

**SUPREME COURT
COUNTY OF ALBANY**

STATE OF NEW YORK

In the Matter of the Application of

EDWARD F. COX, individually and on behalf
of THE NEW YORK STATE REPUBLICAN
COMMITTEE, and MARC MOLINARO,

Petitioners,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

-against-

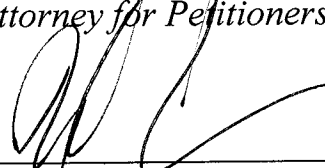
NEW YORK STATE JOINT COMMISSION
ON PUBLIC ETHICS,

Respondent.

PLEASE BE ADVISED that the attached Decision and Order in the above
referenced proceeding was entered in the Office of the Albany County Clerk on
December 20, 2018.

Dated: December 20, 2018

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Attorney for Petitioners



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COPY

At a Special Term of the Albany County Supreme Court,
held in and for the County of Albany, in the City of Albany,
New York, on the 21st day of September 2018

PRESENT: HON. PATRICK J. McGRATH, JSC

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MARC MOLINARO,**

Petitioners,

DECISION AND ORDER
INDEX NO. 04812-18

For a Judgment Pursuant to Article 78
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-against-

**NEW YORK STATE JOINT COMMISSION
ON PUBLIC ETHICS,**

Respondent.

APPEARANCES: MICHAEL J. HUTTER, ESQ.
Attorney for the Petitioners

GLEASON, DUNN, WALSH & O'SHEA
Attorneys for the Respondent

McGRATH, PATRICK J., J.S.C.

Petitioners seeks a judgment pursuant to CPLR Article 78 directing respondent New York State Joint Commission of Public Ethics (hereinafter, "JCOPE" or "the Commission") to formally notify the petitioners as to whether the Commission voted to close its investigation into petitioners' complaints; or alternatively, if the vote did not occur, directing the Commission to conduct such a vote within thirty (30) days of such direction and to formally notify petitioners of the result. The Commission opposes the Petition and cross moves to dismiss the proceeding. The Court heard oral argument on October 18, 2018.

Petitioner Edward Cox is the Chairman of the New York Republican State Committee. Petitioner Marc Molinaro is the County Executive of Dutchess County. On February 18, 2018, Cox, individually and on behalf of the Republican State Committee, filed a complaint with the Commission requesting that it commence an investigation into the misconduct of Joseph Percoco, Governor Andrew Cuomo, and other unidentified employees of the Executive Chamber, alleging, *inter alia*, several instances wherein these individuals used State resources for private and political purposes in violation of the Public Officers Law. On April 13, 2018, Molinaro filed a complaint with the Commission requesting that it commence an investigation into Governor Cuomo, also alleging violations of the Public Officers Law. As of the date of the Petition, verified on July 26, 2018, more than 151 days had elapsed since Cox filed his complaint, and more than 104 days had elapsed since Molinaro filed his complaint. Neither Cox nor Molinaro have been notified by the Commission as to whether the Commission has voted or the result of that vote.

The Commission has oversight over both the Executive and Legislative Branches and is charged with investigating potential violations of Public Officers Law Sections 73 and 74 as they apply to the Governor, Lieutenant Governor, Comptroller and Attorney General, candidates for those offices, and executive branch employees. Exec. Law 94(13)(a).

Executive Law 94(13)(a) states that if the commission receives a sworn complaint alleging a violation of the relevant statutes, the Commission shall notify the individual in writing, describe the possible or alleged violation of such laws, provide a description of the allegations against him or her and the evidence, if any, supporting such allegations... the letter also shall set forth the sections of law alleged to have been violated and provide the person with a fifteen day period in which to submit a written response." "The commission shall, within sixty calendar days after a complaint or a referral is received or an investigation is initiated on the commission's own initiative, vote on whether to commence a full investigation of the matter under consideration to determine whether a substantial basis exists to conclude that a violation of law has occurred."

