

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ANDREW M. CUOMO,

Plaintiff,

DECISION AND
ORDER

-against-

Index No. 902388-22

NEW YORK STATE JOINT COMMISSION ON
PUBLIC ETHICS,

Defendant.

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

GLAVIN PLLC
Rita M. Glavin, Esq.
Attorneys for Plaintiff-Counterclaim Defendant
Former Governor Andrew M. Cuomo
156 West 56th Street, Suite 2004
New York, New York 10019

HOLWELL SHUSTER & GOLDBERG LLP
James M. McGuire, Esq.
Attorneys for Plaintiff-Counterclaim Defendant
Former Governor Andrew M. Cuomo
425 Lexington Avenue
New York, New York 10017

HOGAN LOVELLS US LLP
Benjamin A. Fleming, Esq.
Attorneys for Defendant-Counterclaim Plaintiff
New York State Joint Commission on Public Ethics
390 Madison Avenue
New York, New York 10017

Hartman, J.

Former Governor Andrew M. Cuomo (hereinafter Cuomo) commenced this action on April 1, 2022, pursuant to 42 USC § 1983, seeking to enjoin defendant New York State Joint Commission on Public Ethics (hereinafter JCOPE) from conducting further administrative proceedings against him, claiming that such proceedings would violate his due process right to an impartial hearing under the United States and New York Constitutions. Cuomo's claims arise from JCOPE's issuance, on March 15, 2022, of a Notice of Substantial Basis Investigation and Hearing in connection with Cuomo's authorship of the book, *American Crisis: Leadership Lessons from the COVID-19 Pandemic*, published in October 2020. An adjudicatory hearing was scheduled for September 15, 2022.

On May 6, 2022, JCOPE moved to dismiss the complaint, with prejudice (Motion #1), on the grounds that JCOPE is not a proper defendant in an action brought pursuant to 42 USC § 1983, and that the complaint fails to allege a cognizable cause of action under 42 USC § 1983. Also on May 6, 2022, JCOPE filed an Answer and Counterclaims. As for counterclaims, JCOPE sought an injunction to enforce its March 2022 resolution ordering Cuomo to disgorge profits associated with his book, as well as injunctions preventing Cuomo from retaining future profits and disposing of presently-held funds he received as compensation for the book. Cuomo has opposed JCOPE's motion to dismiss.

But on May 26, 2022, Cuomo moved for voluntary discontinuance of his underlying action, without prejudice (Motion #3), on the ground that recent legislation which replaces JCOPE with a new ethics agency – the Commission on Ethics and Lobbying in Government (*see* Executive Law § 94 [Ethics Commission Reform Act of 2022, L 2022, ch 56, § 1, part QQ] [effective July 8, 2022]) – renders the underlying action moot. JCOPE opposed Cuomo’s motion for voluntary discontinuance, arguing that the Court should address its motion to dismiss (Motion #1) on the merits, and dismiss Cuomo’s claims with prejudice.

Also on May 26, 2022, Cuomo moved to dismiss JCOPE’s counterclaims for disgorgement, retention, and disbursement of funds he received in compensation for authoring the book (Motion #2), on the grounds, among other things, that JCOPE’s administrative order was ultra vires, JCOPE lacked capacity to assert the claims, and JCOPE failed to allege a cognizable cause of action. JCOPE opposed Cuomo’s motion to dismiss the counterclaims.¹

JCOPE’s Pre-Amendment Authority

Before enactment of the Ethics Commission Reform Act of 2022, JCOPE was comprised of 14 commissioners – three appointed by the temporary president of the senate; three appointed by the speaker of the assembly; one

¹ The Court notes that all motions were fully submitted before the effective date of the Ethics Commission Reform Act of 2022, July 8, 2022.

appointed by the senate minority leader; one appointed by the assembly minority leader; and six appointed by the governor and lieutenant governor (see Executive Law former § 94 [1], [2]). The commissioners served five-year terms (see Executive Law former § 94 [3]).

Executive Law former § 94 prescribed JCOPE's authority. Among other things, JCOPE was charged with investigating violations of Public Officers Law §§ 73, 73-a, and 74. JCOPE was authorized to commence an investigation upon receipt of a complaint or on its own initiative (see Executive Law former § 94 [13] [a]). When it initiated its own investigation, it was required to issue notice and give the individual fifteen days to respond, in what was known as a 15-day letter (see Executive Law former § 94 [13] [a]; 19 NYCRR 941.3 [a]). JCOPE then had 60 days to vote on whether to commence a full investigation to determine if "a substantial basis exist[ed] to conclude that a violation of law ha[d] occurred" (Executive Law former § 94 [13] [a]; see 19 NYCRR 941.3 [b] [1]).

