



FREDERIC M. UMANE
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MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
FAX (212) 487-5349
www.vote.nyc.ny.us

AGENDA COMMISSIONERS' MEETING TUESDAY, MARCH 3, 2009 AT 1:30 P.M.

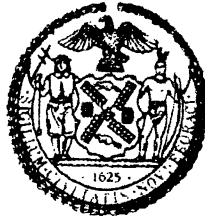
1. Minutes
 - a) 1/27/2009
 - b) 2/3/2009
 - c) 2/10/2009
 - d) 2/17/2009
2. Marcus Cederqvist
 - a) HAVA Update
 - b) Special Election for vacant Bronx Borough President, Tuesday, April 21, 2009
 - c) NYSBOE Annual Election Officials Conference – April 27-29, 2009 in Albany
 - d) City Council Committee on Governmental Operations Hearing – March 12, 2009
3. Steven H. Richman
 - a) March 10, 2009 State Government Information and Education Day in Albany
 - b) Draft Procedures for March 4, 2009 Public Hearing on New Voting Systems
 - c) Designating Petition and Opportunity to Ballot Petition Rules for the September 15, 2009 Primary Election
4. Steven Ferguson
 - a) Update – List maintenance activities and the State Board of Elections
5. John Ward
 - a) Comparative Expenditures
 - b) Vacancy Report
6. Executive Session
 - a) Litigation

For Your Information

- NYS Board of Elections Weekly Status Report for the Weeks of February 19, 2009 and February 26, 2009
- Notice of Hearing from the New York City Council's Committee on Governmental Operations, Re: New York City Council Fiscal Year 2010 Preliminary Budget, Mayor's FY'09 Preliminary Management Report and Agency Oversight Hearings – Thursday, March 12, 2009 at 10:45am
- Letters (2) from New York State Board of Elections concerning Annual Training Conference – Monday, April 27 through Wednesday, April 29, 2009
- Letter from Todd Valentine and Stanley Zalen of the New York State Board of Elections concerning mail delivery
- HAVA Update Report from February 17, 2009 Commissioners' Meeting
- Resolution from Ulster County Legislature concerning lever voting machines
- Resolution from the Association of Towns of the State of New York concerning retention of lever voting machines
- February 25, 2009 meeting agenda, New York State Assembly Election Law Committee
- New York State Legislative Session Calendar
- Certificate from City Council District 32 candidate Glenn Diresto selecting a different name/emblem for an independent body for the February 24, 2009 Special Election
- Short Form Order and Judgment, New York Supreme Court, Queens County
- Order to Show Cause: Supreme Court of the State of New York, County of Richmond
- Request for Judicial Intervention – Index No: 44/33/2009 – Supreme Court of the State of New York, County of Queens
- Decision and Order (Index No. 80054/09): Supreme Court of the State of New York, Appellate Division: Second Judicial Department
- Supreme Court of the State of New York, Appellate Division: Second Department – Docket No. 2009/1663
- Supreme Court of the State of New York, Appellate Division, Second Department – Docket No. 2009/1663
- New York Supreme Court, Appellate Division: Second Department – Index No. 80054/2009
- Supreme Court of the State of New York, Appellate Division: Second Department – Brief of Appellant John A. Tobacco
- Supreme Court of The State of New York, County of Richmond – Notice of Appeal, Index No. 80054/2009
- Supreme Court of the State of New York, County of Richmond – Special Election Part, Index No. 80054/09
- Appellate Division, Supreme Court of the State of New York, Second Judicial Division - Election Appeal Decisions
- Administrative Transfer Order #33

News Items of Interest

- *The New York Times*: Ulrich and Ferreras are Victors in Council Elections
- *Staten Island Advance*: Election Outcome very Much up in the air
- *The New York Times*: Bill That Threatens City's Term-Limit Change Picks Up Support in Albany
- *Staten Island Advance*: Assembly panel OKs bill that could foil mayor's third-term bid
- *The New York Times*: To Get G.O.P. Ballot Line, Mayor May Need Party Card
- *Daily News*: Money, influence and the fate of democracy in New York




THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

PROCLAMATION OF ELECTION

As a result of the resignation of Adolfo Carrión, Jr., effective March 1, 2009, a vacancy has been created in the Borough Presidency of the Bronx. Accordingly, pursuant to the authority vested in me by Section 81(e)(1) and 81(e)(6) of the New York City Charter, I hereby proclaim that a special election shall be held in the borough of the Bronx on April 21, 2009 to elect a Borough President to serve until December 31, 2009. Pursuant to Section 81(e)(7) of the Charter, nomination of candidates in this election shall be by independent nominating petition.

DATED: March 2, 2009


Michael R. Bloomberg
Mayor

Marcus Cederqvist

From: Steven H. Richman
Sent: Monday, March 02, 2009 2:08 PM
To: *Commissioners; *ExecutiveManagement; *Legal Department; *CRU Group;
*ManagersMeetingGroup; Anna Torres; Dawn Sandow; Pablo Martinez; *Reception Counter Staff;
Antonio Ortiz
Subject: CALENDAR for Ind Nom Pets for April 21 2009 Sp Elec- Bronx BP -030209

Attached is the Calendar relating to Independent Nominations for the April 21, 2009 Special Election for President of the Borough of the Bronx. As you know, the Mayor issued the Proclamation for the Special Election this morning.

The Commissioners will set a date for hearings on Specifications of Objections and related matters at their March 17, 2009 meeting (the day after the last day to file petitions).

MIS - Please post the Calendar on the BOE website ASAP. Please confirm by e-mail when posted.

Bronx Deputy Chief Clerks and Reception Counter Staff - Please print, post and make copies available for distribution as your respective front counters. Please confirm by e-mail when the Calendar has been copied and posted at your respective front counters.

Thank you for your cooperation in this matter.

STEVEN H. RICHMAN
General Counsel
Board of Elections in the City of New York
32 Broadway, 7th Floor
New York, NY 10004-1609
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail: srichman@boe.nyc.ny.us

CALENDAR FOR INDEPENDENT NOMINATIONS FOR APRIL 21, 2009 SPECIAL ELECTION

for

PRESIDENT OF THE BOROUGH OF THE BRONX

Date of Proclamation & First Day to circulate & file petitions..... Mar. 2, 2009
Last day to file petitions 9 a.m. - Midnight..... Mar. 16, 2009

<u>FOR PETITIONS FILED ON:</u>	<u>General Objections Must Be Received By:*</u>
Monday, Mar.2.....	Thursday, Mar.5
Tuesday, Mar.3.....	Friday, Mar.6
Wednesday, Mar.4.....	Monday, Mar.9
Thursday, Mar.5.....	Monday, Mar.9
Friday, Mar.6.....	Monday, Mar.9
Monday, Mar. 9.....	Thursday, Mar.12
Tuesday, Mar.10.....	Friday, Mar.13
Wednesday, Mar.11.....	Monday, Mar.16
Thursday, Mar.12.....	Monday, Mar.16
Friday, Mar. 13.....	Monday, Mar. 16
Monday, Mar. 16	Thursday, Mar. 19

<u>General Objections Filed On:</u>	<u>Specifications Must be Received By:*</u>
Thursday, Mar.5	Wednesday, Mar.11
Friday, Mar.6	Thursday, Mar.12
Monday, Mar.9	Monday, Mar.16
Thursday, Mar.12	Wednesday, Mar.18
Friday, Mar.13	Thursday, Mar.19
Monday, Mar.16	Monday, Mar.23
Thursday, Mar. 19	Wednesday, Mar. 25

Last day to file Certificate of Acceptance or Declination of Nomination .. Mar.16

Last day to fill vacancy caused by Declination of Nomination..... Mar.18

Last day to institute court proceedings with regard to independent nominating petitions..... March 23, 2009 or (3) three business days after hearing where petition is invalidated.