Executive Law 94(13)(b) states, in relevant part, that upon the vote to commence a substantial basis investigation, "written notice of the commission's decision shall be provided to the individual who is the subject of such substantial basis investigation." The statute describes the contents of that notice, which includes information concerning the individual's right to respond and be heard. This portion of the statute also provides that "[i]f the commission determines at any stage that there is no violation, that any potential violation has been rectified, or if the investigation is closed for any other reason, it shall so advise the individual and the complainant, if any in writing within fifteen days of such decision. All of the foregoing proceedings shall be confidential."

Executive Law 94(13)(b) provides that all proceedings prior to issuing a substantial basis investigation report, including the vote to commence a substantial basis investigation, " shall be confidential."

Executive Law 94(9-a)(b) states that "testimony received or any other information obtained by a commissioner or staff of the commission shall not be disclosed by any such individual to any

person or entity outside the commission during the pendency of any matter. Any confidential communication to any person or entity outside the commission related to the matters before the commission may occur only as authorized by the commission."

The Commission is exempted from both the Open Meetings Law and the Freedom of Information Law. Exec. Law 94 (18), (19).

Petitioners argue that the Commission was required within sixty days after submission of their complaints to vote on whether to commence a "substantial basis investigation." Petitioners cite Trump v New York State Joint Commn. On Pub. Ethics, 47 Misc.3d 993 (Sup. Ct., Albany County, 2015) (Zwack, J.), in support of their position that Supreme Court may direct that such a vote take place. Further, that the Commission's failure to inform petitioners as to whether the vote has occurred and the result of that vote is in violation of the Executive Law. Petitioners claim, upon information and belief, that the Commission has taken "no or little investigative actions regarding the complaints."

Petitioners also provide the Court with a copy of an article appearing in the Times Union dated September 18, 2018, wherein it was reported that Governor Cuomo's spokesperson said that "the administration had not gotten a '15 day letter.'" Further, that a Cuomo campaign spokeswoman said that the campaign had not received a 15 day letter. Counsel for the petitioners argues that this Court should take judicial notice of the fact reported in this article and conclude that if neither the Governor nor his campaign received 15 day letters, then the Commission must have voted not to investigate, and therefore, under the statute, the Commission must inform petitioners that the Commission has closed its investigation. Petitioners argue that "merely informing petitioners of the result of a vote already taken hardly involves any discretionary judgment on the part of JCOPE...and the right to such notification is clear."

The Commission moves to dismiss, arguing that the petitioners have not and cannot allege standing or entitlement to the requested *mandamus* relief pursuant to the plain language of Executive Law Section 94. Further, that the requested relief is contrary to the Commission's reasonable interpretation of Section 94, which is entitled to deference. Finally, that if the petitioner were granted the relief, it would pose a "severe and ill advised threat to the proper administration and functioning of the Commission."

It is well established that "[m]andamus to compel is available 'only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law.'" Matter of Glenman Indus. & Commercial Contr. Corp. v. New York State Off. of the State Comptroller, 75 AD3d 986, 989 (3d Dept. 2010) *quoting* Matter of Schmitt v Skovira, 53 AD3d 918, 920 (3d Dept. 2008) *quoting* New York Civ. Liberties Union v State of New York, 4 NY3d 175, 184 (2005). "The general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty." Matter of Kleinknecht v Siino, 165 A.D.3d 936, 938 (2 Dept. 2018) *citing* Matter of Willows Condominium Assn. V Town of Greenburgh, 153 AD3d 535, 536 (2d Dept. 2017) *quoting* People ex rel. Schau v

McWilliams, 185 NY 92, 100 (1906).

