

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

DONALD J. TRUMP, individually and on behalf of
THE TRUMP ORGANIZATION,
Petitioners,

For a Judgment Under Article 78 of the CPLR, Index No. 4134-14

v.

NEW YORK STATE JOINT COMMISSION ON
PUBLIC ETHICS,
Respondent.

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS

CARTER, CONBOY, CASE, BLACKMORE,
MALONEY & LAIRD, P.C.
Attorneys for Respondent
Office and P.O. Address
20 Corporate Woods Boulevard
Albany, NY 12211-2362
Phone: (518) 465-3484

PRELIMINARY STATEMENT

This memorandum of law is submitted in reply to the opposition of petitioners Donald J. Trump and the Trump Organization (collectively "Trump Parties") to the motion of respondent New York State Joint Commission on Public Ethics ("Commission") to dismiss the Trump Parties' petition under Article 78 of the New York Civil Practice Law and Rules. That petition seeks an order compelling the Commission to (1) vote whether to commence an investigation of a complaint filed by the Trump Parties alleging that New York State Attorney General Eric T. Schneiderman violated state ethics laws, and (2) formally notify the Trump Parties of its decision. The Commission incorporates the arguments set forth in its earlier submission, which will not be restated here, but responds as follows to several points raised by the Trump Parties in their most recent submission.

ARGUMENT

POINT I

THE TRUMP PARTIES MISCONSTRUE "MINISTERIAL" VERSUS "DISCRETIONARY" ACTS

In its prior memorandum of law, the Commission argues that the Trump Parties have failed to meet their burden under Article 78 of demonstrating that the vote they seek to compel is merely "ministerial" rather than "discretionary." See Resp. Mem. of Law filed Oct. 8, 2014 ("Resp. Mem. of Law ") at 8-11. In reply, the Trump Parties contend that the act of voting itself is ministerial although how a vote is cast may be discretionary. Pets. Mem. of Law in Opposition at 6-7. Such a distinction is misplaced here.

Any vote is necessarily a choice among two or more options. The choice of options is quintessentially discretionary. See N.Y. Civ. Liberties Union v. State, 4 N.Y.3d 175, 184 (2005) (“[a] discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results ...”). The exercise of discretion central to any vote cannot, as the Trump Parties urge, be artificially distinguished from the act of voting any more than the certification of a ballot can be distinguished from the exercise of discretion necessary to determine that a ballot meets legal requirements. See Matter of Ward v. Mohr, 109 A.D.3d 694, 696 (4th Dep’t 2013) (holding that certification of ballot by election commissioner required exercise of discretion as to eligibility of candidates and was not, therefore, purely ministerial). Thus, the Trump Parties have failed to meet their burden of demonstrating that the vote they seek to compel by the Commission is purely ministerial and their petition should be denied and dismissed on this ground.

POINT II

THE RIGHT TO FILE A COMPLAINT WITH THE COMMISSION DOES NOT SATISFY THE TRUMP PARTIES’ BURDEN OF DEMONSTRATING A CLEAR LEGAL RIGHT TO THE RELIEF THEY REQUEST

In its prior memorandum of law, the Commission argued in the alternative that the Trump Parties have failed to meet their burden of demonstrating a “clear legal right” to compel the vote they seek. Resp. Mem. of Law at 11-15. In reply, the Trump Parties argue that because the Commission accepts complaints about the conduct of state officials from private parties, those filing such complaints have been accorded the right to compel the Commission to act on those complaints. Pets. Mem. of Law in Opposition at 7-9.

However, as described in the Commission's prior memorandum of law, whatever may be the Commission's obligations under New York Executive Law § 94, neither that statute nor any other provision of law grants complainants such as the Trump Parties any right, let alone a clear legal right, to compel the Commission to take any particular action with respect to any complaint. No such right of a complainant can be found in any legal authority cited by the Trump Parties in their opposition memorandum. Accordingly, in the alternative, the Trump Parties' petition should be denied and dismissed on this ground as well.¹

POINT III

THE COMMISSION SHOULD NOT BE COMPELLED TO DISCLOSE TO THE TRUMP PARTIES THE OUTCOME OF ANY VOTE

The Trump Parties' assertion that "nothing in Executive Law § 94" prevents the Commission from disclosing the outcome of a vote to investigate is incorrect. See Pets. Mem. of Law in Opposition at 10.²

As the Commission has demonstrated, Executive Law § 94 expressly requires that the Commission's investigative proceedings remain confidential, other than certain specific circumstances not applicable here where limited disclosure is authorized. Resp. Mem. of

¹The Trump Parties' argue that such a right must be found to exist to insure oversight of the Commission's activities. Pets. Mem. of Law in Opposition at 2-4. This argument is likewise misplaced. See Resp. Mem. of Law at 15 n.4.