Last day to submit proof of service of Specifications.....The day after specifications are filed.

Board of Elections hearings on Independent Nominating Petitions at Executive Office, 42 Broadway, 6th Floor Hearing Room. *The date of this hearing will be determined at the March 17, 2009 Commissioners Meeting. Please call our office at 212 487-5300 after 3:00 PM on that day for the date and time of this hearing.*

*Board of Elections is open for filing from 9 AM to 5 PM. The Board of Elections will remain open until Midnight only if a specified filing date for objection(s)/specification(s)/certificate(s) is the last day to file said objection(s)/specification(s)/certificate(s).

For information, call the Board of Elections in the City of New York at 212-487-5300.

NOTE: The Independent Nominating Petition Rules for 2008 (Adopted 11/27/07 & Precleared by the U.S. Attorney General on 1/17/08, per Section 5, Voting Rights Act) governs Independent Nominating Petitions filed for this Election.

Issued By: The Board of Elections in the City of New York on March 2, 2009



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March 2, 2009

TO: The Commissioners of Elections

FROM: Steven H. Richman, General Counsel

COPIES: Marcus Cederqvist, George Gonzalez, Pamela Perkins, Lucille Grimaldi, Valerie Vasquez-Rivera, Daniel Lavelle, John Owens, Steven Denkberg & Charles Webb

RE: DRAFT PROCEDURES FOR THE MARCH 4, 2009 PUBLIC HEARING ON NEW VOTING SYSTEMS

Pursuant to the direction of President Umane, I drafted Procedures to govern the conduct of Wednesday night's Public Hearing on the selection of HAVA-compliant new poll site based optical scanning systems for use in the City of New York. They are similar to the one used by the Commissioners in 2007.

By e-mail dated February 25, 2009, I circulated the same to you for any comments or recommendations; none were received.

This draft is being submitted for your consideration and action. Upon adoption, it should be promptly posted on the web site and at our front counters.

Thank you for your attention to this matter.

BOARD OF ELECTIONS IN THE CITY OF NEW YORK

PROCEDURES FOR THE MARCH 4, 2009 PUBLIC HEARING ON POTENTIAL HAVA-COMPLIANT POLL SITE BASED OPTICAL SCANNING SYSTEMS

The Board of Elections in the City of New York has committed itself to an open and transparent process for the selection of new voting systems for use by the voters of the City of New York. That process continues with the March 4, 2009 public hearing which will be held from 6:00 pm to 8:30 pm in the Commissioners' Hearing Room on the 6th Floor at the Board's Executive Office, 42 Broadway, New York, NY 10004.

In order to enable the Board to hear from the maximum number of speakers within the limited time frame, the Board adopted the procedures set forth below to govern the hearing at their public meeting held on Tuesday, March 3, 2009:

- 1. Speakers shall register prior to the commencement of the hearing at the Reception Counter of the Commissioners Hearing Room, 6th Floor, 42 Broadway, New York, NY 10004. Registration to speak will close at 6:30 PM.**
- 2. Each speaker is limited to three (3) minutes. The time limit will be strictly enforced.**
- 3. Representatives and/or Members of the same organization or entity shall combine their statements into one presentation exceeding the three (3) minute limitation. The Commissioners have the right to terminate a speaker who presents testimony that appears to be similar to that of an organization/entry that has already spoken.**
- 4. The Board will accommodate as many speakers as possible, but the Public Hearing will adjourn at the announced time for the conclusion of the public hearing -- 8:30 PM.**



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February 27, 2009

TO: The Commissioners of Elections

FROM: Steven H. Richman, General Counsel 

COPIES: Marcus Cederqvist, George Gonzalez, Pamela Perkins, Joseph LaRocca, John Owens, Charles Webb and Steven Denkberg

RE: DESIGNATING PETITION AND OPPORTUNITY TO BALLOT PETITION RULES FOR THE SEPTEMBER 15, 2009 PRIMARY ELECTION

Attached is a copy of the Adopted 2008 BOE Rules for Designating and OTB Petitions, which were adopted by the Commissioners on April 1, 2008, submitted for pre-clearance by the Attorney General of the United States on April 7, 2008 and was granted pre-clearance on June 5, 2008.

Please review the same and provide me with any recommendations or amendments you wish to be included in the final draft of the DESIGNATING PETITION and OPPORTUNITY TO BALLOT PETITION RULES FOR THE SEPTEMBER 15, 2009 PRIMARY ELECTION.

-

I respectfully request consideration and adoption of the rules for the September 15, 2009 Primary Election at your meeting to be held on Tuesday, March 17, 2009 so that the submission to DOJ can be made by April 1, 2009. That will start the clock running for DOJ action under Section 5 of the Voting Rights Act (60 days from the date of submission). This will ensure that the rules are in effect prior to the commencement of the petitioning period.

As always, if you have any questions or require additional information, please contact me.

Thank you for your consideration of this matter.

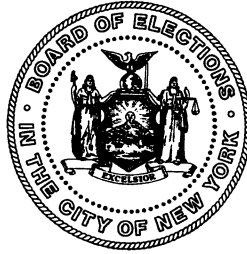
Attachment

JAMES J. SAMPEL
PRESIDENT

FREDERIC M. UMANE
SECRETARY

ANTHONY COMO
JULIE DENT
NERO GRAHAM, JR
TERRENCE C. O'CONNOR
J.C. POLANCO
NANCY MOTTOLA-
SCHACHER
GREGORY C. SOUMAS
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DESIGNATING PETITION AND OPPORTUNITY TO BALLOT PETITION RULES FOR THE SEPTEMBER 2008 PRIMARY ELECTION

Adopted: April 1, 2008

These Rules are adopted by the Board of Elections in the City of New York pursuant to Election Law § 6-154 (2). Everyone is urged to consult the Election Law and Regulations of the New York State Board of Elections, 9 NYCRR §6215, as well as these Rules.

DEFINITIONS:

Petition:

A "petition" is all of the sheets which may be filed with the Board in one or more volumes, together with any required cover sheet, which designate the same candidate for a particular public office or party position.

Petition Volume:

A "petition volume" is the securely fastened grouping of petition sheets for one or more candidates or group of candidates.