In Trump v New York State Joint Commn. On Pub. Ethics, *supra*, petitioner sought mandamus to compel the Commission to vote to commence a substantial basis investigation within 45 days¹ of receiving the sworn complaint of alleged violations. Supreme Court found that,

“[T]he statute's plain language, which required the Commission to vote within 45 days of the filing of the Trump parties' complaint, is incapable of any other understanding. Understanding that the legislature is presumed to have acted intentionally in setting a specific time line, it cannot be said that it otherwise remained within the discretion of the Commission to adhere to any other timetable. Any contrary view, in effect allowing the Commission to either ignore the time line or substitute a confidential process is simply inconsistent with the purpose and spirit of statute and is thus incapable of being an ‘accurate apprehension of legislative intent.’” *Id.* at 997.

The Court held that “the requirement that a vote be held within 45 days from receipt of a complaint is a purely ministerial act—which must be carried out in accordance with the clear statutory language.” *Id.* at 997. The court noted that it had “been asked to compel the vote on the complaint, or at a minimum ascertain if the statutorily required vote has indeed occurred. Here, all that is required of the Commission is a simple yes or no answer, without giving away any potentially prejudicial confidential information. The court has balanced the need for confidentiality inherent in the statute with petitioner's request that a vote be compelled, in the event the Commission has not already done so.” *Id.* at 999. The Court directed, “to the extent that the Commission has not voted on petitioner's complaint, to hold a vote within 30 days, with written confirmation to the court within 15 days following that the vote was held.” *Id.*

The parties also cite the unpublished decision of Koetz v. New York State Joint Commn. On Pub. Ethics, Sup. Ct., Albany County, June 22, 2015, Connolly, J., Index No. 456-15. In that case, petitioners submitted a complaint to the Commission regarding former Assembly Speaker Sheldon Silver. Petitioners sought an order compelling the Commission to perform a full investigation into Silver's alleged misconduct, and to compel the Commission to make a finding that Silver had violated the Public Officers Law. The Court found that mandamus did not lie to support either, because the language of the statute provided the Commission with the discretion to commence an investigation. The Court noted that petitioner was not seeking an order compelling the respondent to vote. The Court also noted that petitioner was not entitled to “formal notification” of the decision on the vote, investigation and actions of JCOPE relating to its complaint. The Court held that “while it seems reasonable that respondent provide a complainant a simple ‘yes’ or ‘no’ as to whether an investigation will be conducted, there is no statutory authority compelling such notification, and accordingly, petitioner is not entitled to the same.” Moreover, the Court noted that the “the

¹ At the time of the *Trump* decision in 2015, Executive Law 94(13)(a) provided the Commission with 45 days to vote to commence a substantial basis investigation. In 2016, the time frame was amended to 60 days.

investigation is statutorily required to be confidential”, and therefore petitioner was not entitled to notification concerning the investigation or respondent’s ‘actions’ concerning the claims she has raised in her complaint.”

The Commission argues that this Court should rely on *Koetz* but not *Trump* because the Legislature did not intend to provide petitioners with standing to compel a vote of the Commission and receive notice of its outcome. Further, that the requested relief would contravene the confidentiality requirements of the statute.

Compelling the Commission to vote and compelling the Commission to give notice to the petitioners of its vote are two different requests for relief and deserve separate treatment.

The Commission argues that the Executive Law does not provide petitioners with “standing” to compel a vote of the Commission. “Standing” is a concept with a specific meaning, which is not actually addressed by the respondent herein. To the extent the Commission is advancing petitioners’ lack of standing here, it is without merit, as “[s]tanding has been granted absent personal aggrievement where the matter is one of general public interest.” Police Conference of N.Y. v Municipal Police Training Council, 62 AD2d 416, 417 (3d Dept. 1978). In such case, a “citizen may maintain a mandamus proceeding to compel a public officer to do his [or her] duty.” Matter of Hebel v West, 25 AD3d 172, 176 (3d Dept. 2005) [internal quotation marks and citation omitted] *quoting* Police Conference of N.Y. v Municipal Police Training Council, 62 AD2d 416, 417-18 (3d Dept. 1978); *see* Matter of Schenectady County Sheriff’s Benevolent Assn. v McEvoy, 124 AD2d 911, 912 (3d Dept. 1986). As “the overall purpose and spirit of Executive Law § 94... is to strengthen the public’s trust and confidence in government,” (Matter of O’Connor v Ginsberg, 106 AD3d 1207, 1211 (3d Dept. 2013) (citations omitted)), the Court finds that the matter here is one of general public interest, and petitioners have standing to bring this proceeding.

