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SCANNED ON 4/13/2005

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

PRESENT: DIANE A. LEBEDEFF Justice

PART 8

NYC Campaign

- v -

Perez, Richard

INDEX NO. 402214/03

MOTION DATE 10/19/04

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for PSJ

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1-9
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

Motion is decided in accordance with the accompanying memorandum decision.

FILED
APR 13 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 05 2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

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NEW YORK CITY CAMPAIGN FINANCE BOARD,

Plaintiff,

-against-

Index No. 402214/03
Mot. Seq. No. 002

RICHARD PEREZ, MANUEL BURGOS, MANUEL BURGOS as Treasurer of THE COMMITTEE TO ELECT RICKY PEREZ, and THE COMMITTEE TO ELECT RICKY PEREZ,

Defendants.

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DIANE A. LEBEDEFF, J.:

The parties raise novel issues concerning a candidate's post-election accountability for compliance with the requirements of the program which dispenses public funds for local election races in New York City.

The New York City system for providing matching funds to participating campaigns is governed by the New York City Campaign Finance Act, which was first enacted by the New York City Council in 1988 (Administrative Code of the City of New York § 3-701, *et seq.*, hereinafter "Administrative Code" and as amended through Local Law No. 60 of 2004). The program is administered by the New York City Campaign Finance Board (New York City Charter, chapter 46, section 1052). As a general matter, the New York City Campaign Finance Board (the "Board") monitors compliance with reporting and accounting requirements and regularly brings cases against candidates,

treasurers and campaign committees where there has been a failure to comply.[1]

In relation to defendant Richard Perez ("Perez"), a former candidate, the Board seeks to recover: (1) $63,756 which constitutes all the public funds granted to his campaign; (2) administratively fixed penalties totaling $8,376; and (3) an additional $10,000 "court-imposed civil penalty." Perez moves for partial summary judgment, requesting dismissal of the Board's claim for repayment of public funds. The Board's cross-motion for summary judgment, which also urges that Perez's challenges to its administrative determinations are barred upon the ground that such objections should have been raised in a timely Article 78 proceeding, will be considered only as to Perez.[2]

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[1] For a description of the New York City campaign finance system's operation, which is generally regarded as a landmark program, see Nicole A. Gordon, *The New York City Model: Essentials for Effective Campaign Finance Regulation*, 6 J.L. & Policy 79 (1997), and, containing speeches delivered at a Conference sponsored by the New York City Campaign Finance Board and the Association of the Bar of the City of New York, Proceedings, *From the Ground Up: Local Lessons For National Reform*, 27 Fordham Urb. L.J. 5 (1999). A broad description of legal issues involved with public financing of election campaigns appears in an article by Richard Briffault entitled *Public Funding and Democratic Elections*, 148 U. Pa. L. Rev. 563 (1999).

[2] The prime motion was interposed only on behalf of Perez and was not served upon the other defendants, who are in default at this time. Given that a "cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party (see CPLR 2215)" (*Kleeberg v. City of New York*, 305 A.D.2d 549 [2d Dept. 2003]), the court declines to consider the branches of the cross motion which request relief against defendants other than Perez, without prejudice to such relief being sought in a separate motion.

Factual Background

Defendant Perez was a candidate in the Democratic primary election held in September of 2001, campaigning for a Kings County seat on the New York City Council. On May 10, 2001, his campaign committee, The Committee to Elect Ricky Perez ("the Committee"), joined the New York City Campaign Finance program. Defendant Manuel Burgos ("Burgos") was Treasurer of the Committee. The Committee, after raising contributions, received $63,756 in public matching funds.

As New Yorkers will recall, the September 11th attack on the World Trade Center took place on the day set for New York City's 2001 primary election, which halted the primary election. The attack had an impact on the Board, for the Board's main office near the World Trade Center was closed; after September 11th, the Board operated out of temporary quarters for a period of time.

Perez did not prevail in the rescheduled primary election. Thereafter, a series of administrative steps were taken by the Board and its staff, beginning with the Board's staff's generation of a draft audit report based upon the campaign's financial submissions. The draft was sent to Burgos and copied to Perez on September 27, 2002. The issue of the Committee's purported failure to respond to the draft audit report and non-filing of certain disclosure statements were placed on the agenda of an upcoming Board meeting, and, by a letter dated December 16, 2002, notice of alleged violations and proposed penalties was sent to the Committee in care of Manuel Burgos and to Perez. The notice stated, "[a]ny penalties assessed by the Board may be assessed not only against the Committee but also against Richard Perez and Manuel Burgos individually."

