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

PRESENT: SHAFER Justice PART 36

EISCAND, JUNE, ET AL

- v -

N.Y.C. CAMPAIGN FINANCE BOARD

INDEX NO. 113537/04

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4,5,6
Replying Affidavits	7,8,9,10

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is denied pursuant to attached Dec

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

FILED

APR 18 2005

COUNTY CLERK'S OFFICE

Dated: 4/8/05

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
==========X
In the Matter of the Application of

June Eisland , et. al., Index No. 113537/04

Petitioners,

-against- DECISION AND ORDER

New York City Campaign Finance Board, et. al.,

Respondents
==========X

Shafer, J.:

Background

Petitioners June Eisland ("Eisland"), Robert C. Rosenberg ("Rosenberg"), EISPAC, the Friends of June Eisland, and Eisland 21st Century, bring this proceeding pursuant to Article 78 of the CPLR seeking to set aside Final Determination No. 2004-1 issued by respondents New York City Campaign Finance Board ("CFB") and the City of New York, on June 8, 2004 (the "Determination"), wherein petitioners were ordered to repay $142,306 in unspent campaign funds.

The Campaign Finance Program

The CFB is an independent, nonpartisan agency that was created in 1988 by the New York City Campaign Finance Act. The CFB administers New York City's voluntary Campaign Finance Program ("the program") which provides public matching funds to candidates running for Mayor, Comptroller, Public Advocate, Borough President and City Council. Private contributions of up to $250 from individuals who reside in

New York City are matched at a rate of four dollars in public funds for every one dollar raised in private contribution. The funds are paid out of a fund allocated from the New York City treasury to make public matching fund payments. In order to qualify for public matching funds, participating candidates must comply with various rules including 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.

Relevant to this proceeding, participating candidates are required to return to the City funds leftover after the campaign, up to the amount received in matching public funds (Admin Code 3-710[2][c]; CFB Rules ("Rules") 1-02, 5-03[e]).

Candidates participating in the program may make contributions to other campaign committees, pay off debt from previous campaigns or transfer funds. When participating candidates from a committee subject to the program transfers funds to a committee not subject to the program, the program requires that the amount of public funds the candidate is otherwise eligible to receive is reduced (Rule 5-01[n]). The stated purpose of this rule is to prevent candidates from using public funds to subsidize activities other than their election to office under the program.

Eisland Campaign

June Eisland ran for Bronx Borough President in 2001. She participated in the program in connection with her candidacy. On May 31, 2001, Eisland and her treasurer Rosenberg, filed the requisite Certification Form with the CFB for the 2001 elections, certifying that they will comply with the provisions of the Act and the Board Rules. Eisland formed three political committees: Eisland 21st Century ("21st Century"); Friends

of June Eisland ("Friends"); and Citizens for Eisland ("Citizens"). On the May 31st Certification Form, both 21st Century and Friends were listed as filing for the 2001 elections. Citizens was not listed to act in the 2001 elections but instead designated "to act after 2001 election cycle" (CFB Certification Form, dated May 31, 2004, sec. 9) and therefore not authorized in the 2001 election cycle. Accordingly, only 21st Century and Friends were subject to the program's requirements and eligible for matching funds.

On June 18, 2001, the requisite financial disclosure statement submitted by petitioners revealed an opening balance in 21st Century of $217,863 in surplus funds from a previous election. 21st Century then transferred, on May 30, 2001 and July 11, 2001, $130,000 to Citizens.

By letters dated June 2001, petitioners asserted to the CFB that the money transferred from 21st Century to Citizens should not be the basis for reducing public funds to 21st Century pursuant to Rule 5-01(n) because the transferred funds were not derived from matchable contributions. In response, CFB contacted the petitioner's agent Larry Laufer on August 1, 2001, and stated that pending determination on a pending advisory opinion regarding Rule 5-01(n), the CFB Board could not advise on whether the $130,000 transfer from an authorized committee to an unauthorized committee will result in the usual deduction pursuant to Rule 5-01(n) and recommended that the money be transferred back to the authorized committee until the advisory opinion is rendered (CFB Contact Record dated August 1, 2001). According to CFB, instead of transferring the money back to 21st Century to avoid the deduction, petitioner suggested instead that they authorize Citizens for the 2001 elections (id.)., since transfers between committees that are both authorized for the 2001 election will not result in a Rule 5-01(n) deduction of

public funds received. CFB contacted Mr. Laufer the next day and informed him that the CFB accepted the recommendation and that to avoid any 5-01(n) reductions, petitioner could either transfer the $130,000 back to 21st Century or authorize Citizens for the 2001 election cycle (CFB Contact Record dated August 2, 2001). On August 2, 2001, petitioners amended their Certification Form to change the designation of Citizens from "no" to "yes" for filing for 2001 elections. This designation was made "under protest" and signed by Rosenberg.

Petitioners ultimately received $316,548 in matching funds from the program for the 2001 election, and returned $4,071.28 on December 16, 2002, in unspent funds. The CFB's final audit report revealed that the petitioners must return $142,306 in unspent public funds. Petitioners challenged the audit and submitted an administrative petition pursuant to Rule 5-02(a) seeking review by the CFB of its determination. Rule 5-02(a) provides for administrative review of a CFB determination and permits aggrieved candidates to submit written material and to appear before the CFB in support of their petition. Several letters were exchanged between the petitioners and the CFB. Accordingly to the CFB, the petitioners declined to appear before the CFB. After consideration of the petitioner's arguments, the CFB denied the Rule 5-02(a) petition. This determination was made during the public session of the CFB meeting on June 8, 2004, and then reduced to a writing issued as Final Determination No. 2004-1. A review of the record reflects that the respondents properly afforded petitioners the opportunity to be heard prior to their issuance of the Determination.