To the extent respondent is arguing Executive Law 94 does not explicitly provide petitioner with the ability to compel a vote, this ignores that “Article 78 is the proper reference point for judicial review of most administrative action in New York” except when the statutory scheme governing the particular agency contains “variations.” Alexander, Practice Commentaries, CPLR 7801:1, at 28. For example, Professor Alexander notes that Labor Law 624 provides that the Appellate Division shall review decisions of the unemployment insurance appeals board, and that some statutes “preclude judicial review altogether”, such as Civil Service Law 76. Executive Law 94 does not limit or preclude judicial review via Article 78, and therefore, petitioner’s argument lacks merit.

This Court agrees with the decision in *Trump* in that the Commission’s duty to hold a vote on whether to commence a substantial basis investigation within 60 days of receiving a complaint is ministerial because holding a vote involves “direct adherence to a governing rule or standard with a compulsory result” rather than “the exercise of reasoned judgment which could typically produce different acceptable results.” Verizon N.Y., Inc. v Village of Athens, 43 AD3d 526, 528 (3d Dept. 2007) [citation omitted], *quoting* Tango v Tulevech, 61 NY2d 34, 41 (1983). The act sought to be

compelled "is premised upon specific statutory authority mandating performance in a specified manner." Peirez v. Caso, 72 AD2d 797 (3d Dept. 1979). The time frame in which to hold a vote is not left to the Commission's expertise, judgment or discretion.

In so holding, this Court is mindful of the Commission's justifiable concerns. In that 60 day time frame, Commission staff must provide Commission members with information on the likely scope and content of the investigation as well as a subpoena plan. Exec. Law. 94[13][a]. The Commission argues that a reasonable interpretation of the statute would only require it to adhere to the 60 day time frames in a case of a "sworn" complaint based on personal knowledge. Otherwise, the Commission would be required to convene and vote on every hearsay complaint, encouraging the filing of multiple complaints for political reasons. The Commission claims that "chaos... would ensue if serial complainants could each trigger sixty day vote responsibilities of the Commission and its staff, on matter that may already be under consideration by the Commission." Nevertheless, this Court cannot turn a blind eye to the clear legislative mandate that requires a substantial investigation vote within 60 days receipt of a complaint. This language is clear, and has been specifically addressed as recently as 2016. As noted by the Court in *Trump*, "[p]rior to the enactment of the State Public Integrity Reform Act of 2011, Executive Law 94 contained no time limitation for the Commission to determine whether to investigate an ethics complaint. A major change to the statute... was the legislative addition of a time line by which the Commission must make the determination whether to investigate a complaint or not." The statute was amended in 2016, (ch 286, §§ 1, 2 (Part J), in 13(a)), extending the time from 45 days to 60. If the Commission cannot fulfill its legislative mandate, its recourse is through the legislative process.

The Commission also claims that granting mandamus to compel a vote would invade the Commission's statutory duty to maintain confidentiality. However, ordering the Commission to vote does not require the Commission to divulge the result of its vote to the petitioners.

As noted *infra*, petitioners are also asking the Court to compel the Commission to provide them with "formal notification" concerning the result of that vote.

The plain language of Executive Law 94(13)(b) explicitly states that upon the vote to commence a substantial basis investigation, "written notice of the commission's decision shall be provided *to the individual who is the subject of such substantial basis investigation.*" The subject of an investigation is clearly entitled to notice that a substantial basis investigation has been commenced. As noted by the Commission, the statute conspicuously omits any provision for notice regarding the vote to the complainant. The only time the complainant is entitled to any notice regarding the Commission's proceeding is if the "commission determines at any stage that there is no violation, that any potential violation has been rectified, or if the investigation is closed for any other reason." Id.