Cover Sheet:

A "cover sheet" is the form (as set forth in Rule C of these Rules) to be filed with the Board which summarizes what petition volume or volumes comprise the Petition for each candidate for a particular public office or party position.

A. GENERAL REQUIREMENTS

- A1. Sheets of a designating petition shall be securely fastened together in one or more petition volumes. The sheets in each petition volume shall be numbered sequentially at the bottom of each sheet
- A2. All papers required to be filed pursuant to Section 1-106 of the Election Law shall, unless otherwise provided, be filed between the hours of 9:00 a.m. and 5:00 p.m. at the Executive Office of the Board of Elections, 32 Broadway, 7th Floor, New York, N.Y. 10004. If the last day for filing shall fall on a Saturday, Sunday, or legal holiday, the next business day shall become the last day for filing. The Board of Elections shall be open for the receipt of any document from 9:00 a.m. until Midnight on the last day to file any such document. Failure of any person or entity to deliver any such document to the Board of Elections on or before the last day to file same shall be a fatal defect.

B. IDENTIFICATION NUMBERS

- B1. No one is required to apply for a petition volume identification number before filing any petition volume. However, any person may apply for a petition volume identification number by submission of an Identification Number Application Form. Identification Number Application Forms are available at the Candidate Records Unit, 32 Broadway, 7th Floor, New York, NY 10004. If a petition Volume identification number has been assigned before the petition volume is filed, the petition volume identification number must appear prominently on the top of the petition volume. The Board requests that petition volume identification numbers **not** be placed on the petition volume's binding.
- B2. The Board will inscribe petition volume identification numbers on all application forms. These forms will be retained in a binder for public inspection.
- B3. A pre-assigned petition volume identification number shall be used only by the candidate/s or applicant/s named in the application. Petition volume identification numbers are not transferable or assignable.
- B4. A pre-assigned petition volume identification number shall be used only for the election event for which the application is made.

B5. Whenever a petition volume is filed without a pre-assigned petition volume identification number, the Board will assign a petition volume identification number at the time the petition volume is filed.

C. COVER SHEET

C1. A cover sheet must be filed for all petitions containing ten or more sheets in one volume or consisting of more than one volume. The cover sheet **SHALL BE FILED SEPARATELY** from the petition volume(s). It shall not be attached to any petition volume.

C2. A cover sheet shall contain the following information:

- a) the office, the political party's name and district number (where appropriate) for which each designation and nomination is being made;
- b) the name and complete residence address of each candidate;
- c) the total number of volumes comprising each petition;
- d) an identification of the volumes comprising the petition; when multiple volumes are filed, a single cover sheet may be filed consistent with the Regulations of the New York State Board of Elections, 9 NYCRR §6215.2 (a) (2), with the volumes identified by listing the identification number of each volume, either individually or cumulatively;
- e) a statement that the petition contains the number, or in excess of the number, of valid signatures, required by the Election Law;
- f) a place for the optional designation of a contact person to be notified to correct noncompliance with the Rules and to receive copies of any specifications of objections (a candidate may be designated as the contact person);
- g) when more than one candidate is designated or nominated on the same petition volumes, the candidates may be grouped together on a cover sheet so that the number of volumes comprising the petition need not be repeated;
- h) a cover sheet may consist of more than one page.

C3. The names and addresses of candidates for county committee may be set forth by election district of candidacy on a schedule to be annexed to the cover sheet. Such cover sheet/schedule for the position of county committee shall include all the information required by Rule C2, and in addition, a list by

election district of the identification numbers or the volume number, and page number where such signatures appear for each election district.

- C4. An amended cover sheet must clearly identify the original cover sheet which it is amending or attach a copy of the original cover sheet which it is amending. The amended cover sheet must contain all the information required of a cover sheet. Amended cover sheets must contain the following authentication: "This is to certify that I am authorized to file this amended cover sheet." Said authentication must be signed and dated and shall include the printed name, address, and may include the office telephone number and fax number of said candidate or representative.
- C5. An amended cover sheet must be filed on or before the last day to file the petition unless the amended cover sheet is filed to cure a failure to comply with the Rules after the Board has made a determination of non-compliance with these Rules.

D. DETERMINATIONS; CURES PURSUANT TO §6-134 (2) OF THE ELECTION LAW

- D1. Within two (2) business days of the receipt of a petition, the Board will review the petition to determine whether the petition complies with the cover sheet and binding requirements of these Rules. Such review shall be limited to matters apparent on the face of the cover sheet, the binding of each petition volume, and the number of petition volumes. Such review and such determination shall be without prejudice to the Board's determination of objections and specifications of objections filed pursuant to the provisions of the Election Law and these Rules.
- D2. In the event that the Board determines that a petition does not comply with these Rules, the Board shall forthwith notify the candidate or candidates named on the petition of its determination and the reasons therefore.
- D3. Notification of a determination of noncompliance shall be given by written notice by depositing such notice on the day of such determination with an overnight delivery service, for overnight delivery, on the next business day after the determination to the candidate or contact person, if designated, at the address stated on the petition. Notification shall be given by overnight delivery unless the candidate shall have filed with the Board written authorization, signed by the candidate, for the Board to give notification by facsimile transmission. In the event that the candidate shall have authorized notification by facsimile

transmission, then the Board shall notify the candidate or the contact person, if designated, by facsimile transmission on the day of the determination to the number set forth by the candidate and shall, in addition, mail a copy of the determination to the candidate.

- D4. A candidate may, within three (3) business days of the date of a determination that the petition does not comply with these Rules, cure the violation of these Rules. Cover sheet deficiencies may be corrected by the filing of an amended cover sheet. Such cure or correction must be received by the Board of Elections no later than the third business day following such determination. Such cure or correction will be reviewed by the Board to determine if it is in compliance with the Election Law and these rules.
- D5. If the petition is one for an opportunity to ballot, then the first named person on the committee to receive notices or applicant(s) for the identification number or numbers under which the petition was filed shall be deemed to be the "candidate" for purposes of these Rules.
- D6. If the Board determines that an attempt to cure a defect does not comply with these Rules or the Election Law, the Board shall upon expiration of the (3) business days set forth in Rule D4, notify the candidate or candidates named on the petition/cover sheet of its determination and the reasons therefore. The Board shall give written notice of such determination and the fact that the candidate (s) will not appear on the ballot by depositing such notice on the day of such determination with an overnight delivery service, for overnight delivery, on the next business day after the determination to the candidate or contact person, if so designated, at the address stated on the petition, cover sheet and/or amended cover sheet, as applicable. Notification shall be given by overnight delivery unless the candidate shall have filed with the Board written authorization, signed by the candidate for the Board to give notification by facsimile transmission. In the event that the candidate shall have authorized notification by facsimile transmission, then the Board shall notify the candidate or the contact person, if designated, by facsimile transmission on the day of the determination to the number set forth by the candidate and shall, in addition, mail a copy of the determination to the candidate by first class mail.

