

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----- X
In the Matter of the Application of :

DONALD J. TRUMP, individually and on behalf of : Index No. 4134/14
THE TRUMP ORGANIZATION, :
Petitioner, :

For a Judgment Under Article 78 of the CPLR, :

NEW YORK STATE JOINT COMMISSION ON :
PUBLIC ETHICS, :
Respondent. :
----- X

Albany County Clerk
Document Number 11734049
Rcvd 11/24/2014 2:57:12 PM


**MEMORANDUM OF LAW IN FURTHER SUPPORT
OF PETITIONER'S ARTICLE 78 PROCEEDING AND IN
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS**

ALAN G. GARTEN, ESQ.
The Trump Organization
725 Fifth Avenue
New York, New York 10022
(212) 832-2000

Attorney for Petitioner

Petitioner Donald J. Trump (“**Mr. Trump**”), individually and on behalf of The Trump Organization (together the “**Trump Parties**”), respectfully submits this Memorandum of Law in further support of this proceeding brought pursuant to New York Civil Practice Law and Rules Article 78 (this “**Article 78 Proceeding**”) and in opposition to the motion by the New York State Joint Commission on Public Ethics to dismiss the Trump Parties’ petition (the “**Petition**”).

PRELIMINARY STATEMENT

The New York State Joint Commission on Public Ethics (the “**Commission**” or “**JCOPE**” as it is more commonly known) was established in 2011 to root out corruption and restore the public’s faith in government through the investigation of alleged ethical violations on the part of the four New York State elected officials (*i.e.*, Governor, Lieutenant Governor, Comptroller and Attorney General). According to JCOPE’s own website “*where there is integrity, transparency, and accountability in government, there will be greater trust in government.*”

Unfortunately, JCOPE has been anything but “transparent”. Since the day it was created, JCOPE, together with its sister anti-corruption panel, the Moreland Commission, have been the subject of endless criticism and concern. Much of the criticism has centered round rampant speculation that these commissions, far from reestablishing the public’s trust in government, are actually being used to protect the very same elected officials they are tasked with investigating. Rather than disavow the public’s suspicions by airing on the side of greater transparency, JCOPE has, instead, gone in the complete opposite direction, creating a modern day “star chamber” – operating in total secret with no transparency and, seemingly, no accountability – raising the possibility for significant abuses of power. As a result, not just the public, but the complainants themselves have no way of knowing whether the complaints that are

filed with JCOPE are being given the consideration they deserve or are simply being thrown to the side.

The ethics complaint at issue here is no different. Filed December 3, 2013 alleging various instances of misconduct by New York State Attorney General Eric T. Schneiderman (“Mr. **Schneiderman**” or the “**Attorney General**”), JCOPE, pursuant to Executive Law § 94, had 45 days (or until approximately January 17, 2014), to vote on whether to commence an investigation. Upon information and belief, that did not happen.

Months later, when the Trump Parties informally inquired by phone as to whether a vote had ever taken place, JCOPE officials not only refused to say, but, in a page right out of a *James Bond* movie, advised the Trump Parties that they could not even confirm the existence of the ethics complaint or that JCOPE had ever even received anything. Indeed, JCOPE refuses to “confirm or deny the existence or receipt of a complaint from the Trump Parties” to this very day – even after the filing of this Article 78 Proceeding -- vaguely claiming they are bound by Executive Law § 94(13)(b) from disclosing this basic information. However, the Executive Law says no such thing and JCOPE’s reading of the statute is strained to the say least.

While such degree of secrecy may be appropriate for the CIA, FBI, Department of Homeland Security or other government agencies tasked with protecting the health and well-being of the public, it is not reasonable here particularly given the stated purpose of JCOPE – to restore “integrity, transparency, and accountability in government” -- and that the Trump Parties are the ones who filed the complaint in the first place. The Trump Parties are not interested in influencing JCOPE’s investigation. Rather, as the complainant, all they seek is confirmation that JCOPE is abiding by its own statutory requirements -- that it vote within 45 days -- and have not buried this ethics complaint at the bottom of the pile as the public already suspects.

For all of these reasons, the Trump Parties respectfully request a judgment

compelling JCOPE to (i) act in accordance with New York State Executive Law § 94, (ii) vote on whether to commence an investigation into the alleged misconduct by the Attorney General as described in the ethics complaint, and (iii) formally notify the Trump Parties of its decision.

