

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

In the Matter of the Appeal of
NEW YORKERS FOR CONSTITUTIONAL FREEDOMS

Before:

George C. Pratt
Judicial Hearing Officer

DECISION

New Yorkers for Constitutional Freedoms ("Appellant") appealed on April 25, 2014, from the April 4, 2014, decision by the Joint Commission on Public Ethics ("the Commission") that denied the Appellant's application for an exemption from the Commission's Source of Funding Reporting Requirements. The appeal was taken under Part 938.6 of the Commission's Source of Funding Regulations and was assigned by the Commission to the undersigned as a Judicial Hearing Officer.

BACKGROUND

Appellant is a nonprofit advocacy organization under Section 501(c)(4) of the Internal Revenue Code. Since 1982 It has lobbied the New York State government regarding matters of concern to the evangelical Christian community. It was actively involved in opposing the legalization of same-sex "marriage", and continues to take a lead in promoting pro-life policies in New York.. These activities involve Appellant in areas of public concern that, according to Appellant, "create a substantial likelihood that disclosure of [its large donors] will cause harm, threats, harassment or reprisals" to

those donors. Because of its lobbying activities, Appellant reports to the Commission as a lobbying "client".

Under the amended regulations Appellant, as an organization that engages in lobbying activities, is required to disclose the names, addresses, employers, and contribution information regarding any contributor who provides to it at least \$5,000. However, the regulations provide for possible exemptions, which presents the problem now under consideration.

The Application.

Appellant originally applied to the Commission on July 11, 2013, but after the Commission amended its regulations Appellant reapplied, as required by the Commission, on October 23, 2013, for an exemption from the source-of-funding disclosure regulations. Its Application consisted of a 2½-page, single-spaced letter, and a three-page application form. The Application appears to be made under Part 938.4(b), but no appeal is permitted from the denial of an application under that subsection. (938.6(a)). However, the substance of the Application, as well as the Commission's denial of the exemption, covers issues presented by an application under subsection (a), and this appeal will not be dismissed because of the technicality. It will be considered and decided as if the Application had specified Part 938.4(a).

To be entitled to an exemption, Appellant was required to show to the Commission by "clear and convincing evidence that disclosure of the Source will cause a substantial likelihood of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source." (938.4(a)). Appellant claimed entitlement to the exemption because its "work involves areas of public concern that

create a substantial likelihood that disclosure of its large donors would “cause harm, threats, harassment or reprisals” to those donors. (App. at 1).

Appellant submitted its Application “under protest” “[b]ecause of our concern about the exemption application process, and because of our continuing objection to the fact that one organization has been granted an exemption under different standards than the standards being applied to us”. (App. at 3). Those issues, however, will not be addressed in this decision, which addresses only whether, under the September 24, 2013 version of the regulations, the Commission’s denial of the exemption was “clearly erroneous in view of the evidence in the record.” (938.7(c)).

The Evidence.

Appellant’s Application presents some evidence of threats and harassment to Appellant’s staff, but it leans heavily on incidents and events that have affected affiliates and other organizations and individuals having similar views. The many incidents of threats, harassment, and reprisals directed at such organizations and individuals make it clear that Appellant and its contributors, who are pro-life and opponents of same sex marriage will soon be targeted, if, indeed, that has not already occurred. Among the specific examples included in Appellant’s application are the following:

- Harassing phone calls and threats to Appellant and its Executive Director.
- In connection with California’s 2008 marriage amendment, Proposition 8, reprisals against donors, including boycotts of their employers and businesses, street protests, and pressure to resign from their jobs.

- Opponents of Proposition 8 placing maps on the internet identifying donors to supporters, and providing their employers and addresses in order to harass and retaliate.
- Forms of retaliation against Proposition 8 supporters included trespassing, vandalism, theft, vulgarity, harassing phone calls, racial and religious slurs, arson, threats of violence, and assault and battery.
- An attack in Washington DC that wounded a security guard.
- In 2009 a pro-life activist was gunned down while peacefully demonstrating against abortion.
- Recently an attack by a knife-wielding assailant on a peaceful pro-life demonstrator.

The Commission's Decision.

The Commission denied the Application by vote of five to three. The Majority's four-paragraph decision states in its first paragraph that it is "set[ting] forth reasons and bases for the denial of the application", but after two paragraphs describing the statutory and regulatory background the Majority merely concluded in its fourth paragraph that

NYCF's application did not present sufficient evidence demonstrating that the NYCF's compliance with the disclosure requirements would create a 'substantial likelihood' of harm to its sources of funding (including individuals and property associated with those sources). Rather, the evidence presented was too remote and speculative to establish a substantial likelihood of harm.

In dissent, the Minority protested the Majority's narrow interpretation of the governing statute, arguing that the demonstration of "substantial likelihood of harm", as required by the Majority, was "an impossible standard for any applicant to meet."

The Appeal.