If JCOPE voted to pursue a substantial basis investigation, it was required to follow certain procedures, and all proceedings were to remain confidential (see Executive Law former § 94 [13] [a], [b]; 19 NYCRR 941.3 [c] [1]). JCOPE was required to give the individual notice of the alleged violations of law and the factual basis for the allegations, notice of the individual's right to a hearing, and a copy of JCOPE's rules and procedures (see Executive Law

former § 94 [13] [b]; 19 NYCRR 941.3 [c]). JCOPE was also required to provide the individual with the evidence it intended to present at the hearing (*see* Executive Law former § 94 [13] [b]; 19 NYCRR 941.3 [a]). The individual was entitled to appear at the hearing, in person, and represented by an attorney, and give sworn testimony and present evidence (*see* Executive Law former § 94 [13] [b]; 19 NYCRR 941.5 [a]).

Within 60 days after the conclusion of the hearing, the hearing officer was required to issue findings of fact and recommendations (*see* 19 NYCRR 941.13 [a]). The individual and JCOPE's staff then had 30 days to submit briefs to JCOPE's commissioners in response to the hearing officer's findings and recommendations (*see* 19 NYCRR 941.13 [b]). JCOPE's commissioners could then vote on whether to issue a Substantial Basis Investigation Report, adopting, rejecting, or modifying the hearing officer's findings and recommendations (*see* Executive Law former § 94 [13] [b]; 19 NYCRR 941.13 [c]). The statute also authorized JCOPE to issue a Notice of Civil Assessment imposing civil penalties on an individual who knowingly and intentionally violated provisions of Public Officers Law §§ 73, 73-a, or 74 (*see* Executive Law former § 94 [14]; 19 NYCRR 941.13 [c]). And such penalties were subject to review in a CPLR article 78 proceeding (*see* Executive Law former § 94 [14]).

Also relevant to this case is Executive Law former § 94 (16), which provided for JCOPE's authority to issue advisory opinions regarding the

provisions of Public Officers Law §§ 73, 73-a, and 74 upon written request from any person subject to those statutory provisions. An advisory opinion rendered by JCOPE, “until and unless amended or revoked,” was explicitly “binding on [JCOPE] in any subsequent proceeding concerning the person who requested the opinion and who acted in good faith, unless material facts were omitted or misstated by the person in the request for an opinion” (Executive Law former § 94 [16]). And any such advisory opinion could “be relied upon by such person [and] introduced [as] a defense, in any criminal or civil action” (*id.*).

And, pursuant to its authority under Executive Law former § 94 (17) (a), JCOPE promulgated rules that required statewide elected officials to obtain JCOPE’s approval for certain outside activities (*see* 19 NYCRR 932.5). Under the statute, however, “a violation of such rules in and of itself shall not be punishable pursuant to [Executive Law former § 94 (14)] unless the conduct constituting the violation would otherwise constitute a violation of [Executive Law former § 94]” (Executive Law former § 94 [17] [a]).

JCOPE’s Actions Vis-a-Vis Former Governor Cuomo

On July 10, 2020, Cuomo’s counsel submitted, in compliance with 19 NYCRR 932.5, a written request to JCOPE for approval to author and publish a book. On July 17, 2020, by letter from JCOPE’s counsel, JCOPE granted the request for approval, provided certain conditions were met. Among those conditions were that “[n]o State property, personnel or other resources may be

utilized for activities associated with the book,” and the “subject matter must be sufficiently unrelated to the Governor’s official duties so that authorship or the advice or material provided in the book cannot be viewed as part of the Governor’s job.” Cuomo’s book, entitled *American Crisis: Leadership Lessons from the COVID-19 Pandemic*, was published on October 13, 2020.

