

STATEMENT OF STEPHEN B. KAUFMAN

December 2, 2009

I appreciate this opportunity to address you. I am Stephen B. Kaufman, a practicing attorney and former member of both the City Council and State Assembly.

I have had many years of public service and political campaigning as a member of the City Council, the State Assembly, and a candidate for State Senate. Within the State Assembly, I chaired the Assembly Elections Committee, and assisted the Campaign Finance Board in negotiations with the State Board of Elections.

Most of you have not been on the Campaign Finance Board for many years. It is vitally important that you gain a sense of the inconsistency of some CFB decisions. At a time when courts throughout the nation, including the United States Supreme Court, are carefully examining campaign finance laws, particularly with regard to political speech, the goals of consistency and fairness must be diligently pursued.

Fundamental to achieving those goals is the timely and evenhanded application of appropriate CFB rules, procedures and decision making. For example, during the recently completed mayoral election, the CFB responded to a complaint concerning Michael Bloomberg's campaign by carefully reviewing the information, clarifying the relevant legal standards, and appropriately applying its decision in a prospective manner only in order to avoid acting as an ex post facto restriction.

Unfortunately, the Campaign Finance Board has on occasion failed to act with the same level of judicious conduct and fairness in the past. During my 2005 campaign, the Board completely ignored its own precedent, and also ignored the fact that no specific law, rule or regulation existed on the point in question when it decided to levy an onerous fine against my campaign. As a candidate, a citizen, and an attorney, I was deeply distressed by this obvious abuse of power.

The Board's logic and holding in the Bloomberg case was completely different from that applied to my campaign. During the course of my 2005 campaign for the New York City Council, a dispute arose when the CFB alleged, in complete contradiction of its own precedent and without any specific rule or statute in support, that my campaign exceeded the primary spending limit as a result of actions involving traditional activities involving political speech during the petitioning process. A heavy fine was levied. Incidentally, my campaign also was deprived of funding to which it was entitled as a result.

Indeed, former CFB member Dale Christensen, in his 2005 dissent from the Miller Advisory Opinion, referring to the Kaufman campaign, noted:

"After a thorough review of the decisions, rules and applicable law...I am compelled to conclude that there is no prior rule or decision directly on point rendered by this Board, nor statute enacted by the legislature that can reasonably be construed to have defined as non-exempt...Arguments to the contrary do not withstand scrutiny. They also have the wholly unfair effect in the absence of a clear holding of changing the rules in midstream." Mr. Christensen found that the "Kaufman decision was wrongly decided." *CFB advisory Opinion no. 2005-3 (Sept. 6, 2005) (separate statement of Board member Dale Christensen Jr.)*

What possible justification could there be in providing totally different logic and legal reasoning? If the Bloomberg case truly reflects a positive evolution in the CFB's thinking on how to resolve allegations of violation of measures "not previously clarified," why shouldn't that standard be applied to my case? There is no reasonable excuse for the Board to continue its efforts to collect penalties from my campaign.

While there may be an institutional inclination to take the "case closed" approach, there are clear and compelling reasons not to do so.

First, the Bloomberg decision was a definitive determination of "no violation," made in the heat of a mayoral campaign. It marks a sharp departure from the adverse pre-election enforcement actions the Board took against participating candidates in the four preceding mayoral elections from 1993 through 2005. A ruling in a pre-election context is more than just precedent; it sends a message about compliance and fairness when public attention to such matters are at their peak. It is a lesson given by the Board when the stakes are highest. That's because you have chosen to act knowing that a pre-election CFB determination can easily be seized upon as a campaign issue used to influence voter behavior. Pre-election CFB enforcement diverts precious time and resources away from campaigning, which can also affect the outcome of the election. All this was true in my case.

This year, the CFB took two months to resolve the allegations against Bloomberg. In my case, in contrast, the Board rushed to reach conclusions, instituting multiple and overlapping proceedings on the same issue, and all in a context complicated by other pending cases and failure to adhere to due process. In my case, the Board's initial error was to reach a definitive conclusion before the election but subsequent to when the action occurred. That error was compounded by its post-election refusal to take a fresh look at the original substantive determination.

In sharp contrast, the pre-election decision in this year's Bloomberg case reflected temperate deliberation. The CFB's failure to do so in my case, and its subsequent refusal to address the matter *de novo* was sharply different and constituted an obvious injustice.