STATEMENT OF FACTS

The facts in this case are undisputed. On December 3, 2013, the Trump Parties, in accordance with Executive Law § 94(9)(g), filed an ethics complaint (the “**Ethics Complaint**”) with JCOPE requesting that it commence an investigation into the misconduct of New York State Attorney General Eric T. Schneiderman. A copy of the Ethics Complaint is attached to the Petition as Exhibit A. Among other unlawful conduct, the Trump Parties alleged in the Ethics Complaint that Mr. Schneiderman had violated the Public Officers Law by soliciting campaign contributions and other fundraising endorsements from the Trump Parties and their executives during an active two year investigation by the Office of the Attorney General (the “**OAG**”) into Trump Entrepreneurial Initiative LLC f/k/a Trump University LLC (“**TEI**”), an affiliate of the Trump Parties.¹

In support of those claims, the Ethics Complaint chronicled, in pain staking detail, supported by several sworn affidavits, countless instances of Mr. Schneiderman and leaders of his campaign fundraising team actively soliciting the Trump Parties, their executives and family members for:

- financial support in the form of contributions to Mr. Schneiderman’s reelection campaign, as well as contributions to other causes and political candidates Mr. Schneiderman either supports or is affiliated with;
- political endorsements, including prevailing upon members of the Trump family, to host a meet-and-greet breakfast to introduce Mr. Schneiderman to their personal friends, colleagues and other young, successful and wealthy business

¹ The Ethics Complaint also alleged that the Attorney General accepted campaign contributions from a law firm representing former students who had brought suit against TEI.

people, whom Mr. Schneiderman deemed the “the next generation of influential New Yorkers”; and

- the aid of their influence and celebrity status to secure other favors and preferential treatment in furtherance of Mr. Schneiderman’s political aspirations.

While enthusiastically soliciting campaign contributions and other support and special favors, the Ethic Complaint also alleged that Mr. Schneiderman, on his own initiative, repeatedly approached the Trump Parties at different fundraising and social events to assure them, unsolicited, that the investigation into TEI was not something they needed to worry about and that it would eventually go away on its own.

Pursuant to Executive Law §94(13)(a), JCOPE was required to vote on whether to commence an investigation into the Attorney General’s misconduct within 45 calendar days of receiving the Ethics Complaint. Indeed, the language of the Exec. Law could not be any clearer: “[t]he commission shall, within forty-five calendar days after a complaint ... is received ... vote on whether to commence a full investigation of the matter.” The Commission received the Ethics Complaint on December 3, 2013. As such, the Commission was required to vote on whether or not to pursue the Ethics Complaint no later than January 17, 2014. Upon information and belief, that deadline came and went without the Commission voting.

In response, on or about August 12, 2014, the Trump Parties filed this Article 78 Proceeding seeking a judgment directing the Commission to (i) act in accordance with Executive Law § 94, (ii) vote on whether to commence an investigation into the Attorney General’s alleged misconduct and (iii) formally notify the Trump Parties of its decision. At the time the Trump Parties filed this Article 78 Proceeding, more than 250 days had elapsed since the filing of the Ethics Complaint. Upon information and belief, as of the filing of this Article 78 Proceeding, the Commission had still not voted and no vote is believed to have taken place since.

ARGUMENT

THE PETITION SHOULD BE GRANTED AND THE COMMISSION'S MOTION DENIED

In opposition to this Article 78 Proceeding, JCOPE argues that the Petition should be dismissed because (i) the relief requested by the Trump Parties, *i.e.*, that JCOPE vote on whether to commence an investigation into alleged misconduct by the Attorney General, involves the exercise of discretion; (ii) the Trump Parties have “no clear legal right” to the relief requested; and (iii) JCOPE is precluded from disclosing to the Trump Parties, the complainants in this matter, whether JCOPE received the Ethics Complaint, voted whether to investigate and, if so, its decision. As demonstrated below, however, not only does the Commission purposely mischaracterize the relief requested by the Trump Parties, but they are also wrong on the law.