The defendants did not responded in writing, nor appear at the meeting of January 8, 2003. On the date of that meeting, a Board letter was issued, headed "Final Board Determination," which reported a Board determination that the "Committee" had violated the Campaign Finance Act. The letter advised that the Board assessed a penalty of $8,376, consisting of $6,376 (or 10% of the public funds received) for failure to respond to the draft audit report, and $2,000 for failure to file certain disclosure statements, as well as required repayment of $63,756 in public funds granted. The determination contained no statement that any individual had been found personally liable.

The day after the meeting, Burgos faxed the Board an apology for missing the meeting because of ill-health, while also protesting that, prior thereto, he had mailed to the Board information remedying some deficiencies. His affidavit recites specific details about mailing material to an alternate address when the Board's main office was closed following the events of September 11, 2001, providing some corroboration that he did contact the Board after September 11th.

The Board responded that it would "not reconsider" its determinations. The Board's letter contained neither a statement that Burgos' claimed submissions had been investigated, nor reasons for refusing reconsideration.[3] It stated that the "Committee" was

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[3] This February 11, 2003, response appears to contravene the Board's own description of its practices regarding reconsideration petitions in effect at the time. In relation to petitions to reconsider orders relating to repayment of public funds under Board Rule 5-02, the Board has stated, "[t]he Board has received comments from some candidates that current Rule 5-02 (a) does not require the Board ... to explain the rationale for a determination on a petition. *The Board's practice has been to review such petitions as soon as practicable, and to issue a written notice of the Board's determination, including an*

permitted to submit documentation within two weeks to settle the obligation to repay $63,756.

Perez, a detective with the New York City Police Department, explains that he first learned of the Board's actions in July of 2003, from a campaign contact. Perez went to the Board office, and was served with the complaint in this action. He promptly retained counsel and thereafter submitted documentation of qualified expenditures, which he describes as containing all reports and supplying all documentation demanded. Neither the motion nor cross-motion request that the court review such documentation at this time.

Apparently, Board mailings to Perez were sent to an outdated address. There is no refutation in the record of Burgos' assertion that the Board was advised of Perez's new address; Burgos stated, both in the request for reconsideration and in a later affidavit, that he had sent in a change of address for Perez, apparently before the Board's determination. Burgos and Perez both aver that Burgos did not tell Perez of the notices Burgos received, even when Perez asked him about the status of the Committee. Burgos, whose employment and living arrangements were negatively impacted by events following September 11th, has been diagnosed with a chronic, life-threatening illness and, prior to the commencement of this action, became a resident of a health facility.

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explanation of the determination" (City Record, January 15, 2003; emphasis added). This explanatory statement related to a Rule amendment which was effective as of January 15, 2003; on such date, Rule 5-02 (a) was amended to add that "the Board shall issue written notice to the petitioner of the Board's determination, including the reason(s) for the determination."

The Presence or Absence of a Final Administrative Determination

The Board urges that the candidate may raise no protest to the Board's repayment and fine determinations because he failed to bring a timely Article 78 proceeding challenging those determinations within four months (CPLR 7801; *Lewis Tree Service v. Fire Department of the City of New York*, 66 N.Y.2d 667, 669 [1985]). When an administrative agency asserts that this time bar exists, it has the burden to establish that the affected party was provided adequate notice of an adverse administrative final determination (*see Matter of Village of Westbury v. Department of Transp. of State of N.Y.*, 75 N.Y.2d 62, 73 [1989]; *Matter of Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 126-127 [1969]; *Matter of Chaban v. Board of Educ. of City of N.Y.*, 201 A.D.2d 646 [2d Dept. 1994]). The candidate here argues that the notice given was deficient in two regards.

First, the candidate accurately notes that the text of the administrative determinations actually contain no direct finding of personal liability on the part of the candidate (*see Matter of Martin v. Ronan*, 44 N.Y.2d 374, 380 [1978], "For a determination to be final 'upon the petitioner' it must be clear that the petitioner seeking review has been aggrieved by it"). Here, the actual determination and its reiterations uniformly state that "The Committee" is responsible for repayment of the matching funds and the fine.[4]

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[4] Both the original determination and subsequent Board communications stated the "Committee" was responsible and made no reference to Perez. For example, the January 14, 2003, Board staff letter to Burgos advised him that the Board had assessed $8,376 in penalties "against the Committee"; annexed to the letter was the final audit report, which recited that "the Committee must repay $63,756 to the Board." A letter of March 25, 2003, reiterated that

