[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 36
Justice

In the Matter of the Application of,
THE ADVANCE GROUP, INC. AND SCOTT LEVENSON, INDIVIDUALLY AND AS PRESIDENT OF THE ADVANCE GROUP INC.,

Petitioners,

For a Judgment Under Article 78 of the Civil Practice Law and Rules

-against-

THE NEW YORK CITY CAMPAIGN FINANCE BOARD

-and-

FREDERICK A.O. SCHWARTZ, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE NEW YORK CITY CAMPAIGN FINANCE BOARD.

Respondents.

INDEX NO. 116706103

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

FILED
JAN 15 2004
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 7, were read on this petition under Article 78 of the Civil Practice Law and Rules:

	PAPERS NUMBERED
Order to Show Cause – Exhibits	1
Verified Answer – Exhibits – Memorandum of Law — Affidavit	2, 3, 4
Reply Affidavit — Memorandum of Law	5
Verified Amended Answer — Supplemental Memorandum of Law	6, 7

SCANNED JAN 14 2004

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this petition is denied.

Background

The present case involves a petition under Article 78 of the CPLR for review of a final determination dated August 26, 2003 (the "Determination") made by respondents, in which respondents assessed $3,157.00 in penalties against petitioners as an "agent" of Fratta 2001, John Fratta's campaign committee (the "Committee"), for late submission of response to a draft audit and the late filing of disclosure statements 10, 11, 12, & 15.

Petitioners the Advance Group, Inc., ("TAG') is a political consulting firm. In March of 2000, John Fratta, who was a candidate for the 2001 City Council elections, entered into a contract with TAG to provide political consulting services, including, ***inter*** *alia*, compliance services, preparation and completion of all filings, campaign consulting, campaign literature, and campaign workers (the "Contract"). The Committee's treasurer was Marie Zullo. Rachel Mann of TAG was designated campaign liaison and was listed on Mr. Fratta's Filer Identification Form and Certification submitted to respondent New York City Campaign Finance Board ("CFB") as the person who should be contacted by the CFB instead of the treasurer. The CFB is an independent, nonpartisan agency that was created in 1988. The CFB administers New York City's voluntary Campaign Finance Program which provides public matching funds to candidates running for Mayor, Comptroller, Public Advocate, Borough President and City Council. In order to qualify for public matching funds, participating candidates must comply with certain rules such as the filing of financial disclosure statements, responding to requests for documentation and information and to audit by the CFB to verify the candidate's compliance with such requirements.

In letters dated March 10,2003, and April 22,2003, the CFB notified the Committee, Mr.

Fratta and Ms. Mann of various alleged violations and penalty recommendations. On May 1, 2003, the penalty recommendations were considered by the CFB. Ms. Mann and Mr. Fratta both attended the meeting wherein Ms. Mann testified that the failure to timely respond to the CFB's draft audit report and the late filing of four disclosure statements were due to her disorganization and the fact that the computer where all of Mr. Fratta's records were held had a virus. Ms. Mann further testified that neither Mr. Fratta nor Ms. Zullo was at fault for these violations. **At** the conclusion of the meeting, the CFB assessed $3,157.00 in penalties against TAG and $300.00 against the Committee.

In a letter dated May 27,2003, the CFB decided to reopen the hearing for the purpose of considering whether TAG should be found in violation and assessed penalties under the circumstances. On June 4,2003, Scott Levenson, the president of TAG, appeared and testified before the CFB. The CFB deferred decision until TAG had an opportunity to submit written materials to the CFB. On August 26,2003, the CFB issued the Determination from which petitioners now seeks judicial review.

Petitioners bring this Order to Show Cause for an order: (1) annulling the Determination; (2) setting aside fines in the amount of $3,157.00 levied by the CFB against TAG; (3) directing the CFB to cease and desist from showing TAG has been fined by the CFB on the CFB website, and prohibiting the CFB from demonstrating on their website that TAG has failed to pay any penalties on the Determination; (4) directing the CFB to publicize the findings of this Court in the same manner that it publicized its own findings directed at petitioners; and *(5)* awarding reasonable attorneys' fees pursuant to CPLR Article 86. Petitioners allege that because Ms. Mann did not receive notice that the information she would be giving on May 1, 2003, could be

used against her and her principals, any of the testimony she provided at said hearing was taken in violation of her and the petitioners' due process rights. Petitioners further allege that TAG was never an agent of the Committee and cannot be held accountable for the violations of the Committee, Mr. Fratta and Ms. Zullo. Specifically, no agent-principal relationship exists between TAG and Mr. Fratta or the Committee based merely on a contractual relationship between the parties, and the work performed bypetitioners.