The Relief Requested Is Ministerial, Not Discretionary

To be clear, the Trump Parties have never sought to compel the Commission to investigate the alleged misconduct by the Attorney General. That would be overreaching. Rather, all the Trump Parties are seeking in this Article 78 Proceeding is for the Commission to vote on “whether” to commence such an investigation as required under § 94(13) of the Executive Law (“[t]he commission shall, within forty-five calendar days after a complaint ... is received ... vote on whether to commence a full investigation of the matter”). Stated another way, the Trump Parties are not trying to tell the Commission “how” to do their job. Rather, they just want the Commission to actually “do” their job.

The case law is in accord. While the remedy of mandamus is not available to compel the performance of a discretionary act, that does not prohibit a court from compelling the performance of an act which is “mandatory” but which is “executed through means that are discretionary.” *In re Campbell Oil Co.*, 127 Misc.2d 281, 283, 485 N.Y.S.2d 948 (Sup. Ct.,

Albany Co., 1985) (mandamus was proper to compel the New York State Department of Taxation to perform mandatory duties imposed by law, but not to oversee the method by which the department undertakes to enforce the laws).

As the Court of Appeals explained in *Klostermann v. Cuomo*, 61 N.Y.2d 525, 538, 475 N.Y.S.2d 247, 254 (1984), traditionally, “[m]andamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought” (citing *Matter of Legal Aid Soc. v. Scheinman*, 53 N.Y.2d 12, 16, 439 N.Y.S.2d 882 (1981)). “What must be distinguished, however, are those acts the exercise of which is discretionary from those acts which are mandatory but are executed through means that are discretionary.” *Id.* While mandamus is not available to direct a government body how to perform a legal duty, it is available to direct a government body “to perform a legal duty.” 475 N.Y.S.2d at 255 (citing *People ex rel. Schau v. McWilliams*, 185 N.Y. 92, 100 (1906)).

Consistent with the foregoing, here, the Trump Parties are not seeking to compel JCOPE to investigate the Attorney General’s alleged misconduct. Rather, all the Trump Parties are seeking is for the Commission to “do” what Exec. Law § 94(13) required it do within 45 days of receiving the Trump Parties’ complaint, namely, “vote on **whether** to commence a full investigation of the matter” (emphasis added). To the Trump Parties’ knowledge, that has never occurred, despite the fact that it has been nearly a year since the Ethics Complaint was filed.

Executive Law § 94 Provides a “Clear Legal Right” to the Relief Requested

Equally without merit is JCOPE’s argument that the Trump Parties have no “clear legal right” to compel the Commission to act in accordance with its own legal requirements

(Memo, p. 10).² It is undisputed that Exec. Law § 94 affords the Trump Parties the express right to file a complaint with the Commission alleging a violation of the New York State Public Officer's Law. The Commission's website, jcope.ny.gov, goes on to explain that a complaint filed with the Commission must be written and conform to the following format:

- a. The complaint must identify the complainant and the respondent. The complainant's address must be reflected on the complaint as well as a telephone number.
- b. The complaint must be sworn to under oath or affirmed before an attesting officer.
- c. The complaint must contain a statement of the facts concerning the alleged violation(s) and should state, insofar as known, the date, time and place of any alleged violation.
- d. The complaint must allege facts constituting a violation of Public Officers Law §73, §73-a, §74, Civil Service Law §107, or Legislative Law Article 1-A.
- e. The complainant should include copies of any documentation or exhibits in his or her possession at the time the complaint is filed to support the allegations contained in the complaint.
- f. The intentional submission of false information may constitute a crime punishable by a fine or imprisonment, or both.

Despite imposing these rigorous filing requirements, JCOPE now argues that, once a complaint is filed, JCOPE does not have to acknowledge that the complaint was ever received (or even exists) and is not accountable to anyone (including the complainant) to abide by the Commission's statutory requirements. Not only is this position unsupported by any statutory authority, it also flies in the face of the very purpose of the Commission, namely, to restore trust, integrity and transparency to New York State government.