E. PRIMA FACIE MATTERS

- E1. The Board of Elections reviews each Cover Sheet and Petition to insure compliance with the New York State Election Law. On occasion, the Board determines that it appears that a Cover Sheet and/or Petition, on its face, fails to comply with the requirements of the New York State Election Law and is not subject to a cure under Section 6-134(2) of the Election Law. In that event, the Board shall notify the candidate or designated contact person in writing, of the Board's preliminary finding of a Prima Facie defect and advise the candidate/contact person that he/she may appear at the commencement of the Board's hearings on said petitions to contest such preliminary finding. Such review, preliminary finding and final determination shall be without prejudice to the Board's subsequent determination of objections and specifications of objections filed pursuant to the provisions of the Election Law and these Rules.

F. EXAMINATION AND COPYING OF PETITIONS

- F1. The Commissioners of the Board, or in their absence, the Executive Director, Deputy Executive Director, the Chief Clerks, Deputy Chief Clerks or such other staff as may be designated by the Executive Director, shall control the requisition, examination and copying of any document filed with the Board in order to assure that candidates, objectors or potential objectors and their representatives have an equal and fair opportunity to examine or copy such documents consistent with the needs of the Board to process petitions and specifications of objections.
- F2. Any person may obtain a copy of any document filed with the Board upon written application and payment of 25¢ per page.
- F3. No document shall be unfastened or taken apart (except by authorized employees of the Board of Elections) while examining the document; nor shall pen and ink or indelible pencil be used while examining documents. Red pencil only is to be used while examining any document. No other writing instrument may be used while examining any filed document.

G. GENERAL OBJECTIONS

- G1. A general objection to a petition must be filed at the Executive Office of the Board of Elections, 32 Broadway, New York, N.Y. 10004, 7th Floor. The last day for filing general objections shall be three days after the latest date on which any part of such petition or cover sheet was filed, even if said petition or cover sheet is subsequently not claimed by the candidate(s) appearing thereon.
NOTE: The Board reserves the right to conduct an inquiry into the facts and circumstances of the filing of any document and the application of Rule G1.
- G2. In the event an amended cover sheet is filed to cure noncompliance with these Rules after the last day to file a petition, the general objection and specifications filed in support of such general objection shall address only issues raised by the amended cover sheet. Such a general objection and specifications are without prejudice to any other issues addressed in any timely filed general objection and supporting specifications which are addressed to the petition. In order to expedite a determination by the Board, objectors are urged to file specifications of an objection addressed to an amended cover sheet filed to cure after a determination of noncompliance at the time when the general objection is filed.
- G3. The general objection shall state the name and address of the objector and candidate, party name and public office or party position on the petition to which the objection is addressed and shall be signed by the objector. If the objection is directed to a petition for opportunity to ballot the objection shall identify the public office or party position and petition volume identification number.
- G4. The general objection shall include a place for the optional designation of a contact person to receive notice of any rulings on the objection. The general objection should include any telephone numbers and fax numbers which can be used to provide notice regarding rulings on the objection.

H. SPECIFICATIONS OF OBJECTIONS

- H1. Specifications of objections shall state the name and address of the objector and the candidate and public office on the petition to which the objection is addressed and shall be signed by the objector. The specifications of objections shall be securely fastened together in one or more volumes. The specification

of objections in each and every volume shall be numbered sequentially at the bottom of each page of the specification.

- H2. The specifications shall include the name and mailing address of any contact person other than the objector to receive notice of any rulings on the specifications designated in the general objection. The specifications should include any telephone numbers and fax numbers which can be used to provide notice regarding rulings on specifications. The specifications may indicate separate numbers to be used on the Saturday and Sunday prior to the date scheduled for Commissioners' hearings.
- H3. When an objector files an objection which presents a factual issue which cannot be determined from documents on file with the Board, the specifications must set forth the factual allegations with particulars. The objector shall submit with the specifications, copies of any documents or affidavits that are required in order for the Board to rule on the issue.
- H4. If the specifications of objections claim that there are an insufficient number of valid signatures, the specifications must state the total number of signatures contained in the petition and the total number of signatures which the objector claims to be invalid.
- H5. Any specific objection to an individual signature or witness statement shall set forth the Board-assigned petition volume identification number, page number and line number and shall set forth with specificity the nature of each objection to that signature or witness statement.
- H6. The following abbreviations are acceptable:

AI	Address illegible or so abbreviated it cannot be identified.
ALT	Alteration (date/signature)
DI	Date incomplete
DUP v._p._l._	Duplicate of same signature located in the petition at volume identification # ____, page ____, line __
DSP	Date of witness statement is prior to date of signature
F	Forgery
ILLS	Illegible signature
ILLD	Illegible date
NA	No address stated
ND	No date stated
NE	Not enrolled in the party for which the petition is filed

NFN	No first name\name is so abbreviated it cannot be identified
NPN	No page number –petition page not sequentially numbered
NR	Not registered as stated in BOE records
OD	Out of the district of the contest
P	Pencil or not in ink
PR	Signature is printed or not handwritten
SH	Similar handwriting
TE	Date of signature is prior to first day for circulating petitions
TL	Date of signature is subsequent to last day for circulating petitions or subsequent to date of witness signature
SAP v. _ p. _ l. _	Signed another petition for the same office on same or prior date designating another candidate, at petition volume identification # _____ page _____, line _____.
SW	Signature is that of the subscribing witness to the page
SWALT	Subscribing Witness information altered (not initialed)
SWNE	Subscribing witness is not enrolled in the party for which the petition is filed
SWNQ	Subscribing witness not qualified
SWNR	Subscribing witness not registered, as stated
SWDI	Date incomplete in subscribing witness statement
SWA	No address or wrong address stated in subscribing witness statement
SWND	No date stated in subscribing witness statement
SWNN	Name of subscribing witness omitted from body of subscribing witness statement
SWNS	Signature of subscribing witness omitted
SWNSO	Number of signatures omitted from subscribing witness statement
SWWNS	Wrong number of signatures stated in subscribing witness statement
SWTE	Date of signature is prior to first day for circulating petitions
SWTL	Date of signature is subsequent to last day for circulating petitions
WA	Wrong address stated on petition

Objectors may use other abbreviations or symbols as long as they are clearly defined in the specifications.

- H7. Objectors are warned not to include in the specifications broad, non-specific or generic claims or claims which are not supported by documents filed with the Board. The Board may dismiss the entire objections as frivolous if specifications include such claims.
- H8. Because the Board believes that the appropriate forum for determination of allegations of forgery or fraud is in an invalidating proceeding commenced in the Supreme Court pursuant to Election Law §16-102, the Board does not ordinarily rule on such allegations. In the rare case where an objector seeks to obtain a ruling from the Board on an issue of fraud, or on a factual issue which cannot be determined from documents already filed with the Board (such as petitions, registration records, party call, party rules, etc.), the specifications must set forth the factual allegations with particularity. The objector should submit with the specifications copies of any documents or affidavits that are required in order for the Board to rule on the issue. Notwithstanding such a submission, the Board will generally decline to rule on any allegation of fraud.
- H9. (a) For petitions designating a candidate for public office, the objector must serve a copy of the specifications personally or by certified mail upon the candidate for public office before filing such specifications with the Board.
- (b) For petitions designating a candidate for party position, the objector must serve a copy of the specifications personally or by certified mail upon the first person listed under the committee to fill vacancies or the contact person before filing such specifications with the Board.

