that the letter was written some time before the hearing. Parkhouse's edits, along with her description of the letter as "the statement of Borough President Scott Stringer,"

made it sound as if Parkhouse was presenting Stringer's current views and acting with his authority (30).

This misimpression was not cured by Parkhouse's reference to herself as someone who was "'volunteering'" to read Stringer's statement (App. R. at 9) (quoting R30). In the context of a public hearing, referring to a document as "the statement" of the borough president suggests that it was prepared for the hearing to convey the author's current views. See Webster's Third New International Dictionary 2229 (1971) (defining "statement" as including "a formal declaration . . . made in the course of some official proceeding (as a statement of a witness)").

Parkhouse is subject to DOI's subpoena power even though she does not work for the City or do business with it (App. Br. at 8). When DOI is conducting a lawful investigation, its subpoena "power reaches any person, even though unconnected with city employment, when there are grounds present to sustain a belief such person has information relative to the subject matter of the investigation." Weintraub v. Fraiman, 30 A.D.2d 784, 784-85 (1st Dep't 1968), aff'd no opn, 24 N.Y.2d 918 (1969). Weintraub was an attorney with records pertinent to an investigation of city marshals, and like Parkhouse, he argued unsuccessfully that he could not be subpoenaed because he was not a City employee and had no City business dealings.

Weintraub, 30 A.D.2d 784, Record on Appeal at 14 (No. 13352N).

The IAS Court properly relied on Weintraub to reject Parkhouse's claim that DOI can only subpoena the City's employees and business associates.

Nor does the subpoena violate Parkhouse's constitutional rights. It is a gross exaggeration to liken DOI's investigation to inquiring about "private discussions of landmarks over breakfast tables, in Third Avenue bars, in developer's board rooms, and in public meetings of civic organizations" (App. Br. at 12). In a similar vein, the proposed amicus curiae contends that DOI is conducting an inquiry into "the truth of unsworn political speech" (N.Y.C.L.U. Amicus Br. at 2) (capitalization altered). However, DOI is not interested in the accuracy of the facts underlying Parkhouse's arguments nor in how she forms her opinions or defends them at home or in community group meetings. But DOI does have a legitimate interest in finding out how it came to pass that two Landmark West! representatives left the misimpression that they were speaking at a public hearing on behalf of two elected officials. The First Amendment does not create a right to mislead others into believing you are speaking on another's behalf when, in fact, you have no authority to do so. See Herbert v. Lando, 441 U.S. 153, 171, 99 S. Ct. 1635 (1979) ("Spreading false information in and of itself carries no First

Amendment credentials. "[There] is no constitutional value in false statements of fact." (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S. Ct. 2997 (1974)).

Nor does the investigation violate Parkhouse's associational rights (App. Br. at 11, 12) (citing Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 91, 103 S. Ct. 416 (1982)). The facts leading to the Brown decision illustrate why it is utterly inapposite here. In Brown, the Supreme Court ruled that a financial disclosure statute was unconstitutional when applied to supporters of "a minor political party which historically has been the object of harassment by government officials and private parties." 459 U.S. at 88. The Socialist Workers Party (SWP), with only 60 members in the entire state, id., presented evidence of recent incidents of hostility, such as "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office" as reasons why its donors' names should not be disclosed. Id. at 99. There is nothing remotely comparable in this record.

Furthermore, Parkhouse has not provided any basis for her allegations that the subpoena was "generated by rancor on the part of a public official" in order to "frighten and chastise the entire group of preservation advocates--

specifically those associated with Landmark West!" (App. Br. at 13). Parkhouse has not produced any evidence linking Stringer or the Commission's chair to the subpoena. In fact, neither official had anything to do with its issuance (39).

These conclusory allegations provide no basis for the motion to quash. The Court of Appeals made that point when it adopted this Court's decision in a case refusing to quash testimonial grand jury subpoenas issued to investigate a seemingly genuine--but, in fact, bogus--newspaper supplement that "contained fraudulent articles of a scurrilous nature about public officials" and candidates for office. In re Kronberg, 95 A.D.2d 714, 714 (1st Dep't 1983), aff'd for reasons stated below, 62 N.Y.2d 853 (1984). An advocacy group called the NCLC sought to intervene, and the reasons for denying that motion are equally applicable to Parkhouse's claims of bad faith and harassment.

The allegations by NCLC that the Grand Jury is investigating in bad faith, that it (the NCLC) is the target and that the investigation infringes on its members' associational rights, are wholly conclusory. They do not warrant even a hearing since they are not substantiated by credible, particularized allegations tending to show that they are true. The affidavit submitted in support of the motion contains hearsay, irrelevancies and conclusions. It states no specific facts which fairly support the NCLC's assertion that the Grand Jury investigation was undertaken in bad faith, or that the investigation was designed to

infringe on the associational rights of any member of the NCLC.

Id. at 716.

The only affidavit Parkhouse submitted is an attorney's affirmation that does not contain any evidence of bad faith or improper motive (19-22). Instead, it infers misconduct from the premise that "there is no conceivable ground" for claiming that Parkhouse falsely put herself forward as Stringer's representative (22). As already explained, the circumstances surrounding Parkhouse's and Miller's oral and written statements provide more than enough support for DOI's investigation and subpoena (supra pp. 10-11).

While Parkhouse and the proposed amicus curiae make much about the alleged violation of Parkhouse's First Amendment rights and the purported "chill" that DOI's subpoena will have on public participation in government hearings, this case is not and has never been about the content of Parkhouse's views or her right to express them. If Parkhouse and Miller had simply appeared at the October 17, 2006, hearing and expressed their personal views or the views of Landmarks West! about the matters in question, there would have been no basis for any official inquiry. Indeed, even if they had cited Stringer and Rosenthal as supporters of their viewpoint and read from their letters, there would have been no investigation. Instead, Parkhouse and

Miller went steps further, apparently attempting to make it appear that they were at the hearing as representatives of and to pass along the views of certain elected officials, with Miller going so far as to sign in falsely as Rosenthal's representative.

The First Amendment is intended to assure the free flow of ideas and information. Public hearings where differing views are put forward to guide government action are a valuable byproduct of our constitutional protections. It would be ironic for the First Amendment to be held to prevent DOI from (i) learning whether some individuals attempted willful subversion of the integrity of the public hearing process and (ii) using that information to consider whether agencies in City government can take measures, consistent with constitutional rights, to prevent such occurrences in the future.

CONCLUSION

**THE ORDER APPEALED FROM SHOULD BE
AFFIRMED.**

Respectfully submitted,

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