

**Matter of Martinez v New York City Campaign
Fin. Bd.**

2008 NY Slip Op 33414(U)

December 15, 2008

Supreme Court, New York County

Docket Number: 106724/08

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND **PART 48**
Justice

INDEX NO. 106724/08

Matter of the Application of
MIGUEL MARTINEZ and MARTINEZ 2001,

MOTION DATE

Petitioners,

For a Judgment pursuant to Article 78 of
The Civil Practice Law and Rules,

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO.

NEW YORK CITY CAMPAIGN FINANCE BOARD

Respondent

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: In this article 78 proceeding, the petitioners challenge a determination by the respondent New York City Campaign Finance Board ("Board") finding that, in successfully running for election to the New York City Council in 2001, petitioner Miguel Martinez, along with his campaign committee for that election, petitioner Martinez 2001 (the "Committee"), and the committee treasurer, nonparty Placido Rodriguez, committed 12 violations of the New York City Campaign Finance Act, Administrative Code of the City of New York § 3-701 *et seq.* ("Campaign Finance Act"), warranting an assessment of fines and penalties against them in the amount of \$173,566. The petitioners seek to annul this determination on the ground that it is arbitrary and capricious, an abuse of discretion and not supported by substantial evidence. In its answer, the Board has asserted a counterclaim for a money judgment against the petitioners in the amount of \$173,566.

Statutory Background

The Campaign Finance Act provides public matching campaign funds to candidates running for the offices of Mayor, Comptroller, Public Advocate, Borough President and City Council. The program is administered by the respondent Board, an independent agency charged with ensuring that participating candidates comply with the requirements for obtaining matching funds. The Board has adopted its own rules which supplement the terms of the Campaign Finance Act. Candidates who participate in the voluntary program must agree to abide by the Act's requirements, which, *inter alia*, include (a) the filing of periodic financial disclosure statements that report all contributions received by the campaign and the campaign's expenditures, (b) limitations on the total amount a campaign may spend to promote a candidate's election, (c) limitations on the total monetary value of contributions the campaign may receive from any single contributor and (d) the obligation to respond to requests for documents and information from the Board necessary to verify the campaign's compliance with the program's requirements. *See NYC Admin Code § 3-701 et seq.* In addition, candidates must agree to comply with all applicable laws, rules and regulations in order to receive public funds. Each candidate, along with his or her designated treasurer, is required to sign a Certification Form in which they acknowledge their obligation to comply with all of the requirements of the Campaign Finance Act. *See NYC Admin Code § 3-703(1); Board Rule 2-01.*

The matching funds must be spent only on "qualified campaign expenditures," as set forth under section 3-704 of the Administrative Code. All expenditures must be documented by the campaign, which is responsible for maintaining proper documentation and proving compliance with the program's requirements. See NYC Admin Code § 3-703 [1][d]. If a candidate cannot provide sufficient documentation of expenditures, he or she will be required to repay the funds. See NYC Admin Code §§ 3-710(2)(b); 3-711(3). In addition, the Act provides that if a candidate and his principal campaign committee violate any provision of the Act or of the Board Rules, the candidate, the committee and its treasurer, or any other agent of the candidate shall be subject to civil penalties in an amount not to exceed \$10,000 for each violation of the Act or Board Rules. See NYC Admin Code §3-711. Furthermore, the Board is authorized to assess penalties for any misrepresentation of a material fact in the documents submitted to the Board and to recover any public funds which had been given to the campaign.

The Board is empowered to investigate all matters relating to the performance of its functions and "shall have the power to require the attendance and examine and take the testimony under oath of such persons as it shall deem necessary and to require the production of books, accounts, papers and other evidence relative to such investigation." NYC Admin Code §§ 3-708[5];3-710[1]. The Board's Rules require that a campaign maintain adequate documentation of its expenses. In addition to requiring that participants "retain a copy of each bill for goods or services provided," Board Rule 4-01(d), the Rules also provide that

[p]articipants must exercise reasonable care to keep records that enable the Board to verify the accuracy of disclosure statements and confirm any matchable contributions claimed. Participants must maintain and may be required to produce copies of checks, bills, or other documentation to verify contributions, expenditures, or other transactions reported in their disclosure statements. Participants shall maintain clear and accurate records sufficient to show an audit trail that demonstrates compliance with this Act and these rules. The records shall be made and maintained contemporaneously with the transactions recorded, and maintained and organized in a manner that facilitates expeditious review by the Board.

Board Rule 4-01(a).