For petitions designating a candidate for party position for which no committee to fill vacancies or contact person has been designated, copies of the specifications, clearly labeled "copy one" and "copy two" on the face of the specifications must be filed with the Board. The Board shall be deemed the agent for service of specifications of objections for all candidates for whom neither a committee to fill vacancies appears on the petition nor a contact person appears on the cover sheet. The second copy shall be available at the Executive Office for inspection or copying.

- H10. Specifications of objections must be filed within six (6) days after the filing of general objections, in person, at the Executive Office, Board of Elections, 32 Broadway, 7th Floor, New York, N.Y. 10004. The Executive Office will be open during the period for filing objections and specifications until midnight of each day (except Saturday and Sunday) to permit the filing of such papers in person.

The Election Law does not authorize the extension of time for filing objections or specifications.

- H11. Proof of service of specifications (which must identify the specification it is related to by including the borough and General Objection/Specification number or attaching a copy of the first page of the specification) must be filed in person at the Executive Office, Board of Elections, 32 Broadway, New York, N.Y. 10004, no later than the day after specifications are filed. The Board will issue a receipt for proof of service upon filing.
- H12. Upon receipt of Specifications of Objection in a borough office, the Chief Clerk and Deputy Chief Clerk (or their designees) shall review said specifications of objections on their face and determine if said specifications appear to be frivolous or if the objectors lack standing to file such specifications. Upon such a preliminary determination by the Chief Clerk and Deputy Chief Clerk, they shall refer their preliminary determination to the Executive Director and General Counsel of the Board for review. If the Executive Director and General Counsel confirm that the specifications of objection appear to be frivolous or that the objector(s) lack standing to file such specifications, they shall confirm the preliminary determination of the Chief Clerk and Deputy Chief Clerk and direct that the specifications of objections not be worked by the borough office staff. Such findings and confirmation thereof shall be reported to the Commissioners at the commencement of the hearings for their review.

I. CLERKS'/COUNSEL'S REPORT

- 11. The Chief Clerk and Deputy Chief Clerk of each borough shall assign staff to examine the specifications of objections and to prepare a report to the Commissioners on the objections.
- 12. As soon as the borough office has prepared the report to the Commissioners, the borough office shall fax copies of the summary report (without line-by-line rulings) to the contact persons designated on the petition cover sheet and on the specifications to receive notices at the fax number indicated. Candidates or objectors who are unable to receive faxes must check with the Chief Clerk or Deputy Chief Clerk of the respective borough office if the candidate or objector wishes to review the Clerks' Report prior to the Commissioners' hearing.
- 13. At least twenty-four hours before each date for Commissioners' hearings, each borough office shall prepare a list of Clerks' Reports, which have not been completed and shall immediately transmit a copy to the Executive Office and

shall make the list available to the public. The Commissioners' hearing on Clerks' Reports included on the list will be automatically postponed from the immediate hearing date to the next hearing date scheduled by the Commissioners unless there is consent from the objector and the candidate to rule on the Clerks' Report as scheduled.

14. Once the borough office has prepared the report to the Commissioners, the original specifications of objections with the line by line rulings of the clerks will be made available for examination or copying by the objector, candidate or representative, provided that the specification is not being used by the clerks for the review of any other specifications of objections.
15. The rules regarding examination and copying of petitions shall also apply to specifications of objections showing the clerks' line by line rulings. The use of nominating or designating petitions and specifications by the clerks for the preparation of their report shall have priority over any request for examination or copying by any objector, candidate or their representative.
16. In the event that the specifications of objection present legal rather than or in addition to factual issues, said specifications of objections shall be referred to the Office of the General Counsel of the Board who shall assign staff to examine such specifications of objections and prepare a report to the Commissioners on the legal issues raised in the specifications. The notice and inspection provisions found in Sections 12, 14 and 15 of these Rules shall apply to such Counsel's Report.

J. HEARINGS

- J1. The Commissioners shall render a ruling on specifications of objections after they receive the Clerks' or Counsel's Report. Candidates or objectors who wish to be heard by the Commissioners should review the Clerks'/Counsel's Report and individual line-by-line rulings prior to the Commissioners' hearing. Candidates or objectors are encouraged to present to the Commissioners a list of exceptions which identifies with specificity each ruling by the clerks which is claimed to be erroneous. In view of the short deadlines and urgency of obtaining final rulings by the Board, the Board may reject any application for an extension of time to review the Clerks'/Counsel's Report when the candidate or objector received notice of the Clerks' Report at least 24 hours prior to the hearing (*including* weekends and holidays), or the candidate or objector failed to designate a fax number for the receipt of notice.

- J2. Attorneys appearing on behalf of a candidate or objector must file a Notice of Appearance on the Board prepared form, which shall include the current address, telephone number and fax number of the attorney.
- J3. An individual, other than an attorney (including a candidate or objector), representing a candidate or an objector must file a Notice of Authorization that must be signed by said candidate or objector. Notices of Appearance and/or Authorization can be obtained from the Candidate Records Unit.
- J4. The hearings held by the Board shall be transcribed by a professional reporter and/or tape recorded and preserved in the Board's permanent records. Any person may obtain a copy of the transcript or tape recording by making a written request to the Executive Director or Deputy Executive Director (or their designees) and paying the applicable fee.
- J5. Whenever there is not a quorum of Commissioners present on any day scheduled for Commissioners' hearings, a committee of the Commissioners shall rule on the Clerks' or Counsel's Reports. The committee is constituted pursuant to Election Law §3-212 (5). The committee shall consist of the largest equal number of Commissioners from each of the political parties represented on the Board who are available and designated by the President and Secretary of the Board, who may make such designation by telephone. In the absence of the President or the Secretary, the Commissioner of the same political party with the greatest length of service on the Board who is available shall make such designation. The President and Secretary, or senior Commissioners present shall attempt to confer with the other Commissioners of the same political party before making such designation. The committee shall serve only for that hearing date, or until a quorum of the full Board is present, whichever is shorter, unless the full Board shall provide otherwise.
- J6. The Board may reconsider any determination or the determination of any committee of the Board. In such event, the Board will provide notice to any objector, candidate and representative.

