

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1643

KA 08-01441

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF THE SECOND REPORT OF
THE SENECA COUNTY SPECIAL GRAND JURY OF
JANUARY 2007.

MEMORANDUM AND ORDER

FIRST NAMED PUBLIC OFFICIAL, APPELLANT;

R. MICHAEL TANTILLO, SPECIAL DISTRICT
ATTORNEY OF SENECA COUNTY, RESPONDENT.

GEIGER AND ROTHENBERG, LLP, ROCHESTER (DAVID ROTHENBERG OF COUNSEL),
FOR APPELLANT.

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY OF SENECA COUNTY,
CANANDAIGUA, RESPONDENT PRO SE.

Appeal from an order of the Seneca County Court (Dennis F. Bender, J.), dated February 15, 2008. The order accepted Report Number 2 of the January 2007 Seneca County Special Grand Jury and directed the filing of the report as a public record.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the report is sealed.

Memorandum: We agree with appellant, a public official of Seneca County, that County Court erred in directing that a grand jury report be filed as a public record. It is "incumbent upon the prosecutor to instruct the Grand Jury regarding the duties and responsibilities of the public servant who is the target of the probe" (*Morgenthau v Cuttita*, 233 AD2d 111, 113, lv denied 89 NY2d 1042; see *Matter of Grand Jury of Onondaga County* [appeal No. 1], 101 AD2d 1023). Here, we agree with appellant that the special prosecutor's instructions concerning appellant's duties were vague and inadequate. "Without a [clear and adequate charge] as to . . . [appellant's] duties, it was not only impossible for the Grand Jury to determine that [appellant] was guilty of misconduct, nonfeasance or neglect, but impermissible as well, for it allowed the Grand Jury to simply substitute its judgment for that of [appellant]" (*Matter of June 1982 Grand Jury of Supreme Ct. of Rensselaer County*, 98 AD2d 284, 285; see *Matter of Reports of Grand Jury of County of Montgomery Impaneled on Apr. 30, 1979*, 100 AD2d 692). Indeed, we agree with appellant that the conclusions of the grand jury with respect to the alleged violation of those duties were in fact contradictory to the special prosecutor's instructions

concerning appellant's duties.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court