On April 9, 2021, JCOPE sent Cuomo a 15-day letter stating that it had received information that Cuomo’s conduct in connection with the book may have violated Public Officers Law § 74 (3) (a), (b), (c), (d), and (h). It asserted that Cuomo may have “abused [his] State position for personal benefit, including but not limited to utilizing State property, personnel or other resources of the State for activities associated with the book and promoting the book during State appearances.” Cuomo, through counsel, responded on May 10, 2021, denying any violation of Public Officers Law § 74 (3). On August 10, 2021, Cuomo resigned from office. On March 15, 2022, JCOPE issued a Notice of Substantial Basis Investigation and Hearing, advising that the adjudicatory hearing would commence on April 12, 2022. The adjudicatory hearing was subsequently adjourned to September 15, 2022.

In addition to commencing administrative investigatory proceedings pursuant to Executive Law former § 94 (14), JCOPE issued a series of resolutions regarding Cuomo’s authorship and publication of the book. First, on November 16, 2021, JCOPE’s commissioners, by a vote of twelve to one,

issued a resolution (Resolution 21-03) revoking its approval letter for the book, finding that, contrary to Cuomo's representations, State property, resources, and personnel were used in connection with the preparation, writing, editing, and publication of the book; the book was developed as part of Cuomo's job responsibilities and substantially related to his job responsibilities; and the approval request contained material omissions and misrepresentations.

Nearly one month later, on December 14, 2021, JCOPE's commissioners, issued a second resolution (Resolution 21-04) ordering Cuomo, within 30 days, to pay over to the Attorney General an amount equal to all proceeds he earned from the book. The resolution recited findings that, as a consequence of its revocation of the approval letter, Cuomo lacked legal authority to engage in the outside activity and was not legally entitled to retain compensation for activities related to the book. JCOPE's resolution provided that, if Cuomo did not pay the Attorney General compensation he received for the book within 30 days, "enforcement of such order is hereby referred to the Attorney General," who would "determine the identity of appropriate recipient(s) of the Book Proceeds under the law and distribute such funds accordingly." Two days later, the Attorney General advised JCOPE by letter that it needed to conduct a full investigation, hold an adjudicatory hearing, issue a Substantial Basis Investigation Report, and provide a record of administrative proceedings,

before referring the matter to the Attorney General to enforce any disgorgement remedy.

And on March 18, 2022, JCOPE voted for a third resolution (Resolution 22-02), which again recited that Cuomo “lacked legal authority to engage in outside activity and receive compensation” from the book. JCOPE expressed its disagreement with the Attorney General’s rationale for declining to enforce its December 14, 2021 resolution. And it again directed Cuomo, within 30 days, to pay an amount equal to the book proceeds, but this time to the party or parties who paid him such proceeds. If he failed to do so, JCOPE warned, it would seek authority and funding to engage outside counsel to enforce its disgorgement directive.

The Ethics Commission Reform Act of 2022

On April 9, 2022, Governor Hochul signed into law the Ethics Commission Reform Act (L 2022, ch 56, § 1, part QQ). The 2022 legislation repealed former section 94 of the Executive Law, which had established JCOPE and imbued it with the above-described authority. As a result, effective July 8, 2022, JCOPE ceased to exist. In its stead, the 2022 legislation established the Commission on Ethics and Lobbying in Government (hereinafter the new Commission).

The new Commission will consist of eleven members, to be nominated by the selection members as follows: three members by the governor; two

members by the temporary president of the senate; one member by the minority leader of the senate; two members by the speaker of the assembly; one member by the minority leader of the assembly; one member by the attorney general; and one member by the comptroller. The new legislation establishes an Independent Review Committee, which is charged with reviewing the qualifications of the nominated candidates and approving or denying them.²

Under the 2022 legislation, the new Commission must review any pending inquiries or matters affected by Executive Law § 94 and shall establish policies to address them (*see* Executive Law § 94 [1] [c]). It must undertake a comprehensive review of all existing regulations and advisory opinions of predecessor ethics agencies (*see* Executive Law § 94 [1] [d]). In that regard, the new legislation provides: “This section shall not be deemed to have revoked or rescinded any regulations or advisory opinions in effect on the effective date of this section that were issued by predecessor ethics and lobbying bodies” (Executive Law § 94 [1] [e]).

² Although several individuals have been nominated to the new Commission, as of this writing, it appears that none have been confirmed by the Independent Review Committee and formally appointed (*see* Independent Review Committee for Nominations to the Commission on Ethics and Lobbying in Government, <https://www.ny.gov/independent-review-committee-nominations-commission-ethics-and-lobbying-government> [last accessed August 16, 2022]).