²The Trump Parties complain in their opposition memorandum that the Commission will "not even confirm the existence of the [Trump Parties'] ethics complaint or that [the Commission] has ever even received anything. . . ." Pets. Mem. of Law in Opposition at 3. For reasons discussed in its prior memorandum of law, the Commission cannot publicly confirm the existence or receipt of any complaint, but, as the Trump Parties are aware, the Commission does confirm to a complainant the receipt of a complaint.

Law at 10-16. The confidentiality of Commission proceedings is further supported by the fact that the Commission is exempt from producing documents under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, and the Open Meetings Law. See N.Y. Exec. Law § 94(19). The assurance of confidentiality serves purposes critical to the Commission's mission, including preserving the integrity of the investigative process and protecting the subjects of complaints unless and until the Commission finds a substantial basis to conclude there has been a violation of law. See Resp. Mem. of Law at 15-16. A breach of this confidentiality by Commission members or staff is subject to criminal sanctions. See Exec. Law § 94(9-a)(c). Contrary to the Trump Parties' position, the Commission does not have discretion to provide information concerning any vote it may or may not undertake.

In opposition, the Trump Parties discuss the placement of a particular confidentiality provision in Executive Law § 94(13)(b) ("All of the foregoing proceedings shall be confidential"). The Trump Parties argue that this confidentiality provision applies "only to the substance of the Commissions's investigation" and does not protect the confidentiality of the Commission's votes. See Pets. Mem. of Law in Opposition at 10. However, the plain language of the statute belies this argument. Section 94(13)(b) dictates the Commission's procedures upon an affirmative vote to commence an investigation, including written notice to the subject of the investigation. The Commission cannot publicly reveal that it has voted on a specific matter without running afoul of the clear and specific directive to maintain the confidentiality of such proceedings.

As noted in the Commission's prior memorandum of law, it is well established that the Commission's interpretation of a statute it is empowered to administer is entitled to

deference. See Samiento v. World Yacht Inc., 10 N.Y.3d 70, 79 (2008) (“[T]he [agency]’s interpretation of a statute it is charged with enforcing is entitled to deference. The construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld.”); Matter of O’Connor v. Ginsberg, 106 A.D.3d 1207, 1210 (3d Dep’t 2013) (same).³ ***footnote 3***

For the reasons discussed herein and in its prior memorandum of law, the Commission’s interpretation of its enabling statute is not irrational or unreasonable and, therefore, merits deference.

Moreover, even if those requirements of confidentiality were found to be ambiguous or even non-existent, which they are not, such absence of any clear prohibition still would not satisfy the Trump Parties’ burden of demonstrating a clear legal right to notification of the outcome of any vote. As previously discussed, Article 78 requires the Trump Parties to demonstrate a “clear legal right” to notification of the outcome of any vote. See Matter of Horowitz v. New York City Police Dep’t, 82 A.D.3d 887, 887-88 (2d Dep’t 2011) (collecting cases). The ambiguity or nonexistence of any confidentiality requirement would not suffice to establish the Trump Parties’ affirmative “clear legal right” to that notification. See Resp. Mem. of Law at 11-14 (discussing cases holding that a petitioner’s right to relief under Article 78 must be clear and express). Accordingly, the Trump Parties’ petition in this regard should also be denied and dismissed.

³Executive Law § 94(17)(b) grants the Commission the “power and duty to . . . administer and enforce all the provisions of this section”

CONCLUSION

For the reasons stated above, it is respectfully requested that the Trump Parties' petition be denied and dismissed.

DATED: December 12, 2014

Respectfully submitted,

CARTER, CONBOY, CASE, BLACKMORE,
MALONEY & LAIRD, P.C.

By: David R. Homer
DAVID R. HOMER

Attorneys for Respondent
Office and P.O. Address
20 Corporate Woods Boulevard
Albany, NY 12211-2362
Phone: (518) 465-3484