Appellant's appeal from the Commission's denial is dated April 25, 2014. The regulations provide that the record on appeal "shall consist of the original application for exemption together with any supporting materials that were submitted pursuant to Part 938.5 and the Commission's written denial." (938.7(b)). Those materials were received from the Commission on June 30, 2014. Under the regulations this decision may "affirm, reverse or remand the decision of the Commission" (938.7(d)), but may reverse "only if such denial is clearly erroneous in view of the evidence in the record." (938.7(c)).

DISCUSSION

As indicated by the foregoing, the task of the Judicial Hearing Officer on this appeal is to determine whether the Commission's denial of an exemption to Appellant was "clearly erroneous in view of the evidence in the record." "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Since there was no evidentiary hearing before the Commission, and since no opposing papers were submitted, the only "evidence in the record" is what was included in Appellant's written Application to the Commission. None of that evidence was presented under oath, but as required by the Commission's application form, Appellant's letter Application included a declaration "that the information contained in

this application is true, correct, and complete to the best of my knowledge and belief.” (App. at 4). Of course, all of the Appellant’s evidence was hearsay, but the rules of evidence do not apply in this type of proceeding, and there has been no challenge to any of the statements and reports included in the application, nor does anything in those statements and reports inherently suggest any question as to their reliability.

If the application showed by “clear and convincing evidence that disclosure of the Source will cause a substantial probability of harm, threats, harassment or reprisals”, the Commission was bound to grant the exemption (“The Commission shall grant the exemption” [938.4(a) emphasis added]). The issue on appeal thus becomes: Assuming that the events and circumstances described in Appellant’s Application occurred as described, was the Commission’s denial of the exemption clearly erroneous? Because disclosure of donors had not previously been required, it was apparent, to the Legislature in enacting the statute, and to the Commission in promulgating the regulations, that an applicant would most likely be unable to present evidence of actual harm, etc. having already occurred to its donors. Because donors’ identities had not been previously disclosed, such harm simply would not have occurred.

The regulations, however, provide guidance for bridging this apparent gap. They list five types of evidence that the Commission is to consider when determining whether the required showing of harm, etc. had been made. The first four are:

- (i) Specific evidence of past or present harm,
- (ii) The severity, number of incidents, and duration of past or present harm,
- (iii) A pattern of threats or manifestations of public hostility, and

- (iv) Evidence of harm, threats, harassment or reprisals directed against organizations or individuals holding views similar to those of the Source(s) or Client Filer.

All four of these include evidence of harm not only to or against the "Source" i. e. the donor, but also, more broadly, to or against the "Client Filer", i.e. the Appellant. The third category, pattern of threats or manifestations of public hostility, is further broadened to include as the targets "individuals or property affiliated with the Source(s) or Client Filer." (emphasis added), and the fourth category is expanded even further to include evidence of harm, etc. "directed to organizations or individuals holding views similar to those of the Source(s) or Client Filer." (emphasis added). Appellant's Application relied primarily on incidents in the third and fourth categories.

A failure to consider and follow these regulations would make the Commission's denial "clearly erroneous", particularly in light of the regulations' mandatory requirement that the exemption "shall" be granted upon the described showing.

Analyzed in light of the above considerations, the decision of the Commission is, indeed, clearly erroneous. The evidence in the record is described above in abbreviated form, but the Application itself provides more detail and additional examples. Even in the abbreviated form, however, it is clear that Appellant provided "specific evidence" of many and severe incidents extending over a period of years that show a "pattern of threats" and "manifestations of public hostility" to Appellant's supporters and to others holding similar views because of their religious-based opposition to abortion and same-sex marriage. This uncontroverted and unchallenged evidence fully satisfies the requirements of Parts (iii) and (iv) of Part 938.4 of the

Commission's regulations, and when evaluated realistically, the evidence in the record shows that there was "a substantial likelihood of harm, threats, harassment [and] reprisals" to the "Client Filer" [Appellant] and to "individuals [and] property affiliated with the . . . Client Filer". The Commission's findings that the application "did not present sufficient evidence" and that "the evidence presented was too remote and speculative" were clearly erroneous. The exemption must be granted.

An exemption for qualified donors to the Appellant is consistent with the intent of the Legislature in enacting the Lobbying Act, which proclaimed:

This disclosure shall not require disclosure of the sources of funding whose disclosure, in the determination of the commission based upon a review of the relevant facts presented by the reporting lobbyist, may cause harm, threats, harassment, or reprisals to the source or to individuals or property affiliated with the source. (Lobbying Act § 1-h(c)).

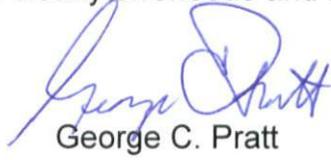
The sponsors of the legislation significantly noted that "organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation, or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption."

Moreover, an exemption to Appellant gives proper deference to the constitutional requirement to protect the First Amendment rights of citizens to express their views on controversial issues by providing financial support to organizations that further their favored causes.

CONCLUSION

The decision appealed from is clearly erroneous and is therefore reversed.

July 11, 2014



George C. Pratt

Judicial Hearing Officer