The Board then points out that Board materials referenced "Perez" as a column heading, and that it demanded payment from Perez. Viewing these two factors in a light most favorable to the Board, at best, these portions of the record give rise to ambiguity. In such instance, the applicable rule is that "the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court" (*Mundy v. Nassau County Civil Service Commission*, 44 N.Y.2d 352, 358 [1978]; *see Matter of Biondo v. New York State Bd. of Parole, supra*, 60 N.Y.2d 832, 834 [1983]). The Board's later website posting that amounts were due is general in nature, identifying the candidate in entirely general terms, so that such posting does not illuminate this issue. On this record, the court finds plaintiff has not established that it issued an administrative determination which was sufficiently clear and determinative of personal liability to deny plaintiff a day in court on the merits. It should be noted that this lack of clarity in a Board decision is unlikely to recur.[5]

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the Board had assessed penalties "against the Committee." An April 29, 2003, letter was similarly worded.

[5] The requirement of explicit findings was addressed in Local Law 12 of 2003 § 11 (eff. Feb. 18, 2003), which appears to be an amendment sponsored by the Board itself. Local Law 12 of 2003 added a new section 3-710.5 to the Administrative Code, entitled "Findings of violation or infraction." That provision states:

> "*The board shall determine whether a participating candidate, his or her principal committee, principal committee treasurer or any other agent of a participating candidate has committed a violation or infraction of any provision of this chapter or the rules promulgated hereunder, for which the board may assess a civil penalty pursuant to section 3-711 of this chapter.* * * * * . The board shall give written notice and the opportunity to appear before the board to any participating candidate, his or her principal committee, principal committee treasurer or any other agent of a participating

Second, plaintiff has not carried its burden to establish that defendant was properly notified of the determination made. The candidate has advanced evidence that service was not made to the last address provided to the Board, which stands unrefuted by the Board (*Matter of Village of Westbury v. Department of Transp. of State of N.Y.*, 75 N.Y.2d 62, 72 [1989], "A determination generally becomes binding when the aggrieved party is 'notified'"; *see also Biondo v. New York State Bd. of Parole*, *supra*, 60 N.Y.2d at 834, "fundamental fairness would seem to compel the conclusion that a petitioner should not be held to have been dilatory in challenging a determination of which he was not aware"). Basic due process as to candidate Perez would require more (*see Block v. Ambach*, 73 N.Y.2d 323 [1989]).

Accordingly, this argument is not found sustainable.

Substantive Claims

Based upon the arguments addressed above, the court has concluded that the Board has failed to demonstrate a final determination was reached as to the imposition of personal liability upon candidate Perez. Two of the causes of action herein – the claim for repayment and for penalties – require the existence of an adverse administrative determination.

Given this status of the record, the court grants the motion for summary judgment and dismisses the first cause of action. Further, as to the claim for penalties against the

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candidate, if the board has reason to believe that such has committed a violation or infraction, before assessing any penalty for such action." (Emphasis added.)

candidate, in the interests of justice and judicial economy, pursuant to the authority granted by CPLR 3212 (b), the court may search the record and award summary judgment to a nonmoving defendant (*see Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106 [1984]), and the penalties claim is also dismissed. Dismissal of both such claims is without prejudice to the Board's commencement of appropriate administrative proceedings.

If this result were not reached, the court notes that it finds considerable merit in the candidate's statutory construction argument, which it does not find to be frivolous. The candidate urges that the Board's claim for repayment against him must fall because no portion of the governing statute imposes upon a candidate an obligation to repay public matching funds based upon the candidate's campaign committee's failure to file reports or accountings in a timely fashion.[6]

As has been stated, "[t]he starting point in any case of statutory interpretation must, of course, always be the language itself, giving effect to its plain meaning" (*American Transit Ins. Co. v. Sartor*, 3 N.Y.3d 71 [2004]; *see Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 [1998]). In this case, the candidate relies upon the settled maxim *expressio unius est exclusio alterius* dictating that "where a law expressly describes

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[6] The unreported decisions relied on by the Board do not present the challenges raised by Perez as to statutory construction and the administrative determinations (*see, for example, New York City Campaign Finance Board v. Lewis* [Sup. Ct. N.Y. Co., Index No. 400628/04; *New York City Campaign Finance Board v. Treasurer for Sergio* [Sup. Ct. N.Y. Co, Index No. 405076/01]; *New York City Campaign Finance Board v. Lynn* [Sup. Ct. N.Y. Co., Index No. 40597/01]).

a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*People v. Aarons*, 305 A.D.2d 45, 51 [1st Dept. 2003]; *see Thoreson v. Penthouse Intern., Ltd.*, 80 N.Y.2d 490, 498 [1992], applying maxim in construing the Human Rights Law, "[t]he logical inference, of course, from the Legislature's action in expressly permitting punitive damages in [specified] cases is that such damages were not then recoverable for discrimination in other [unspecified] areas"; McKinney's Statutes, § 240).