The Board's Post-Election Audit and Investigation of the Petitioners

In the course of running for election to the City Council in 2001, petitioner Martinez joined the matching fund program on June 1, 2001 by submitting a Certification Form to the Board. The Certification Form designated the petitioner Martinez 2001 as the committee responsible for receiving public matching funds and submitting financial disclosure statements to the Board on behalf of his candidacy. The Form also listed Rodriguez as the treasurer of the Committee. In the Certification Form, Martinez and Rodriguez expressly agreed to be bound by the terms and conditions of the Campaign Finance Act and the Board Rules applicable to the 2001 elections. They also agreed that they, together with the Committee, may be held jointly and severally liable for the repayment of public funds and/or payment of civil penalties assessed pursuant to sections 3-710(2) and 3-711 of the Administrative Code. Based on the disclosure statements filed by the campaign committee in 2001, Martinez received \$128,786 in public matching funds for the 2001 campaign.

Following the election, the Board requested expenditure documentation from the campaign in order to conduct an audit. Specifically, the Board provided the campaign with a list of expenditures and asked

the campaign to provide copies of cancelled checks and bills supporting these expenditures. According to the Board, despite numerous extensions which were granted in order to allow the campaign to gather documents, the campaign's response, in June, 2002, included only minimal paperwork which failed to include documentation that justified or explained any qualified expenditures. On November 20, 2002, the Board issued a draft audit report which found that the campaign had not documented any qualified expenditures. The report indicated that if the Committee could not provide documentation such as bills and cancelled checks which would demonstrate that the public funds received were used for qualified expenditures, the Committee would have to repay the Board all of the funds it received.

On March 11, 2003, the campaign responded to the draft audit report with additional documentation, accompanied by a letter stating that the documents included all of the remaining invoices and checks for expenditures for the 2001 Martinez campaign. The Board found this response to be unsatisfactory. On July 8, 2003, Board staff member Julius Peele wrote a letter requesting additional information. In the letter, Peele charged that the campaign's previous documentation of expenditures appeared to be fraudulent in that it contained altered invoices, discrepancies in signatures and false endorsements of checks. After a further exchange of documents, the Board served the campaign with a notice alleging 17 separate violations of the Campaign Finance Act and Board Rules. The notice of violations, which was eventually supplemented by the Board, included charges that the campaign had attached submitted documents which "did not appear to be contemporaneous, authentic documents generated or signed by the parties presented as generating or signing them." The supplemental notices identified nine categories of fraud, such as documents with false or forged signatures and documents that appeared to have been altered. In response, the campaign brought an action alleging that the notices were vague and/or violated the petitioners' due process rights under the New York Constitution. The complaint was found to be without merit. *See Martinez 2001 v. New York City Campaign Finance Bd.*, 36 AD3d 544 (1st Dept. 2007).

Thereafter, on August 9, 2007 and September 6, 2007, the Board held two lengthy public hearings at which Martinez, along with legal counsel, appeared. On January 17, 2008 the Board issued its final determination that Martinez, his campaign committee and Rodriguez had committed 12 violations of the Campaign Finance Act and Board Rules. The Board concluded that the campaign had committed several serious violations that were sufficiently egregious to rise to the level of a breach of the petitioners' Certification Agreement. The Board essentially found that after receiving notice of the post-election audit, the campaign created and submitted non-contemporaneous documentation made to look like original contemporaneous records from various vendors in order to avoid having to pay back funds for non-qualified expenditures. In addition to requiring that the campaign return all of the \$128,786 in public funds it received for the 2001 election, the Board assessed \$44,780 in penalties, jointly and severally, against Martinez, Martinez 2001 and Rodriguez. This article 78 proceeding then followed.

Discussion

Judicial review in this proceeding is limited to an inquiry as to the existence of a reasonable basis for the determination under review. The law is well-settled that "[I]t is not the function of judicial review in an article 78 proceeding to weigh the facts de novo and substitute [the Court's] judgment for that of the body reviewed, but only to determine if the action to be reviewed can be supported by any reasonable basis." *Matter of Kayfield Construction Corp. v. Morris*, 15 AD2d 373, 378 (1st Dept. 1962). Moreover, an agency's construction and interpretation of its own regulation and of the statute under which it functions is entitled to the "greatest weight." *Tommy and Tina, Inc. v. Department of Consumer Affairs of City of New York*, 95 AD2d 724 (1st Dept. 1993). Unless an agency's interpretation of a statute is in clear conflict with the plain wording of the law, it will normally be accorded deference by the courts. *See Excellus Health Plan, Inc. v. Serio*, 2 NY3d 166, 171 (2004); *Raritan Development Corp. v. Silva*, 91 NY2d 98, 102 (1997).

Here, the petitioners have failed to demonstrate that the Board's determination was arbitrary and capricious or an abuse of discretion. Rather, the Board's determination that the petitioners are jointly and severally liable for the repayment of \$128,786 in public funds and \$44,780 in penalties is supported in the record, which shows that, despite numerous opportunities to satisfy its burden during the post-election process, the campaign failed to demonstrate that it had spent the public funds it had received on only qualified campaign expenditures.