**Cuomo's Motion for Voluntary Discontinuance Is Granted
(Motion #2)**

Cuomo moves for an order, pursuant to CPLR 3217 (b), granting voluntary discontinuance of the underlying action in which he alleges that further proceedings before JCOPE should be enjoined on the ground that he would be deprived of due process as a result of JCOPE's commissioners' bias against him. The Court grants his motion for voluntary discontinuance.

CPLR 3217 (b) provides for voluntary discontinuance upon order of the court and upon terms and conditions as the court deems proper. Whether an application to discontinue claims pursuant to CPLR 3217 (b) should be granted "lies within the sound exercise of the court's discretion" (*Champlain Gas & Oil, LLC v People of the State of New York*, 185 AD3d 1192, 1193 [3d Dept 2020]). And "an application to discontinue should ordinarily be granted, and granted without prejudice, unless discontinuance will itself prejudice the opposing party" (*id.* at 1194, quoting *Tucker v Tucker*, 55 NY2d 378, 383-384 [1982]; see *Hurrell-Harring v State of New York*, 112 AD3d 1213, 1217 [3d Dept 2013]; *Wells Fargo Bank, N.A. v Fisch*, 103 AD3d 622, 622 [2d Dept 2013]; *Matter of Fiacco v Engler*, 79 AD3d 1206, 1207 [3d Dept 2010]).

Here, Cuomo commenced this action against JCOPE on April 1, 2022, seeking to enjoin further proceedings before JCOPE on the ground of its members' alleged bias against him. One week later, on April 9, 2022, the

legislature and executive enacted into law the Ethics Commission Reform Act, repealing Executive Law former § 94, terminating JCOPE as an administrative body effective July 8, 2022, and creating a newly constituted oversight agency – the Commission on Ethics and Lobbying in Government. After JCOPE answered and simultaneously moved for dismissal with prejudice in early May, Cuomo, on May 26, 2022, moved for voluntary discontinuance, without prejudice.

In its discretion, the Court grants Cuomo's motion for voluntary discontinuance based on manifold considerations. First, Cuomo has moved for voluntary discontinuance at a very early stage of these proceedings, before the Court and the parties invested substantial resources. Second, the intervening legislation likely renders Cuomo's underlying 42 USC § 1983 claim for injunctive relief moot, as JCOPE no longer exists.

The Court is mindful that the proceedings initiated under JCOPE's aegis – including the hearing scheduled for September 15, 2022 – may continue, upon review of the new Commission pursuant to Executive Law § 94 (1) (c) and (d). But the crux of the complaint is the alleged bias of JCOPE's former members, who no longer have seats on the now-defunct commission. Whether any one or more of them will be involved with the new Commission is entirely speculative, given the nominating and independent approval mechanisms included in the 2022 legislation. Thus, further litigation of Cuomo's underlying

claims would not appear to be a prudent use of the Court's or litigants' resources.

**JCOPE's Motion to Dismiss the Complaint Is Denied as Academic
(Motion # 1)**

Because the Court has granted Cuomo's motion for voluntary dismissal, there is no occasion for the Court to address JCOPE's motion to dismiss on the merits. Cuomo's 42 USC § 1983 claims against JCOPE no longer present a live controversy. Accordingly, JCOPE's motion to dismiss such claims on the merits is denied as academic.

**Cuomo's Motion to Dismiss JCOPE's Counterclaims Is Granted
(Motion # 3)**

JCOPE counterclaimed for injunctions to enforce its administrative order in Resolution 22-02, requiring Cuomo to disgorge profits associated with his book; preventing Cuomo from retaining future profits from the book; and preventing Cuomo from disposing of presently-held funds he received as compensation for the book. JCOPE contended that, once it revoked its Conditional Approval Letter for the outside activity to write and publish a book, through Resolution 21-03, it had authority to bring a plenary action to enforce its determination that Cuomo's outside activity was unauthorized. Cuomo moves to dismiss JCOPE's counterclaims on the grounds that JCOPE's actions were ultra vires; the relief JCOPE sought would violate Due Process;

JCOPE lacked capacity to assert counterclaims; and the counterclaims for relief must fail because JCOPE asserted no cognizable cause of action.

In essence, the question distills to this: Did JCOPE have authority to seek a judicial injunction to enforce Resolution 22-02, without having pursued its administrative procedures required by Executive Law former § 94 (13) and (14) for determining whether an individual had violated the statute or regulations and imposing penalties or sanctions? In the Court's view, because JCOPE has no such authority, it failed to state an underlying cause of action in asserting its counterclaim.