The statute contains no language imposing an obligation upon a candidate to repay public funds for a failure of his or her campaign committee to file reports and accountings (see Administrative Code § 3-710 [2][b], imposing repayment obligation on "committee" when funds are shown to have been used for other than "qualified campaign expenditures"). Instead, the statute defines an entirely different remedy for such a situation: a candidate may be fined for failing to assure that the committee met filing obligations (Administrative Code § 3-711 [1], "Any participating candidate whose principal committee fails to file in a timely manner a statement or record required to be filed by this chapter ... shall be subject to a civil penalty in an amount not in excess of ten thousand dollars"). Further, the Administrative Code does provide for a candidate's personal responsibility to repay public funds in an entirely different instance, present if excess funds remain after an election (Administrative Code § 3-710 [2][c], Board may seek recoupment from both the "candidate and committees" of the amount by which "the total of contributions, other receipts, and payments from the fund ... exceed the total campaign expenditures of such candidate and committees," with an obligation to repay

such excess arising "not later than ... the day on which the campaign finance board issues its final audit report for [the] participating committee").

Of course, a court cannot amend a statute by adding words that are not there (*American Transit Ins. Co. v. Sartor, supra*; *People v. Gersewitz*, 294 N.Y. 163, 169 [1945], "The court has no power to supply even an inadvertent omission of the Legislature"). Neither can it defer to an administrative interpretation which "runs counter to the clear wording of a statutory provision" (*New York Public Interest Research Group, Inc. v. New York State Department of Insurance*, 66 N.Y.2d 444, 448 [1985]; *State Farm Mutual Automobile Insurance Co. v. Mallela*, __ N.Y.3d __, 2005 WL 705972 [2005]), nor to an administrative rule which lacks a statutory basis (*Matter of Jones v. Berman*, 37 N.Y.2d 42, 53 [1975], "[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute" and regulation held invalid).

However, it is not necessary to reach a determination of the statutory construction argument given the procedural stance of the case upon the record before the court.

The Claim for a "Court-Imposed" Civil Penalty

The court denies the request that the court impose a further civil penalty upon the candidate. As Justice Gerges noted in *People v. O'Hara*, 191 Misc.2d 248, 250, fn 4 (Sup. Ct. Kings Co. 2002):

> "The court has strong reservation whether New York City Administrative Code § 3-711 authorizes the court to impose a civil penalty. A reading of the relevant sections indicates that the civil penalty of the New York City Administrative Code is to be imposed by the Campaign Finance

> Board, not the court. The Campaign Finance Board has in fact on other occasions imposed civil penalties. The Campaign Finance Board can ask the court to insure that its penalties are enforced."

As a general matter, New York court lacks inherent authority to create new penalties not provided for in the statute or court rule (*A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 [1986], holding sanctions could not be imposed for commencement of frivolous litigation "because at the time the petitioner instituted the proceeding, there was neither a statute nor a court rule authorizing the imposition of sanctions for frivolous actions," and "the most practicable means for establishing appropriate standards and procedures which will provide an effective tool for dealing with this problem is by plenary rule rather than by ad hoc judicial decisions"; *see also Wetzler v. Roosevelt Raceway, Inc.*, 208 A.D.2d 120 [1st Dept. 1995], "It is well settled that the imposition of a penalty is exclusively the prerogative of the sovereign"). Further, absent an authorizing statute or court rule, this request is inconsistent with the general American rule that parties bear their own costs in litigation and may not "recover damages for the amounts expended in the successful prosecution or defense of its rights" (*Mighty Midgets, Inc. v. Centennial Insurance Co., Inc.*, 47 N.Y.2d 12, 21- 22 [1979]).

Although some judges have granted such relief in whole or in part, each such decision contains some indication that the conduct of the defendants was frivolous (22 NYCRR § 130-1). In this instance, Perez has prevailed upon several arguments and advanced others found to contain merit.

Accordingly, in the exercise of the court's discretion, the imposition of an additional penalty or sanction is denied. In the interests of justice and judicial economy,

pursuant to the authority granted by CPLR 3212 (b), the court will search the record and award summary judgment to the nonmoving defendant (*see Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, *supra*). Based on the foregoing, this claim for a court-imposed civil penalty is severed and dismissed.

Conclusion

The motion is granted, and the cross motion denied to the extent set forth above. No sooner than five days after service of a copy of this order with notice of entry and a proposed judgment upon defendants, the clerk shall enter upon the presentation of appropriate papers.

This decision constitutes the order of the court.

Dated: April 5, 2005

J.S.C.