NOTICE:

The sample forms listed below (prepared by the New York State and or City Board of Elections) follows these rules:

- ❑ Designating Petition Sheet;
- ❑ Opportunity To Ballot Petition Sheet;
- ❑ Cover Sheet;
- ❑ Amended Cover Sheet;
- ❑ General Objection;
- ❑ Specifications Of Objection;
- ❑ Certificate Of Acceptance;
- ❑ Certificate Of Declination;
- ❑ Certification Of Authorization;
- ❑ Certificate Of Substitution By Committee To Fill Vacancies After Declination, Death Or Disqualification;
- ❑ Certificate of Substitution by Party Committee after Declination, Death or Disqualification.
- ❑ Notice of Appearance and/or Authorization for Petition Hearings, Death or Disqualification.
- ❑ Sample Specification of Objection Worksheet

Copies of the:

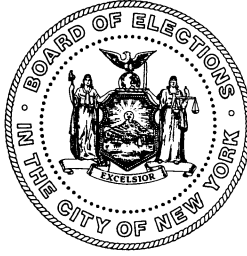
- ❖ **Election Law of the State of New York and**
- ❖ **the Rules and Regulations of The State Board of Elections**

are available for purchase at the Reception Desk at 32 Broadway, 7th floor, New York, N.Y. 10004.

The Election Law and State Board Rules and Sample Forms can also be viewed and downloaded from the State Board of Elections website:

<http://www.elections.state.ny.us/law/elaw.pdf>

Please note that these Rules were adopted unanimously by the Commissioners of Elections in the City of New York, at their public meeting held on Tuesday, April 1, 2008.



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPSEL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
GREGORY C. SOUMAS
JUDITH D. STUPP
MARYANN YENNELLA
COMMISSIONERS

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
www.vote.nyc.ny.us

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

JOHN J. WARD
FINANCE OFFICER

DATE: February 24, 2009

TO: Commissioners

FROM: John J. Ward
Finance Officer

RE: Comparative Expenditures

FY09	P.S. Projection through 2/20/09 Payroll:	\$13,635,500
FY09	P.S. Actual through 2/20/09 Payroll:	<u>\$18,721,800</u>
	Difference	(\$ 5,086,300)

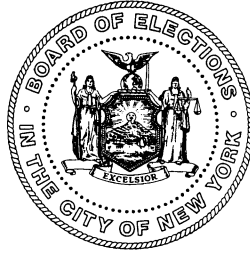
Overtime pays two weeks ending 2/06/09

OVERTIME USAGE

General Office	28,421
Brooklyn	10,034
Queens	21,947
Bronx	3,993
New York	410
Staten Island	<u>3,541</u>
Total	\$68,346

Respectfully submitted,

Finance Officer



JAMES J. SAMPEL
PRESIDENT

FREDERIC M. UMANE
SECRETARY

JOSE MIGUEL ARAUJO
JULIE DENT
NERO GRAHAM, Jr.
JUAN CARLOS "J.C." POLANCO
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ADMINISTRATIVE MANAGER

JOHN J. WARD
FINANCE OFFICER

DATE MARCH 3 2009
TO: Commissioners

FROM: John Ward
Finance Officer.

RE: Vacancies

					Inc.	New.
1	Jean Lettiere	Adm Assoc.	S.I.	Dem.	\$46,878	\$44,646
2	Assistant General Counsel					\$75,000
3	Valerie Marshall	Adm. Asst.	N.Y.	Dem.	\$39,440	\$37,562
4	Robert Helenius	VMT	Bklyn	Rep.	\$27,818	\$26,493

FYI



State of New York
STATE BOARD OF ELECTIONS

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Chair
Douglas A. Kellner
Chair
Gregory P. Peterson
Commissioner
Evelyn J. Aquila
Commissioner

40 STEUBEN STREET
ALBANY, N.Y. 12207
Phone: 518/474-6367 Fax: 518/486-4546
website: www.elections.state.ny.us

Todd D. Valentine
Executive Director
Stanley L. Zalen
Executive Director
Kimberly A. Galvin
Special Counsel
Paul M. Collins
Deputy Counsel

February 20, 2009

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending February 19, 2009.

Respectfully submitted,

s/ _____
Kimberly A. Galvin (505011)
Special Counsel

s/ _____
Paul M. Collins (101384)
Deputy Special Counsel

HAVA COMPLIANCE UPDATE
Activities & Progress for the Week of 2/13/09 – 2/19/09

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders.

PLAN A

Overall Compliance Status Summary

Overall, activities and progress toward HAVA compliance are in jeopardy and behind schedule per the project timeline for Plan A.

Contracting with Voting System Vendors

Status of tasks in this category: *on schedule*

- Lengthy contract negotiation sessions have taken place between SBOE and ES&S, and Sequoia. Escrow accounts, licensing agreements, pricing increases, performance bonds, and other matters were discussed. NYSBOE will discuss the various issues discussed and will put the matter to the Board at the next Board meeting for discussion and determination. In the event that any contract changes are authorized by the Board, staff will work with the vendors, OGS and OSC to finalize, effectuate and implement these contract changes.
- ES&S and Sequoia have made their required escrow payments.
- ES&S has indicated it will comply with the reissuance of the performance bond which has not as yet expired and while Sequoia's performance bond is still in the process of being reissued, it has provided additional monetary security until that bond is reissued.
- Premier's contract was cancelled for convenience. Avante has been notified that its contract will be cancelled for convenience as well.

Testing, Certification, and Selection of Voting Systems & Devices

Status of tasks in this category: *in jeopardy and behind schedule*

- Overall progress of testing by SysTest:
 - SBOE continues to await the resumption of testing by SysTest, due to the EAC's suspension of their certification. As previously noted, this creates an ongoing negative impact upon all essential testing activities for the State of New York.

NEW YORK STATE BOARD OF ELECTIONS

- The EAC and NVLAP are currently conducting an on-site inspection at SysTest Labs. It is expected that this inspection will be finalized by close of business on Friday, February 20, 2009.
- NYSBOE has made outreach at several levels to stress that time is of the essence in making the final inspection determinations.
- SysTest continues to work on the development of the remaining test cases needed for release to vendors. The readiness test case was provided to NYSTEC for review.
- ES&S and Dominion continue to review the completed test cases in detail and are discussing them via emails and conference calls with NYSTEC and appropriate SBOE staff for clarification as needed.
- NYSTEC has continued its work on the Crypto and GenSec test cases this week.
 - Additional technical information is being gathered from vendors for the Crypto test case.
 - Further technical information is also being gathered from vendors for the GenSec test case, primarily in the area of encryption.
 - During the time that NYSTEC is working on the test cases noted above, key areas of evaluation and any potential “show stoppers” are being discussed with vendors via ongoing weekly conference calls.
- NYSTEC’s work to identify policies and procedures necessary for the integration of electronic voting equipment into County Board and SBOE functions continued this week.
 - Working meetings continued this week on a draft of the workflow, relative to pre-election, election, and post-election tasks and activities; a follow-up session was held on 2/18/09 and additional meetings are scheduled.
 - NYSTEC and SBOE continue work on developing draft quarterly maintenance and other procedures.
- NYSTEC is in the process of preparing a document outlining issues and recommendations concerning the requirements for a valid ballot mark, the

NEW YORK STATE BOARD OF ELECTIONS

use of encryption, and language requirements. Several meetings with NYSBOE staff have been held to discuss this issue.

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: *in jeopardy & in danger of being behind schedule*

- Nothing new to report in this category this week.

