

OFFICE OF THE CORPORATION COUNSEL



MEMORANDUM

TO: Albert Lucas, Director, Office of Legislative Services,
New Haven Board of Alders

FROM: John Rose, Jr., Acting Corporation Counsel

DATE: February 18, 2015

RE: The Civilian Review Board/Subpoena Power

John Rose, Jr.
2/18/2015

Issue

Whether the recently reconstituted Civilian Review Board has or may be granted subpoena power; and, whether the Civilian Review Board has the capacity or authority to enforce subpoenas.

Short Answer

The Revised City Charter, approved by the Board of Alders as of August 5, 2013, by Article VII, Sec 4, captioned "Boards and Commissions Required by the Charter", at subsection B, establishes the Civilian Review Board, describes its objectives and make-up and prescribes its operations.

The Charter at Article VII, Section 4.B (7) prescribes that "The Board of Alders shall, by ordinance, establish such additional authority necessary to effectuate the purposes and duties of the [Civilian Review] Board." To date no such ordinances have been enacted.

The questions posed to Corporation Counsel for opinion are:

- (a) Whether the Civilian Review Board has subpoena power; and
- (b) Is it possible/legal for the Board of Alders to grant the Civilian Review Board subpoena power if it does not already have it?

And the consequent follow-up inquiry is: whether the Civilian Review Board, if it has or is granted subpoena power, may enforce that power by compelling reluctant witnesses to appear before it.

The short answer is as follows:

- a. The Civilian Review Board, as one “of the several boards of commissioners” of the Board of Alders has the power to compel the attendance and testimony of witnesses before it by the issuance of subpoenas and the administration of oaths ; and
- b. Neither the Board of Alders nor the Civilian Review Board has the power or authority to enforce a subpoena to compel the attendance or testimony of a reluctant witness.

Relevant Statutory and Regulatory Provisions

The City commissioned an outside law firm to provide an opinion concerning whether, under state law, the Board of Alders has the authority to issue subpoenas. On September 27, 2010, the Crumbie Law Group LLC rendered that opinion, and this one relies on that opinion, in material part, with confirmation of its conclusions having been had. From that report the following statement is pertinent here: “...subpoena power may be granted to a municipality or its governing or legislative body only by state legislation including Special Acts.”

By 13 Special Act No. 467, Section 131 of the 1899 session of the General Assembly, the New Haven Board of Alders (“Aldermen” by that statute) was granted the authority to issue subpoenas. The language of the 1899 Special Act 467 reads:

The presiding officers of the board of aldermen, board of councilmen, of the several committees of said boards, and of the several boards of commissioners, and the director of public works, shall respectively have power to compel the attendance and testimony of witnesses before their respective boards, committees, and departments over which they preside by the issue of subpoenas and the administration of oaths in the matter and according to the rules governing the same in courts of justice; and when it shall be necessary to secure the attendance or testimony of witnesses before said boards, committees, departments or director of public works, such presiding officers and such director of public works shall have the right to apply to the court of common pleas, or the superior court, for an order compelling any witness so summoned before them to testify; which courts shall have the power to issue subpoenas and to enforce the presence and testimony of all witnesses summoned, in the same way and to the same extent as they now have power to enforce and compel the presence and testimony of witnesses in each of said courts.

The language of the 1899 Special Act has been tracked in several versions of the New Haven Charter, including the Charter of 1952. With only minor changes or revisions, the language of the Special Act has been recited in the City Charter for many years. The City Charter approved by the Alders as of August 5, 2013, restates the subpoena language at Article IV, Board of Alders, Sec 2. G. as follows:

- G. Authority of certain boards, committees, officers to compel attendance and testimony of witnesses. The presiding officer of the Board of Alders, of the several committees of said board, and of the several boards of commissioners, and the Director of Public

Works, shall respectively have power to compel the attendance and testimony of witnesses before their respective boards, committees and departments over which they preside, by the issue of subpoenas and the administration of oaths in the manner and according the rules governing the same in courts of justice.

(1) Application to the Superior Court. When it shall be necessary to secure the attendance or testimony of witnesses before said boards, committees, departments or Director of Public Works, such presiding officers and such Director of Public Works, shall have the right to apply to the superior court for an order compelling any witness so summoned before them to testify; which courts shall have the power to issue subpoenas and to enforce the presence and testimony of all witnesses summoned in the same way and to the same extent as they now have power to enforce and compel the presence and testimony of witnesses in each of said courts.

(2) Failure to comply. Grounds for removal from office. Failure of the chief executive or any other employee of any Department, Board or Commission of the City to appear following the issuance of a subpoena therefore by the presiding officer of the Board of Alders, or of one of the committees of said board, shall, upon vote of the Board of Alders, be grounds for removal from office pursuant to §§11.C,D and F of Article 1 of this Charter. In the event of such a vote, a copy thereof shall be forwarded to the Personnel Director for inclusion in said employees permanent personnel file and to the Mayor.

Being a creation of the State, New Haven, a municipality, has no inherent power of its own. The only powers that a municipal corporation has are those expressly granted by the State. City Council of the City of West Haven v. Jon Hall, 180 Conn. 243 (1980). In the West Haven case, our Supreme Court said, inter alia:

We have long recognized that as a creation of the state, a municipality has no inherent powers of its own...the only powers a municipal corporation has are those which are expressly granted to it by the state...