In support of its claim that the Commission has closed its investigation, petitioners ask this Court to take judicial notice of "facts" reported in the aforementioned newspaper article. Judicial notice is reserved for "matter[s] of common and general knowledge, well-established and

authoritatively settled." Prince, Richardson on Evidence § 2-201 [Farrell 11th ed] [internal quotations marks and citations omitted). Purported facts gleaned from newspaper articles provide no basis for judicial findings nor do they constitute matters for which judicial notice may be taken. See Chong Min Mun v Soung Eun Hong, 109 AD3d 732 (1st Dept. 2013); TOA Constr. Co., Inc. v Tsitsires, 54 AD3d 109 (1st Dept. 2008); Merkos L'Inyonei Chinuch, Inc. v Sharf, 59 AD3d 403 (2d Dept. 2009); Platovsky v City of New York, 275 AD2d 699 (2d Dept. 2000); Young v Fleary, 226 AD2d 454 (2d Dept. 1996); People v. Nagelberg, 97 Misc.2d 514 (District Court, Nassau County, 1978) ("no extensive legal authority needs to be cited to support the conclusion that newspaper clippings are not admissible in evidence nor are they appropriately subject matter to be admissible in evidence by means of judicial notice."); Advisory Committee on Judicial Ethics, Opinion 14-121.

This Court will not take judicial notice of hearsay statements as reported by the press. Pursuant to the unambiguous language in the statute, only the Commission and the individuals named in the complaint would be aware of such information, and they have not provided any proof on this issue. As such, Petitioners have not established a clear legal right to "formal notification" that the Commission has voted or the results of such a vote.

Accordingly, it is hereby

ORDERED that respondent's motion to dismiss the petition is denied;, and it is further

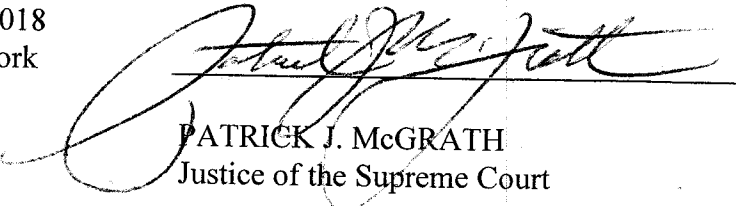
ORDERED that the petition is granted to the extent if the respondent has not already done so, respondent is directed to comply with Executive Law Section 94 by conducting a vote within 30 days from the date of this order as to whether to conduct a substantial basis investigation into the subject complaints; and it is further

ORDERED that respondent is directed to file a written report with the Court within 45 days detailing whether or not said vote has occurred within the 30-day period; and it is further

ORDERED that the balance of the petition is denied.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for the petitioners. All supporting documentation is being forwarded to the Albany County Clerk's Office for filing. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Petitioners are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

Dated: December 18, 2018
Albany, New York


PATRICK J. McGRATH
Justice of the Supreme Court

Papers Considered:

1. Notice of Petition, dated July 27, 2018; Verified Petition, dated July 26, 2018, with annexed Exhibits A-C.
2. Notice of Motion to Dismiss, dated September 12, 2018; Attorney Affirmation, Monica Stamm, Esq., dated September 11, 2018, with annexed Exhibits A-C; Defendant's Memorandum of Law in Support of its Motion to Dismiss, dated September 12, 2018.
3. Reply Affidavit, Michael J. Hutter, Esq., dated September 21, 2018, with annexed Exhibits A-C; Petitioners' Memorandum of Law, dated September 21, 2018.
4. Reply Affirmation, Monica Stamm, Esq., dated September 26, 2018, with annexed Exhibits D & E; Respondent's Reply Memorandum of Law in Support of its Motion to Dismiss, dated September 27, 2018.