A. Penalties for the Submission of Fabricated Documents -- Pursuant to sections 3-703(1)(d)(1) and 3-704 of the Administrative Code and Board Rules 1-08(g) and 4-01, the campaign was required to demonstrate that it spent all of the \$128,786 in public funds it received for the 2001 elections on qualified expenditures. The Board found that the campaign did not meet its burden. Instead, as to monies allegedly paid to vendors for qualified campaign expenditures, the Board found that the campaign had submitted self-created or non-contemporaneous documentation altered to look like originals. Not only was the Board's conclusion about the authenticity of these documents not irrational, it appears to have been well-founded. Thus, the Board has pointed to numerous invoices, all allegedly from unrelated campaign service vendors, which contain identical billing addresses and typographical errors. Many of the invoices also contain non-existent addresses and/or incorrect zip codes. As the Board reasonably points out, most vendors can be expected to list their correct address and zip code on their invoices and it is hardly unreasonable for the Board to question the authenticity of invoices which lack such basic information.

At the second Board hearing held on September 6, 2007, the Martinez campaign introduced affidavits from two of the subject vendors who claimed that although they never issued a formal invoice to the campaign in 2001, they reviewed and approved the invoices created and submitted by Martinez 2001 to the Board. However, there was no explanation at the hearing as to why the submitted invoices contained non-existent or incorrect addresses. Moreover, the petitioners did not submit any affidavits from the vendors who were listed on other questionable invoices. At the hearings and in this proceeding, the petitioners have submitted copies of canceled checks to various vendors which, they argue, is sufficient proof that the funds were spent on qualified expenditures, even absent accurate invoices created by the vendors themselves which contemporaneously reflect those expenditures. The Board's rejection of this argument was rational. Indeed, the Board correctly found that without proper invoices to substantiate expenditures, there is no way to demonstrate whether the expenditures were related to the campaign and, if so, whether the campaign paid fair market value for the provided services. Based on the evidence presented, the Board reasonably concluded that the campaign fabricated documentation in order to mislead the Board into believing that the campaign had complied with the record-keeping requirements of the Campaign Finance Act. The Board's assessment of a \$10,000 penalty for this misrepresentation was rational and well supported.

The Board also found that the campaign had made misrepresentations in connection with its accounting for expenditures to campaign workers. It assessed a \$10,000 penalty for that misrepresentation. In response to a letter sent by the Board on October 9, 2003, the campaign submitted copies of what it purported to be "employment contracts" which allegedly documented the reported expenditures to various campaign employees. The documentation submitted was purportedly executed contemporaneously to the performance of campaign duties by the employees in 2001. However, the Board found that the contracts were almost identical to sample forms developed by the Board and first issued six months after the election. The submitted documents were clearly represented as authentic, contemporaneous records of employee wage expenditures. They contained a 2001 date and spoke in the future tense about "wages I will receive for performing such duties." The Board rationally found that the submission of these employee contracts was a misrepresentation made for the purpose of avoiding the campaign's obligation to repay funds when it could not document that the monies were properly spent on qualified expenditures. Indeed, it appears from the

record that the campaign did not acknowledge that the contracts were not contemporaneous to the performance of the duties until the August 9, 2007 hearing, almost four years after the contracts were first submitted to the Board. Based on the evidence presented, the Board reasonably concluded that the campaign misrepresented fabricated employee contracts as authentic contemporaneous documents in order to mislead the Board.

The Board also assessed a \$10,000 penalty for the campaign's misrepresentation in connection with reported expenditures for get-out-the-vote activities. The Board found that the campaign had again submitted fabricated and non-contemporaneous work contracts for those activities. The Board's determination was rationally based on indicia such as mismatched signatures and spellings. The petitioners, however, claim that the Board may not levy such penalties for misrepresentation absent proof, such as handwriting analysis, that the documents were signed by the same individual. The court disagrees. As discussed previously, the Board had a reasonable basis for suspecting the authenticity of the documents submitted by the Martinez campaign and it is appropriate for the campaign to bear the burden of demonstrating that it was in compliance with the Campaign Finance Act. At the hearings, the campaign did not present any testimony or other evidence on this issue which suggested that the signatures were genuine.

B. Penalty for Lack of Cooperation - - The Board also imposed a \$10,000 penalty for the campaign's failure to cooperate with the Board by not adequately responding to the Board's letters concerning the lack of documentation of expenses. This determination was entirely rational. Although the petitioners argue that no such penalties should be imposed if it is ultimately determined that the goods and services paid for out of public funds were actually provided, the petitioner reasonably concluded that, irrespective of this ultimate issue, penalties are appropriate where a campaign, knowing that its record-keeping was inadequate and that it would therefore have to return public funds, fabricated documents and submitted them to the Board as authentic, contemporaneous records.

C. Penalty Related to Coordinated Expenditures - - In addition to the above-detailed penalties concerning the submission of fabricated documents, the Board also assessed a \$2,500 penalty for the campaign's "unreported and unaccounted-for coordinated activity" in connection with a mailing sent in September of 2001 by the political club Northern Manhattan Democrats for Change ("NMDC"). The Board found that the campaign coordinated with NMDC in the design, production and distribution of the mailing, yet failed to report it as a third party in-kind contribution or expenditure.

Board Rule 1-08(f)(1) sets forth a list of factors the Board uses to determine whether an expenditure by a third party which benefits a particular campaign is made independently of the campaign. Non-independent or coordinated expenditures must be reported to the Board and are considered a contribution to, and an expenditure by, the campaign. Coordinated expenditures, like all campaign expenditures, were forbidden by Board rules during the period between September 12, 2001 and September 24, 2001, the date to which the Democratic Primary in New York had been rescheduled following a postponement due to the events of September 11, 2001. The Board charged that NMDC had coordinated with the Martinez campaign to send a mailing that featured a large picture of Martinez, identified him as the president of NMDC and urged people to vote in the primary. In making its determination that the campaign coordinated in the design, production and distribution of the NMDC mailing, the Board appropriately considered the fact that (1) NMDC and the Martinez campaign shared the same address, (2) NMDC and Martinez used the same picture of Martinez, (3) Martinez, as its president, controlled NMDC, (4) the campaign failed to report the mailing and (5) the campaign had a motive to have such mailings sent out since it was otherwise prohibited from doing so directly during this period. The Board's determination and imposition of a penalty were rational and should not be disturbed.

D. Breach of Certification - - The Board also found that the campaign's overall conduct constituted a breach of its Certification, requiring a return of all funds it received, pursuant to Board Rule 2-02. This Rule provides as follows:

The Board considers each of the following activities to be a fundamental breach of the obligations affirmed and accepted by the participant in the certification:

- (a) submission of fraudulent matchable contribution claims;
- (b) use of public funds to make or reimburse fraudulent campaign expenditures;
- (c) cooperation in alleged independent expenditures, whereby material or activity that directly or indirectly assists or benefits a participant's nomination or election, which is purported to be paid by independent expenditures, was in fact authorized, requested, suggested, fostered, or cooperated in by the participant; and
- (d) use of a political committee or other entity over which a participant exercises authority to conceal from the Board expenditures that directly or indirectly assist or benefit the participant's nomination or election.

In the event of a fundamental breach, the participant will be deemed by the Board to be ineligible for public funds and to have forfeited all public funds previously received for the elections covered by the certification, and will be subject to such civil and criminal sanctions as are applicable under section 3-711 of the Code and other applicable law.

This rule is not intended to be an enumeration of all circumstances that may constitute a fundamental breach of obligations, as may be determined by the Board.

The petitioners argue that none of their alleged actions falls within this Rule. They are mistaken. The finding by the Board that the Martinez campaign engaged in unreported and improper coordinated activity with NMDC is sufficient under the Rule to find a breach of the campaign's Certification. Moreover, the Rule specifically states that its application is not limited to the enumerated activities. In this respect, the Board found that the deceptive actions of the Martinez campaign were sufficiently egregious to constitute a fundamental breach of their obligations under the Campaign Finance Act and Board Rule 2-02. The petitioners have not offered any argument which suggests that this determination was irrational or arbitrary and capricious.

E. Liability of Treasurer Rodriguez - - The petitioners argues that the treasurer, nonparty Placido Rodriguez, is not individually liable for the penalties and/or the repayment of public funds. The petitioners, however, lack standing to make this argument. Since Mr. Rodriguez is not a party to this proceeding, the issue is not properly raised. Nevertheless, it appears that the Board clearly has the power to impose penalties against a treasurer pursuant to section 3-711 of the Administrative Code.

F. Counterclaim - - Finally, the Board has asserted a counterclaim for a money judgment in the amount of \$173,566, reflecting the repayment of the \$128,786 in public funds the Martinez campaign received and the \$44,780 in penalties which were imposed. The counterclaim is granted with respect to the petitioners herein, Martinez and Martinez 2001. See *Eisland v. New York City Campaign Finance Bd.*, 31 AD3d 259 (1st Dept. 2006). Since Rodriguez is not a party to this proceeding, any money judgment which the Board seeks against him must be sought in a separate proceeding.

Accordingly, the petition is hereby denied and the respondent's counterclaim granted. The Campaign Finance Board shall have judgment against the petitioners Miguel Martinez and Martincz 2001, jointly and severally, in the amount of \$173,566, plus interest from February 29, 2008, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

The Clerk Shall Enter Judgment Herein

Dated: 12/15/08

Check one: FINAL DISPOSITION



MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

FILED
DEC 22 2008
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