HAVA COMPLAINT PROCESS

McFeely HAVA Complaint

- SBOE has requested a follow-up meeting with the NYC Board of Elections to discuss the 11/3/08 memo summarizing the NYSVoter discussions to date, in an effort to continue work toward a resolution of these issues. Potential meeting dates were identified, and a response was requested by 2/20/09.
- The NYC Board has reached out to the SBOE's IT Unit indicating that authorization has been given to work together on a method for receiving death, felon, and duplicate files. The NYC Board's plan is to work on the 3 types of files through their existing process, and modify their records accordingly.

F.Y.I.



State of New York
STATE BOARD OF ELECTIONS

James A. Walsh
Chair
Douglas A. Kellner
Chair
Gregory P. Peterson
Commissioner
Evelyn J. Aquila
Commissioner

40 STEUBEN STREET
ALBANY, N.Y. 12207
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Stanley L. Zalen
Executive Director
Kimberly A. Galvin
Special Counsel
Paul M. Collins
Deputy Counsel

February 27, 2009

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending February 26, 2009.

Respectfully submitted,

s/ _____
Kimberly A. Galvin (505011)
Special Counsel

s/ _____
Paul M. Collins (101384)
Deputy Special Counsel

HAVA COMPLIANCE UPDATE

Activities & Progress for the Week of 02/20/09 – 02/26/09

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders.

PLAN A

Overall Compliance Status Summary

Overall, activities and progress toward HAVA compliance are in jeopardy and behind schedule per the project timeline for Plan A.

Contracting with Voting System Vendors

Status of tasks in this category: *on schedule*

- OGS and SBOE met with ES&S and Sequoia regarding modifications to their contracts as more fully set forth in last week's Status Report.

Testing, Certification, and Selection of Voting Systems & Devices

Status of tasks in this category: *in jeopardy and behind schedule*

- The weekly status meeting was held with NYSTEC to review progress with regard to Plan A.
 - Overall progress of testing by SysTest:
 - NVLAP has reinstated SysTest accreditation in the electronic voting systems testing program effective 2/26/09.
 - The EAC is expected to do reinstate SysTest's accreditation in the very near future based upon NVLAP's findings.
 - Crypto test cases were released to Dominion and ES&S on 2/25/09. A total of seven of the eleven test cases for each vendor have now been completed and released to the vendors. At this time SysTest is reviewing NYSTEC's comments and updating the test cases for Vendor Readiness; SysTest has completed the test strategy for Volume/Stress and Accuracy and has forwarded the test cases for NYSTEC for review and comment. NYSTEC is still working on the Gen Sec test case.

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: *in jeopardy and in danger of being behind schedule*

NEW YORK STATE BOARD OF ELECTIONS

- Draft Interim Maintenance and Pre-Qualification Procedures for BMD's have been developed and are under review.

HAVA COMPLAINT PROCESS

NYC HAVA Complaint

- SBOE staff worked on the creation of a response to the latest communication from the technical staff from NYCBOE on technical issues which is anticipated to be communicated to NYCBOE by March 2nd.



GARY ALTMAN
LEGISLATIVE COUNSEL

THE COUNCIL OF
THE CITY OF NEW YORK
OFFICE OF THE SPEAKER
CITY HALL
NEW YORK, N.Y. 10007

FYI

TELEPHONE
212-788-7210

February 20, 2009

Hon. Marcus Cederqvist, Executive Director
NYC Board of Elections
32 Broadway, 7th Floor
New York, NY 10004

Dear Mr. Cederqvist:

RE: New York City Council Fiscal Year 2010 Preliminary Budget, Mayor's FY'09 Preliminary Management Report and Agency Oversight Hearings

Please be advised that the Committee on Governmental Operations will hold a hearing on **Thursday, March 12, 2009 at 10:45 a.m. in the Committee Room, City Hall, 2nd Floor, New York, N. Y.** regarding the above referred topics.

You are hereby requested to attend this hearing and testify therein. Please feel free to bring with you such members of your staff you deem appropriate to the subject matter.

It would be greatly appreciated if you could bring **(20)** copies of your written testimony to the hearing. Thank you for your cooperation.

Sincerely,

Gary Altman
Legislative Counsel

GA: csc

RECEIVED
G.O. BOARD OF ELECTIONS
IN THE CITY OF NEW YORK
2009 FEB 24 PM 7:37



F.U.I.

James A. Walsh
Co-Chair

State of New York
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Douglas A. Kellner
Co-Chair

Gregory P. Peterson
Commissioner

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ALBANY, N.Y. 12207-2108
Phone: 518/474-6220
www.elections.state.ny.us

Evelyn J. Aquila
Commissioner

Todd D. Valentine
Co-Executive Director

Stanley L. Zalen
Co-Executive Director

February 13, 2009

Honorable Marc Shaw
New York City Deputy Mayor of Operations
City Hall
New York, New York 10007

Dear Mr. Shaw:

The New York State Board of Elections will conduct its Annual Training Conference for county election commissioners and officials on Monday, April 27 through Wednesday, April 29, 2009, at the Holiday Inn on Wolf Road, Albany, New York.

This year's seminar will cover a variety of important election related issues. A few of the specific topics we are planning to address include:

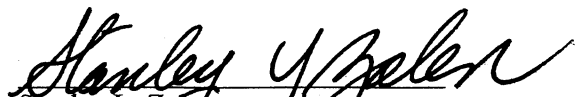
- updates on the Help America Vote Act of 2002 (HAVA) and the voting machine selection process for the county boards of elections, and an update of the Poll Worker Training Program and Voter Outreach Programs;
- HAVA guidelines from the Election Assistance Commission;
- other federal and state legislative updates;
- campaign finance, petition process and law review

This year's conference is extremely important to county election officials as the HAVA requirements will continue to be implemented during 2009. Major election process decisions, such as new voting machine purchases, will be made during 2009. The conference provides an excellent opportunity for election officials from throughout the state to learn and exchange ideas on HAVA and other election laws and administration. Only through such meetings can the quality and uniformity of election procedures be maintained.

The cooperation of your legislative body in the past making it possible for local election officials to attend this conference has contributed to its strong record of success. We hope you will again consider approving attendance at the seminar for members of your county board of elections.

Sincerely,


Todd D. Valentine
Co-Executive Director


Stanley L. Zalen
Co-Executive Director

cc: County Boards of Election Commissioners

1/11



FYI

STATE BOARD OF ELECTIONS

James A. Walsh
Co-Chair

Gregory P. Peterson
Commissioner

Todd D. Valentine
Co-Executive Director

40 STEUBEN STREET
ALBANY, N.Y. 12207-2108
Phone: 518/474-6336 Fax: 518/474-1008
URL: <http://www.elections.state.ny.us>

Douglas A. Kellner
Co-Chair

Evelyn J. Aquila
Commissioner

Stanley L. Zalen
Co-Executive Director

February 27, 2009

Dear Commissioners:

The New York State Board of Elections' Annual Election Officials Conference is Monday, April 27 through Wednesday, April 29, 2009 at the Holiday Inn on Wolf Road, Albany, New York.