Second, in my case, it was not only a matter of the Board failing to "previously clarify" the law. In fact, the Board completely contradicted its prior position without warning, deliberation, or notification. It ignored the precedent set just four years previously when the CFB made a totally different determination on the identical issue. During that proceeding, the candidate's counsel had urged the Board to clarify its legal standard prospectively. This was in the 2001 election, when following a complaint and investigation against the Hevesi mayoral campaign, the Board upheld virtually all of the exempt petitioning claims, including all exempt claims for the independent nominating petition carriers, notwithstanding the carriers distribution of literature—a first amendment fact pattern identical to mine, but with a wholly different Board decision as a result.

The Hevesi determination was precedent, which the Board did not overturn or limit in the following years. I had every right to rely upon it. Indeed, if candidates cannot rely on the Board's own decisions and precedent, than no candidate, no matter how scrupulous he or she structures his or her campaign, can ever be confident that they are not in violation of some spontaneous, arbitrary and capricious change in legal interpretation and attitude. This will strongly discourage candidates from participating either in the CFB program or from running at all. It has a powerful chilling effect on the rights and ability of individuals to exercise their rights as citizens and run for office.

Third, the law on exempt expenditures was changed in 2007 by Local Law 34. The statement the City Council made in deciding to repeal the exemption for petitions is telling:

The council has heard reports that the Board, in applying the law has offered inconsistent rulings that have caused uncertainty for campaigns making it difficult to budget and spend effectively. NYC Council, Report of the Committee on Governmental Operations on Proposed Intro 586-A at 23—24 (June 2007.)

The Council's action made the CFB's decision in my case a legal dead end; the outcome is now irrelevant for future cases because the same legal question will not appear again. Dropping the fines and penalties in my case would be a statement that the Board recognizes that candidates should not be held responsible where its rulings are inconsistent, just like the holding in the Bloomberg case relieves candidates from responsibility where the Board has not been clear. This is vital to encourage participation by future candidates.

As our federal courts review the entire rationale of campaign finance regulation, the Board must take steps that insure its actions do not violate constitutional rights. In recent cases, the Court has clearly ruled that spending limits are viewed with great skepticism. The Board is on a collision course with the Court due to the CFB's stance that the Act's spending limit should be construed broadly, whereas the Act's exemption from the limit should be construed narrowly. This directly contradicts the Supreme Court's view that restrictions on First Amendment free speech, such as spending limits, must be narrowly tailored to further a compelling interest.

A statutory exemption means that no limit applies to an expenditure that is exempt, regardless of whether the candidate is participating and has received public funds. Where there is a close question of whether a particular expenditure is subject to a spending limit, the Board must heed the Supreme Court's warning: "*Where the First Amendment is implicated, the tie goes to the speaker, not the censor.*" *Federal Election Commission v. Wisconsin Right To Life* 551 U.S. 449 (2007).

I have suffered twice at the hands of the CFB. In the first instance, campaign funds were inappropriately withheld which seriously affected my ability to campaign and thus contributed to my defeat. Secondly by fining me and imposing penalties a year after the election concluded, I was left without an opportunity to resolve this issue before the fact and was relegated to judicial remedies where administrative remedies were no longer viable and the damage to my campaign was irreparable. The stated fines against my campaign—totaling \$18,152—were in reality more than doubled by the CFB's withholding of \$18,972 in matching funds that my campaign was eligible for. Thus, the total financial cost to my campaign from the CFB's decision which was not based on any violation of black letter regulation and which was clearly inconsistent with its own prior rulings was \$37,124. Indeed, the decision to withhold funds was yet another inappropriate CFB decision not based on any stated procedure, precedent, or regulation.

Lastly, the fines and penalties levied against my campaign affected not only me personally but also my Treasurer, who was a volunteer as most persons serving in this capacity are in campaigns at this level of politics. Her credit rating has been damaged as a result of this judgment. She did nothing wrong, and always during the course of the campaign acted with fidelity to the law as she understood it and as she had the law interpreted to her by lawyers who were expert in this field of jurisprudence. What message does this send to average citizens who want to be involved in the electoral process, but then are punished for their efforts no matter how arduously they try to follow the rules? The attempt to punish her is perhaps the worst and most unjustifiable aspect of this entire matter.

I respectfully come before you and request only that you offset the fines and penalties against the funds withheld from my campaign in the same manner as the offset that was done for Borough President Ferrer, in the name of fairness.

Thank you.