Petitioners bring this petition for an order annulling the Determination and setting aside fines in the amount of $142,306, on the grounds that the calculation was erroneous

because: (1) $217,863 in surplus funds accumulated prior to the 2001 election cycle in the Friends committee were not subject to Admin. Code 3-710(2)(c) and did not need to be returned to the program because it was accumulated prior to receipt of any matching funds; (2) $130,000 transferred to Citizens committee from 21st Century are not subject to 3-710(2)(c) and did not need to be returned to the program because those funds were transferred prior to the receipt of any matching funds; and (3) $6,794 were erroneous exclusions/calculations.

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. 1996] *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 Conciliation & 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. 1990] *citing Fresh Meadows Associates v New York City Conciliation 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.

Administrative Code 3-710(2)(c): Returning Unspent Funds

Petitioners contends that the $217,000 surplus funds brought into the campaign from a prior election is not subject to the program's requirement, including the obligation under Administrative Code 3-710(2)(c) to pay back unspent funds to the City. Administrative Code 3-710(2)(c) provides:

> "If the total of contributions and payments from the fund received by an eligible candidate and his or her authorized committees exceed the total campaign expenditures of such candidate and committee for all elections held in the same calendar year, such candidate and committees shall use such excess funds to reimburse the fund for payments received by the authorized committee from the fund during such calendar year... No such excess funds shall be used for any other purpose, unless the total amount of the payments received from the fund by the authorized committee has been repaid."

Furthermore, Rule 1-02 states clearly that the program's rules do not apply to committees that are not involved in an election in which the candidate is a participant or a prospective participant, and that a committee is deemed "not involved" only if the committee does not, at any time, accept contributions, loans, or other receipts, or make expenditures, including expenditures of surplus funds, in that election.

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]). The CFB held that surplus funds available for use in the 2001 election year are unspent funds that must be included in calculating how much to return pursuant to Admin Code 3-710(2). The CFB also

determined that there are no exceptions in the statute or rules that unilaterally exempt surplus funds from this calculation, absent proof that those funds were acquired through prohibited contributions (see Rule 1-07[c]). Where, as here, the plain language of the regulations require that all "contributions," as defined in 3-702, and "other receipts" as defined by Rule 1-02, be added together in calculating the amount of unspent funds, it cannot be held that the CFB's interpretation of §3-702 and Rule 1-02 is unreasonable. This holding is consistent with the CFB's intention to preserve taxpayer resources by requiring participant to reimburse the City for funds they received but did not use, and also ensures that the public funds issued are used only for the purpose specified. "This return obligation is designed to keep the costs of the program to a minimum and to prevent candidates from building up war chests at public expense or subsidizing future activities with public funds" (LoPrest Affirmation, dated November 1, 2004, ¶ 26). Accordingly, this Court finds that the CFB's inclusion of the surplus funds in the amount of $217,863 in determining the amount of unspent funds was neither arbitrary not capricious.

Rule 5-01(n): Transfer Deduction

Petitioners contend that the $130,000 transferred to the Citizens committee should not be repaid because they did not contain matchable contributions and Citizens did not engage in any activity during the 2001 elections. Rule 5-01(n) provides that

> "[t]he following will be presumed to consist entirely of contributions claimed to be matchable: (1) transfers and other disbursements from a political committee that is involved in an election in which the candidate is currently a participant to a political committee that is not involved in that election ... An amount equal to the amount of public

> funds the participant is otherwise eligible to receive for such matchable contribution claims shall be deducted from the public funds paid to the participant."

Petitioners contend that they have overcome the presumption that the $130,000 is matchable by demonstrating that the amount did not come from matchable contributions and were transferred prior to the receipt of any public funds by the transferring committee. The CFB's decision to reject this argument was rationally based. The fact that surplus funds are not eligible to be matched with public funds does not exempt them from the unspent funds return obligation. As stated by the CFB, many other receipts, such as contributions from organizations or contributions from individuals who do not reside in New York City, are not matchable contributions but are still subject to return if left over at the end of the campaign (see Admin. Code 3-702[3]). The instances when surplus funds were not subject to the unspent funds return obligation pursuant to Admin. Code 3-712 is inapplicable here (see Advisory Opinion Nos. 1996-2 and 1999-5).

Furthermore, Citizens was a committee listed as filing for the 2001 election cycle and therefore subject to the program's obligation to return unspent funds pursuant to Admin. Code 3-710(2)(c). The designation of Citizens was expressly changed by the petitioners in order to avoid a public funds deduction under Rule 5-01(n), bringing the Citizens committee within the jurisdiction of the program. Petitioners argue that the change in designation of the Citizens committee was done "under protest." However, no challenge was timely raised when the designation was made. Moreover, to allow a campaign to reap the benefits of the program in order to transfer funds between committees without deduction, and then to allow that campaign to escape the obligation

under the program to repay its unspent funds would not serve the purpose of the Campaign Finance Act.

"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. This reflects the decision and order of the court.

Dated: 4/8/05

ENTER:

HON. MARILYN SHAFER, JSC

J.S.C.

COUNTY