Concerning the power to issue a subpoena, the Court in the Hall case said:

The power to issue a subpoena is a great power...if the legislature had intended to include this very important authority to issue subpoenas, it would have specifically so stated...It is generally held that the express enumeration of powers granted to municipalities constitutes an exclusion of all other powers not expressly delegated to them. 2 McQuillin, Municipal Corporations (3rd Ed. Rev. 1979) §10:23, p. 802. See also State ex rel. Barlow v. Kaminsky, 144 Conn 612 (1957).

McQuillin reports, concerning municipal charters, that they are "...sometimes mentioned as constitutions, that is, fundamental organic laws of municipal corporations." McQuillin, 2 Municipal Corporations, § 9:3 (3rd Ed. Rev. 2006).

In the case of New Haven's Charter and State Law and the granting of power to the municipality - which power it would not have had but for the 1899 Special Act - the power to subpoena and the process for enforcing a subpoena against a reluctant witness was codified and has come down to us in the Charter.

New Haven could not constitutionally or legally have included the subpoena power in its Charter before the enactment of the 1899 Special Act. See Board of Selectmen of the Town of Fairfield v. James G. Kellis, 35 Conn Sup 668, 669 (1929). The Special Act granted the subpoena power to the municipality's governing or legislative body and to the named constituents at the City. See City Council of the City of West Haven v. Jon Hall, at 247, supra.

The power to subpoena is granted to:

- (a) The presiding officer of the Board of Alders;
- (b) The several committees of the Board of Alders (in the matter covered by the Crumbie Law Group memo, the power to subpoena was afforded to the Tax Abatement Committee of the Board of Alders);
- (c) The several boards of commissioners, being the boards enumerated in the Charter at Article VII, Sec 3 (A through K) and at Article VII, Sec 4 (A and B); and
- (d) The Director of Public Works.

The Civilian Review Board, by the language of the new Charter is one of the "boards of commissioners" required by the Charter. Charter, Article VII, Sec.4.B. Within the language of the Charter, the Civilian Review Board is referred to as a "Commission" as well as a "Board". The Board of Alders is designated as the entity to, by ordinance, "establish such additional authority necessary to effectuate the purposes and duties of the Board."

But by the Special Act in 1899 and by the very language of the Charter, as it has come down to since 1899, the presiding officer of the Board of Alders and the presiding officer of all the boards, and committees and all of the board of commissioners of the Board of Alders must apply to the superior court "to issue subpoenas and to enforce the presence and testimony of all witnesses..."

In Board of Selectman of the Town of Fairfield v. James G. Kellis, 35 Conn. Sup. 168 (1979), the Appellate Session of the Superior Court said, in a similar case:

The special act and charter do not grant subpoena powers accompanied by a grant of power to punish summarily those who refuse to obey the subpoena or testify, nor do they grant subpoena powers coupled with the authority to apply to the court to compel compliance. If the General Assembly desired the plaintiff to have those powers, it could have so provided by special act or statute...No court can rewrite a statute or supply an essential provision which is totally lacking. That function alone belongs to the legislative branch of the government.

The Kellis court refers to an old New Haven case, Blakeslee & Sons v. Carroll, 64 Conn 223 (1894), which references the Charter provision, in place even before the enactment of the 1899 Special Act, giving the presiding officer of the committee of the Board of Alders the power to issue subpoena to and administer oaths...the Court in Blakeslee said concerning that power,

This provision however cannot be held to confer judicial or quasi-judicial power upon the presiding officer, and certainly not upon the committee. All it gives is power to the presiding officer to issue subpoenas for and administer oaths to witnesses whom the committee may desire to improve, and nothing more. If the witness refuses to obey the subpoena, neither the presiding officer nor the committee has power to issue a *capias*; and if, the witness appears but refuses to testify, neither the committee nor the presiding officer has power...to commit him for such refusal...

Blakeslee, supra at 234-235.

CAVEAT:

The balance of the Charter provision at Article IV, Sec. 2.G (2) provides the Board with a “hammer” which can be used to enforce the subpoena power, though that provision is - with all due respect – seriously problematic. Titled “Failure to Comply. Grounds for removal from Office,” this provision states that failure to appear before the Board of Alders or before one of the committees of the Board of Alders following the issuance of a subpoena...shall, upon vote of the Board of Alders, be grounds for removal from office...” [the reference to the Article/sections of the new Charter is wrong at this point].

That provision is no part of the 1899 Special Act and is therefore a creation of the Charter. Per the ruling in Board of Police Commissioners v. White, 171 Conn. 553 (1976); any employee in a union subject to a collective bargaining agreement will contend and will prevail by claiming that she/he cannot be terminated pursuant to this Charter provision. The terms of the collective bargaining agreement prevail over the inconsistent Charter provision.

The exposure of non-union, appointed employees of the City to removal from office for failure to appear in response to the issuance of a subpoena is less clear from the language, but it certainly furnishes a ripe field for litigation.

Conclusion

In summary, the Special Act of 1899 was the grant to the City's Board of Alders and to their constituent committees and commissions of the power to issue subpoenas and administer oaths. That very language of the Special Act has come down to us in the several City charters, including the Charter approved by the Board of Alders on August 5, 2013. The Civilian Review Board, by the Charter, is a commission of the Board of Alders. As such, the Civilian Review Board is empowered to issue subpoenas and administer oaths, but the Civilian Review Board is restrained, just as is the Board of Alders and the Director of Public Works, because the language of the Charter, derived from the Special Act, compels it where it seeks to enforce a subpoena against a reluctant witness to apply to the superior court for an order.