In opposition, respondents maintain that the Determination was neither arbitrary nor capricious. Respondents contend that pursuant to New York City Administrative Code §3-711(1), the term "agent" includes individuals and entities who have undertaken the responsibility for campaign compliance. Respondents further contend that the purpose of providing for agent liability in this manner is to ensure that individuals and entities carry out their obligations to comply with the law on behalf of campaigns. Respondents also assert that they have comported with due process considerations in that New York City Administrative Code §3-711(1) provided ample legal notice of the possibility that TAG could be subject to liability and the CFB cured any purported due process violations by reopening the penalty hearing and providing **TAG** with written notice of possible penalties, and an opportunity to appear.

Discussion

It is well settled that judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious or lacks a rational basis *(In re Application of Chelrae Estates, Inc. v State Division of Housing and Community Renewal. Office of Rent Administration,* 255 AD2d 387, 389 [1st Dept. 19961 *citing Matter of Pell v Board of Education*, 34 NY2d 222, 230-231 [1974]). An Article 78 proceeding

is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and "[t]he function of the court . . . is to determine. . . whether the determination had a rational basis in the record (*In re Application of HLV Associates v Aponte*, 223 AD2d 362,363 [1st Dept. 1996]; *citing Matter of Fanelli v New York City Conciliution &Appeals Bd.*, 90 AD2d 756, 757 [1st Dept. 1982]). Courts are not permitted to substitute their judgment for that of the administrative agency where said decision is rationally based on the record (*In re Application of Royal Realty Co. v New York State Division of Housing and Community Renewal*, 161 AD2d 404,405 [1st Dept. 19901 *citing Fresh Meadows Associates v New York City Conciliution and Appeals Board*, 88 Misc.2d 1003 [Sup Ct, New York County 1976]).

This Court finds that respondents' determination is neither arbitrary nor capricious and rationally based on the record. It is clear that the purpose behind New York City Administrative Code §3-71 1 is to encourage compliance with the rules and regulations provided by the Campaign Finance Act. Candidates voluntarily participate in the Campaign Finance Program in order to receive public matching funds, which gives the participating candidates four dollars for every qualifying dollar that they raise. However, in order to receive such funds, there are certain rules and regulations with which participating candidates must comply. Here, as part of the Contract with Mr. Fratta, petitioners' agreed to undertake the task of satisfying these compliance requirements. Pursuant to the section entitled "Compliance" of the Contract, petitioners agreed to provide the complete range of compliance services. Petitioners also claimed that they developed systems designed to keep the campaign in compliance with the CFB regulations. The Contract further provides for the completion of all filings with the CFB and explanation and

monitoring of all rules and regulations to the candidate. In agreeing to provide these services to Mr. Fratta, petitioners agreed to be Mr. Fratta's agent, at least with respect to compliance with the CFB. It is undisputed that Ms. Mann was the primary contact person on behalf of the Fratta campaign and that the Candidate Certification listed TAG's address as the mailing address rather than a separate campaign address or the treasurer's address. It is further uncontroverted that Ms. Mann represented to the CFB that she represented the Committee with respect to its compliance and that the Committee's disclosure statements were generally hand-delivered by a representative of TAG. Moreover, there is no dispute that contacts with Ms. Mann outnumbered those with other representatives of the Committee and that contacts with Ms. Mann continued after the elections. To allow any entity, that has agreed to fulfill the compliance requirements on behalf of a candidate, to shoulder the blame for a candidate's non-compliance, and then to allow that same entity to escape liability because it claims it is not an "agent" of the candidate would not serve the purpose of the Campaign Finance Act. To accept petitioner's argument would defeat the policy behind the Campaign Finance Act.

It is well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is given great deference and will be upheld, if not irrational or unreasonable (*Johnson v Joy*, 48 NY2d 689 [1979]). Where, as here, the plain language of the statute is clear notice to TAG that, as "any other agent of a participating candidate, it will be subject to a civil penalty, . . ," therefore, it cannot be held that the CFB's interpretation of §3-711 is unreasonable. Moreover, respondents properly afforded petitioners the opportunity to be heard prior to their issuance of the Determination by reopening the hearing.

"Judicial examination of an administrative determination should be limited to a review of

the record for substantial evidence that supports a rational and lawful basis for that determination" (*Reingold v Koch*, 111 AD2d 688,691 [1st Dept. 1985]). With the matter at bar, a review of the record reveals a rational and lawful basis for respondents' determination.

Conclusion

Accordingly, it is ordered that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents. This reflects the decision and order of the court.

Dated: 1/8/04

J.S.C.

HON. MARILYN SHAFER JSC

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION