Matter of Vanel v New York City Campaign Fin. Bd.
2013 NY Slip Op 32039(U)
August 26, 2013
Supreme Court, New York County
Docket Number: 100660/2013
Judge: Eileen A. Rakower
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[* 1]
SCANNED ON 9/4/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PART 15

Index Number : 100660/2013

FRIENDS OF CLYDE VANEL

vs

NYC CAMPAIGN FINANCE BOARD

Sequence Number : 001

ARTICLE 78

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ____________

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ | No(s). 1

Answering Affidavits — Exhibits ____________ | No(s). 2

Replying Affidavits ____________ | No(s). 3

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/26/13

____________, J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: .... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: .... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

IN THE MATTER OF THE APPLICATION OF,
FRIENDS OF CLYDE VANEL,
CLYDE VANEL 2009 CAMPAIGN,
CLYDE VANEL,

Petitioners,

INDEX NO. 100660-2013

For Judgment Under Article 78 of the CPLR

- v -

MOTION DATE ______

NEW YORK CITY CAMPAIGN FINANCE BOARD,

MOTION SEQ. NO. 1

MOTION CAL. NO. ______

Respondent.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: Yes X No

Friends of Clyde Vanel, Clyde Vanel 2009 Campaign, and Clyde Vanel (collectively, "Petitioners"), bring this Article 78 proceeding to challenge the New York City Campaign Finance Board's (the "Board") decision to impose penalties against Petitioners for violations of the Campaign Finance Act and Board Rules. The Board opposes.

Clyde Vanel ("Vanel") was a candidate in the 2009 primary for City Council District 27. Friends of Clyde Vanel ("the Committee") was Vanel's designated campaign committee for the 2009 election. Petitioners participated in the NYC Campaign Finance Program ("the Program") and received a total of $70,050 in public funds.

Following a post election review of Petitioners' reporting and documentation for the 2009 election, the Board staff sent Petitioners a Public Funds Notice and a Penalty Notice on June 8, 2012. The Public Funds Notice recommended that Petitioners repay $32,214 in public funds. The Penalty Notice recommended that Petitioners be assessed total penalties of $9,753 for a variety of violations of the Act and Board Rules.

On October 5, 2012, Petitioners submitted a written response contesting the allegations in the Public Funds and Penalty Notices. On November 29, 2012, Vanel appeared before the Board to contest the allegations in the Public Funds and Penalty Notices ("the Hearing"). After review of the documents and oral statements from Petitioners and Board staff, the Board issued a final determination on December 13, 2012, which: a) reduced the scope of the undocumented transactions, impermissible post-election expenditures, and over-the-limit contributions findings; b) eliminated findings for failing to provide bank statements and report an in-kind contribution; and c) reduced Petitioners' public funds repayment by $32,674.[1]

The Board ultimately determined that the amount due from Petitioners was $7,871 based on the following assessed penalties: 1) $250 for accepting two corporate contributions; 2) $300 for filing a disclosure statement six days late; 3) $2,000 for failing to accurately report cash receipts; 4) $500 for failing to accurately report monetary receipts; 5) $1,452 for failing to document 31 transactions; 6) $117 for making impermissible post-election expenditures; and 7) $2,712 for accepting over-the-limit contributions. Petitioners do not contest the Board's assessment of a $117 penalty for making impermissible post-election expenditures, but challenge the remaining penalties in the action. To date, Petitioners have not paid any of the portion of the Board's penalty assessment, including the $117 penalty they do not contest.

The Board administers the NYC Campaign Finance Program ("the Program"), which provides public matching funds to candidates for NYC public office. To qualify for these public funds, a candidate agrees to abide by the Program's requirements, which include but are not limited to: a) limitations on the source or amount of contributions the campaign may receive; b) the filing of periodic

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[1]The Board also found that Petitioners had to repay $540 in public funds, which Petitioners do not contest and have repaid.

disclosure statements that report contributions and expenditures; and c)the reporting and documenting of campaign-related transactions. (*Admin Code §3-701*).

After the election, Board staff conducts a thorough audit of each campaign's records and disclosure statements, and notifies each campaign of any potential public funds repayment obligation or violation of the Act and Board Rules. (*See, Admin Code 3-710*). Alleged repayment obligations are communicated in the Post-Election Public Funds Calculation Repayment Notice ("Public Funds Notice"), and alleged violations and recommended penalties are communicated in the Alleged Violations and Recommended Penalties Notice ("Penalty Notice"). (*Admin Code 3-710[4], 3-710.5[ii]*). Campaigns may contest the allegations contained in the Notices in writing and/or by appearing before the Board. (*Admin. Code 3-710[4], 3-710.5[ii]*; *Board Rule 7-02[c]*).

The Board may assess penalties of up to $10,000 each for most violations of the Act or Board Rules. (*Admin Code §3-711*). The candidate and committee are jointly and severally liable for assessed penalties. Although penalties are ultimately subject to its discretion, the Board promulgated a schedule of recommended civil penalties ("baseline penalties") for common infractions and violations in effect for the 2009 election cycle in the Guidelines for Staff Recommendations for Penalty Assessments for Certain Violations of the 2009 Elections ("Penalty Guidelines") (*See, Admin Code §3-711[1]*).

The New York City Campaign Finance Act, Administrative Code 3-710, states in pertinent part:

> 1. The Campaign Finance Board is hereby empowered to audit and examine all matters relating to the performance of its functions and any other matter relating to the proper administration of this chapter...
>
> 2.(a) If the board determines that any portion of the payment made to the principle committee of a participating candidate from the fund was in excess of the aggregate amount of payments which such candidate was eligible to receive pursuant to this chapter, it shall notify such committee and such committee shall pay to the board an amount equal to the amount of excess payments.

> (b) If the board determines that any portion of the payment made to a principle committee of a participating candidate from the fund was used for purposes other than qualified campaign expenditures, it shall notify such committee of the amount so disqualified and such committee shall pay to the board an amount equal to such disqualified amount.
>
> (c) If the total amount of contributions, other receipts, and payments from the fund received by a participating candidate and his or her principle committee exceed the total campaign expenditures of such candidate and committee for all covered elections held in the same calendar year.... such candidate and committee shall use such excess funds to reimburse the fund for payments received by such committee for the fund.... Such reimbursement shall be made not later than ten days after all liabilities have been paid and in any event, not later than either the closing date of the disclosure date report, or the day on which the campaign finance board issues its final audit report for such participating committee, for such covered election, as shall be set forth in rules promulgated by the campaign finance board.

New York City Campaign Finance Rule 5-03(e) states, in pertinent part:

> (1) Pursuant to 3-710 of the Code, the participants shall pay to the Board unspent campaign funds from an election not later than 10 days after all liabilities for the election have been paid and, in any event, not later than the day on which the Board issues its final audit report for the participant's committee... Unspent campaign funds determinations made by the Board shall be based on the participants receipts and expenditures (including any outstanding bills). The Board may also consider information revealed in the course of an audit or investigation in making an unspent campaign funds determination, including, but not limited to, the fact that campaign expenditure were made in violation of the law, that expenditures were made for any purpose other than the furtherance of the participant's nomination or election, or that the participant has not maintained or provided requested documentation.

Pursuant to Admin Code §3-711, "Penalties", "the board shall publish a schedule of civil penalty for common infractions and violations, including examples

of aggravating and mitigating circumstances that may be taken into account by the board in assessing such penalties." Such schedule is published by the Board in a document called "Guidelines for Staff Recommendations for Penalty Assessment for Certain Violations 2009 Elections."

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pel v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

<u>Accepting two corporate contributions</u>

Campaigns may not accept a contribution from a corporation. (See, Admin. Code 3-703[1][l]). When a campaign knows that it has accepted a contribution from a source prohibited by the Act, the campaign shall promptly return the prohibited contribution by bank or certified check. (Board Rule 1-04[c][1]). The evidence provided indicates that the campaign accepted two contributions, totaling $150 the Law Office of Delmas A. Costin, Jr., and the campaign did not make the refund until July 31, 2009, which was after the deadline imposed by the Board.

Vanel argued at the hearing before the Board on November 29, 2012, that the Law Offices of Delmas A. Costin, Jr. was a sole proprietorship rather than a corporation. He states that "[t]he owner of the firm told us that it was a sole proprietorship and sent us a letter requesting that. And even after we found this out, when the Campaign Finance Board called us to return the funds, we did; although, I believe we returned the funds two weeks late." In opposition, the Board stated that although the entity may be a sole proprietorship, it is a "domestic professional corporation."

Pursuant to the NYC Campaign Finance Board Guidelines, the baseline penalty for accepting a contribution or loan from a corporation is $250 "if return of contribution or loan following notification from CFB is not prompt." As the evidence provided indicates that The Law Office of Delmas A. Costin, Jr. was a corporation, and the return of the funds was not prompt, it was not arbitrary or capricious to impose a $250 penalty on Petitioner for accepting such contribution in violation of the Administrative Code.

Filing a disclosure statement six days late

Campaigns are required to file complete and timely disclosure statements on scheduled dates. (*See, Admin Code* 3-703[1][d], [g], [6], [11], [12]). The campaign filed its disclosure statement six days after the deadline date of September 25, 2009.

Vanel states at the November 29, 2012 hearing that on the date that the statement was due he was in Washington, DC where he "lost a lot of data" from his computer. He states that as soon as he got back to New York, he "entered Statement 12 at the Campaign Finance Board Offices on October 1st." He indicates that "on that date, we had to submit hundreds of — I had to resubmit and re-input hundreds of transactions and the office allowed us to do so. And at that time, I guess we made a number of mistakes entering information. But that's what happened. That's why I submitted late."

According to the NYC Campaign Finance Board Guidelines, the daily baseline penalties for late filing are: City Council, $50. As Petitioner admits that he filed his disclosure statement six days late, it was not arbitrary or capricious for the Board to impose a penalty of $300 for his late filing.

Failure to accurately report cash receipts ; failure to accurately report monetary receipts; failure to document 31 transactions

Campaigns are required to report all cash receipts, to deposit them into the account listed on the candidate's Certification, and to provide the Board with the deposit slips. (*See, Admin. Code 3-703[1][d], [g], [6], [10], [11], [12].*) The campaign reported cash receipts of $5,760, but provided deposit slips and bank statements showing that $9,430 in cash was deposited, a difference of $3,670. The board assessed a penalty of $2,000 for this violation.

Campaigns are required to report all receipts, to deposit them into the account listed on the candidate's Certification, and to provide the Board with the bank statements. (*See Admin. Code 3-703[1][d], [g], [6], [10], [11], [12]*). The campaign reported receipts of $112,458, but provided bank statement showing only $101,000.92 was deposited. A difference of $11,457. The board assessed a penalty of $500 for this violation.

Furthermore, campaigns must maintain records, such as copies of cancelled checks, bills and other documentation that enable the Board to verify the contributions and expenditures reported in the candidate's disclosure statements. (*See, Admin Code 3-703[1][d], [g]*). Campaigns are required to furnish such records to the Board upon request. (See, Admin Code 3-703[1][d], [g]). A loan to a campaign and its repayment must be documented by copies of the front and back of the loan check and repayment check, by a signed and dated loan agreement between the campaign and the entity making the loan, and by the front and back of the loan check and the check repaying the loan. (See, Board Rules 4-01[b][2], [f], [g]). The campaign failed to provide documentation concerning twenty five transactions reported as loans, and six transactions reported as loan repayment. Thus, the board assessed a penalty of $1,452 for these violations.

Vanel admits to the improper filing of cash receipt, monetary receipts, and failure to document 31 transactions. He attributes all of this misfiling to the "miss-entering on October 1st". However, he states that he actually reported "less cash but we showed more, there's no evidence of fraud or trying to hide cash or money or anything like that." The Board replies that "proper control of cash receipts and other receipts is essential to maintain a public trust for our program and to show we are reducing corruption and the appearance of corruption through accurate record keeping."

The NYC Campaign Finance Board Guidelines provide that for failure to accurately report receipts and disbursements, the percentage of under-or-over reporting of the amount of receipts or disbursements, determines the amount owed in penalties by the City Council. Here, the Campaign reported cash receipts of $5,760, but provided deposit slips and bank statements showing $9,430 in cash was deposited, a difference of $3,670, or a variance of 63.72%. The Guidelines provide that such a variance is subject to a $2000.00 penalty, and accordingly, it was not arbitrary or capricious for the Board to impose such penalty.

The Campaign reports monetary receipts of $112,458, but provided bank statements that only $101,000.92 was deposited, a difference of $11,457. This results in a receipts variance of 11.34%. The Guidelines provide for a $500 penalty for 11% over-or-under reporting. Thus, it was not arbitrary or capricious to impose this penalty.

Furthermore, the Guidelines provides that the baseline penalty for failure to provide/maintain documentation for a specific transaction is $50 per transaction. Since Vanel admits to his failure to document 31 transactions, it was not arbitrary or capricious for the Board to impose $1,452 for these violations.

Accepting over-the-limit contributions

Participating 2009 City Council campaigns were not permitted to accept a contribution from the candidate in excess of $8,250. (See, Admin Code 3-703[1][f], [h]). A loan to the campaign from the candidate, that is forgiven or is not repaid, is considered a contribution to the campaign, subject to the contribution limits. (See, Board Rules 1-05[a], [j]). An unreimbursed advance to the campaign by the candidate, which is a payment on behalf of the campaign for goods and services (with the expectation of reimbursement), is an in-kind contribution subject to contribution limits. (See, Board Rule 1-02). If a campaign accepts an over-the-limit contribution, it must return the excess portion to the contributor. (See, Board Rule 1-04[c][1]).

Vanel states that he contributed $12,551 to the Campaign, but that he was reimbursed $7,660.68. At the November 29, 2012 hearing, he provides "checks 1020 through 1025 for different amounts, adding up to $7,660." He admits that "the actual advances or loans may not have been properly documented" but he states that "the checks were actually reimbursed to me". The Board indicates that it is not sure if there is a paper trail to prove "that he paid out so much money and was reimbursed so much money." It is alleged that Vanel never reported such repayments.

Upon review of the documents submitted, the Campaign's reporting and records show a total of $10,712.28 in contributions and unreimbursed loans or advances from the Candidate. This is $2,462.28 over the contribution limit. The Board imposed a penalty of $2,712. The Board's Guidelines state that the penalty for accepting over-the-limit contributions up to $3,000 is "overage plus $250" where overage is not returned following notification from CFB. Accordingly, the Board's

imposed penalty was not arbitrary or capricious.

The Board conducted an extensive audit and investigation, made numerous re-evaluations of its own earlier determination, and ultimately reduced the repayment and penalty amounts to $7,871. Thus, the Board's decision was not arbitrary and capricious. Instead, the Board issued a rational decision and as such, it cannot be disturbed. (*See, Pel v. Board of Education, supra; Matter of Sullivan County Harness Racing Association, Inc v., supra*).

Wherefore, it is hereby,

ORDERED and ADJUDGED that this Petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: **August 26, 2013**

HON. EILEEN A. RAKOWER

Check one: **X FINAL DISPOSITION** **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

UNFILED JUDGMENT
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