This conclusion is particularly compelling here, where administrative proceedings remain pending before JCOPE's successor Commission regarding Cuomo's outside activities related to the book. To briefly recap, on April 9, 2021, in accordance with Executive Law former § 94 (13) (a), JCOPE sent Governor Cuomo a 15-day letter stating that it had received information that the Governor's conduct in connection with the book may have violated Public Officers Law § 74 (3) (a), (b), (c), (d), and (h). Then, on March 15, 2022, also in accordance with Executive Law former § 94 (13) (a), JCOPE issued a Notice of Substantial Basis Investigation and Hearing. The adjudicatory hearing was scheduled to commence on April 12, 2022, but it was adjourned to September 15, 2022.

It is unknown at this point whether the new Commission will pursue the investigation and hold the scheduled hearing against Cuomo. Under the amended Executive Law § 94 (1), the new Commission “shall review any pending inquiries or matters affected by this section and shall establish policies to address them” (Executive Law § 94 [1] [c]). And it “shall undertake a comprehensive review of all regulations in effect upon the effective date of [the amended § 94 and] review all advisory opinions of . . . JCOPE” (Executive Law § 94 [1] [d]). If, upon review of JCOPE’s actions, the new Commission decides to pursue action against Cuomo, proceeds with the adjudicatory hearing, and determines that a violation has occurred, the new Commission may then impose a civil penalty against him (*see* Executive Law § 94 [10] [n] [ii]). Such determination will be reviewable in court in a CPLR article 78 proceeding (*see* Executive Law § 94 [10] [o]). And the new Commission would be able to seek enforcement of the penalty, if any and if necessary (*see* Executive Law § 94 [14]; *see also* Executive Law § 63 [1], [3]).

But JCOPE effectively attempted to bypass the administrative procedures set forth in Executive Law former § 94 when it asserted the counterclaims in this case. JCOPE argued that it could seek to “compel compliance with its own rules and regulations” under its “plenary authority” to “administer and enforce all the provisions” of Executive Law § 94 (*see* Executive Law former § 94 [17] [b]), outside the administrative infrastructure

governing investigations and hearings in Executive Law former § 94 (13) and (14). The Court is not persuaded by JCOPE's argument. First, JCOPE was seeking to impose sanctions for Cuomo's alleged non-compliance with JCOPE's outside activities rules. Under Executive Law former § 94 (17) (a), however, JCOPE could impose sanctions only for violations of the statute, not for violations of JCOPE's rules: "a violation of [JCOPE's] rules . . . concerning restrictions on outside activities . . . in and of itself shall not be punishable pursuant to subdivision fourteen of this section unless the conduct constituting the violation would otherwise constitute a violation of this section."

Moreover, to allow JCOPE to bypass the administrative procedures set forth in the statute would implicate Due Process protections (*see Mathews v Eldridge*, 424 US 319 [1988]; *People v Aviles*, 28 NY3d 497, 505-506 [2016]; *Matter of State of New York v Floyd Y.*, 22 NY3d 95, 105-106 [2013]; *Pringle v Wolfe*, 88 NY2d 426, 431-435 [1996]). Here, JCOPE issued the approval for the outside activity, then unilaterally determined wrongdoing, then withdrew the approval, and finally imposed the disgorgement penalty – all without an opportunity for a due process hearing explicitly provided for under the procedures set forth in Executive Law former § 94 (13) and (14), and now under Executive Law § 94 (10).

In sum, even assuming JCOPE or its successor Commission has the capacity to assert such counterclaims in court, JCOPE failed to state a

justiciable, underlying cause of action at this juncture. Any judicial review of any determination by the new Commission regarding Cuomo’s book writing and publishing activities is premature, and must await finality of the administrative proceedings.

Accordingly, it is hereby

ORDERED that Cuomo’s motion for voluntary discontinuance of the underlying action is hereby granted; and it is

ORDERED that JCOPE’s motion to dismiss on the merits is hereby denied as academic; and it is

ORDERED that Cuomo’s motion to dismiss JCOPE’s counterclaims is hereby granted.


This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for Cuomo shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
August 16, 2022

Denise A. Hartman

HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

Papers Considered
NYSCEF 10-13; 16-29; 32-41



08/16/2022