Not surprisingly, while JCOPE brazenly contends that courts have "consistently held that absent express statutory language, complainants ... have no clear right to compel

² References to JCOPE's Memorandum of Law in Opposition to Article 78 Petition and in Support of Motion to Dismiss are referred to as "Memo" followed by the applicable page number.

authorities to take any particular action in an investigation" (Memo., p. 11) none of the cases cited by JCOPE go quite that far. In *Matter of Houston*, 82 A.D.3d 1099, 1100, 918 N.Y.S.2d 887 (2d Dep't 2011), for example, the Court, without doing any analysis, merely stated that the petitioner had "failed to demonstrate a clear legal right to the relief sought." Similarly, in *Matter of Horowitz*, 82 A.D.3d 887, 918 N.Y.S.2d 370 (2d Dep't 2011), the Court simply repeated the general rule that writs of mandamus are only available to compel a ministerial act when a "clear legal right to the relief has been demonstrated." In *Matter of Brown*, 241 A.D.2d 279, 672 N.Y.S.2d 373 (2d Dep't 1998), the Court held it was "without any authority" to award the petitioner pre-indictment discovery. The Court reached a similar result in *Matter of Pirro*, 230 A.D.2d 909, 646 N.Y.S.2d 866 (2d Dep't 1996), holding that it cannot award pre-indictment discovery in criminal actions "for which there is no statutory basis." Finally, in *Matter of Grzyb*, 182 A.D.2d 942, 582 N.Y.S.2d 298 (3d Dep't 1992), the Court held that there was no statutory basis for the relief the petitioner was requesting.

Regardless, in the case there is "statutory authority" for the relief the Trump Parties are seeking. The Trump Parties are asking the Court to compel JCOPE to "vote on whether to commence an investigation into alleged misconduct" by the Attorney General. Executive Law § 94 expressly states that "[t]he commission shall, within forty-five calendar days after a complaint ... is received ... vote on whether to commence a full investigation of the matter." Thus, the Trump Parties are not seeking to compel JCOPE to do anything more than the express language of Executive Law § 94 already requires and the Court has the "statutory authority" to grant the relief requested.

Executive Law § 94 Does Not Prohibit the Disclosure of the Limited Information Being Sought

Finally, JCOPE argues not just that it “has no legal obligation” to provide the Trump Parties with the very limited confirmations they are seeking (Memo, p. 14), but that the relief sought by the Trump Parties – that JCOPE notify them of the outcome of its vote whether to investigate – is “precluded under Executive Law § 94” (Memo, p. 16). In short, there is nothing in Executive Law § 94 or any other statute that prohibits such limited disclosure, especially to the complainant.

While the statute (Executive Law § 94(13)(b)), admittedly, does state that the Commission “shall so advise” the complainant if it determines “that there is no violation” or that a potential conflict has been rectified, this language merely requires JCOPE to provide certain information. It does not, as JCOPE now argues, prohibit or otherwise make it illegal for JCOPE to provide a complainant (of all parties) with such basic information as whether the Commission received the complaint it filed or whether the Commission had voted on whether to investigate and, if so, what was the decision. Such restrictive language simply does not exist.

JCOPE also claims that the sentence in § 94(13)(b), which states that “[a]ll of the foregoing proceedings shall be confidential”, further precludes JCOPE from disclosing the basic information requested. Once again, however, JCOPE unnecessarily expands the meaning of that sentence for no justifiable reason. As anyone can plainly see, that sentence appears at the very end of a section entitled “Substantial basis investigation.” Thus, the words “foregoing proceedings” is clearly intended to refer to the substance of JCOPE’s investigation – not such basic information as whether JCOPE voted, how it voted (i.e., in favor of investigating or against investigating) or whether a complaint was ever filed (or even received).

As the Appellate Division, Third Department, explained in *Canales v. Pinnacle Foods Group LLC*, 117 A.D.3d 1271, 986 N.Y.S.2d 641, 642 (3d Dep't 2014), in analyzing a statute, a court's objective is to "discern and apply the intent of the Legislature, which is determined in the first instance by giving effect to the plain meaning of unambiguous statutory language." Here, the intent of Executive Law § 94 is, in JCOPE's own words, to restore trust in government through "integrity, transparency, and accountability in government." JCOPE cannot accomplish this goal through unnecessary secrecy when all the complainant wants to know is that their complaint is being handled in accordance with the statutory requirements.

CONCLUSION

For the foregoing reasons, the Trump Parties respectfully request that this Court grant the Petition and deny JCOPE's motion to dismiss in its entirety.

Dated: New York, New York
November 21, 2014



ALAN G. GARTEN, ESQ.
The Trump Organization
725 Fifth Avenue
New York, New York 10022
(212) 832-2000

Attorney for Petitioner