HOTEL REGISTRATION: The Holiday Inn will be offering a "two-night package plan". Please see the hotel registration form enclosed (p.6). If you need overnight accommodations, but are not purchasing the two-night package plan, please call the hotel direct at 518-458-7264. If you choose not to stay at the Holiday Inn, we have included a list of Hotels/Motels close by (p.7). The hotel registration cut-off date is **Friday, March 27, 2009**.

HOTEL PAYMENT: Please make checks or vouchers payable to the Holiday Inn. If you are paying by credit card, please enter your information on the enclosed hotel registration form, otherwise your reservation will not be guaranteed.

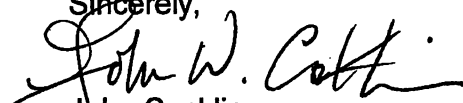
CONFERENCE REGISTRATION FORM: Anyone who is attending this year's conference should complete the enclosed State Board of Elections' Conference Registration Form (p.4). This form is used to create name tags, conference packets, and final counts for walk-in meals and breaks.

WALK-IN MEALS: If you are not purchasing the package plan, individual meal tickets will be sold at the State Board of Elections registration table (cash or check only please, payable to the Holiday Inn. **YOU MUST PROVIDE A TAX EXEMPT CERTIFICATE IF PURCHASING WALK-IN MEALS AS THE PRICE EXCLUDES TAX**). See menu items on page 2.

CONFERENCE REGISTRATION FEE: There will be a \$20.00 conference fee per conference attendee. For those purchasing the hotel package plan, the fee is included in the package price. (cash or check only please).

If you have any questions, please call John Conklin or Donna Mullahey, State Board of Elections, at 518-474-1953. We look forward to seeing you at this year's event.

Sincerely,


John Conklin
Director of Public Information

Encl.

CONFERENCE MENU AND COSTS OF WALK-IN MEALS

[YOU MUST PROVIDE A TAX EXEMPT CERTIFICATE IF PURCHASING WALK-IN MEALS AS THE PRICE EXCLUDES TAX]

Monday, April 27, 2009:

6:00 p.m. Reception: One hour of hotel complimentary cheer, Cheese & Crackers, Vegetable Crudités with Dip, Sliced Fresh Fruit (cost included in Dinner price)

7:00 p.m. Capital Dinner Buffet: Fruit Salad, Tossed Salad with Dressings, Dinner Rolls, Fennel Rubbed Pork Loin, Cheese Tortellini topped with Fresh Marinara Sauce, Toasted Parmesan Pan Seared Salmon with an Herbed Butter Sauce, Oven Roasted Red Bliss Potatoes, Chef's Seasonal Vegetables, Assorted Cakes and Tarts, Freshly Brewed Coffee and Teas.....**\$ 51.00***

Tuesday, April 28, 2009:

7:00 - 8:45 a.m. Breakfast Buffet: Fresh Fruit Salad, Assorted Cereals, Scrambled Eggs with Chives, Hash Brown Potatoes, Smoked Bacon, Country Sausage, Chilled Juices and Freshly Brewed Coffee and Teas
..... **\$18.00***

12:45 - 2:00 p.m. Sandwich Buffet: Mixed Italian and Grilled Vegetable Subs, Chicken Salad Wraps and Turkey Croissants, Kosher Dill Pickles, Assorted Chips, Pepperoni Pasta or Potato Salad and Assorted Mini Desserts, Coffee, Decaf, Tea and Soda.....**\$17.40***

6:00 p.m. Reception: One hour of hotel complimentary cheer, International & Domestic Cheese Display, Scallops Wrapped in Bacon, Mini Chicken Cordon Blue, Chicken Brochettes, Vegetable Egg Rolls (cost included in Dinner price)

7:00 p.m. Sit-down Dinner includes: The Grille's House Salad with Assorted Dressings, Dinner Rolls and Butter, White Chocolate Swirl Cheesecake, Freshly Brewed Coffee, Decaffeinated Coffee and Selection of Hot Teas.
Entrée Selections are: 1) **Roasted New York Sirloin** – Whole Roasted Sirloin Sliced Thin and Served with a Rich Demi-Glace and Roasted Yukon Gold Potatoes
2) **Chicken with Prosciutto and Fontina** – Pan Fried Chicken Breast Topped with Thin Sliced Prosciutto Ham and Melted Fontina Cheese Served with Fettuccine and a Creamy Garlic Sauce. **YOUR ENTREE SELECTION MUST BE FILLED IN ON THE STATE BOARD REGISTRATION FORM (pg4).....\$61.00***

Wednesday, April 29, 2009

8:30 - 10:30 a.m. Breakfast Buffet: Fresh Fruit Salad, Breakfast Pastries, Assorted Cold Cereals, Scrambled Eggs with Chives, Hash Brown Potatoes, Smoked Bacon, Country Sausage, Chilled Juices and Our Freshly Brewed Coffee and Teas..... **\$18.00***

*** All prices inclusive of a 20% Service Charge**

**DRAFT Agenda
New York State Board of Elections
Annual Conference
April 27-April 29, 2009**

Monday, April 27, 2009

- | | |
|------------------------|--|
| 10:00 a.m. - 5:00 p.m. | SBOE Registration Desk Open - Please register, purchase walk-in meal tickets, pay \$20.00 registration fee and pick up conference packet - attendees on their own for lunch. |
| 1:00 p.m. - 2:30 p.m. | New Commissioners' Workshop (Anna Svizzero, Joe Burns, SBOE) |
| 3:00 p.m. - 3:30 p.m. | Opening Remarks (Todd Valentine, Stanley Zalen, SBOE) |
| 3:30 p.m. - 5:00 p.m. | NYSVoter Update/Statewide Database Discussion (George Stanton, Patrick Campion, Vicki Gonzalo, SBOE) |
| 6:00 p.m. | Reception |
| 7:00 p.m. | Dinner (buffet) |

Tuesday, April 28, 2009

- | | |
|-------------------------|---|
| 7:00 a.m. - 8:45 a.m. | Buffet Breakfast |
| 8:30 a.m. - 5:00 p.m. | SBOE Registration Desk Open |
| 9:00 a.m. - 9:45 a.m. | Local News Anchor, invited |
| 9:45 a.m. - 10:45 a.m. | State legislative Update with invited State Legislators (Kim Galvin, Paul Collins, invited Legislative Staff) |
| 10:45 a.m. - 11:00 a.m. | Coffee Break |
| 11:00 a.m. - 12:00 p.m. | Poll Worker Training Update and SOE Software Update (John Conklin, Bob Brehm, SBOE; Chris Peifer, SOE) |
| | Voter Education Presentation (John Conklin, Bob Brehm, SBOE; Richard Novik, NYSBA; SunyNET) |
| 12:00 p.m. - 12:45 p.m. | Petition Review/Legal Update (Kim Galvin, Paul Collins, SBOE) |
| 12:45 p.m. - 2:00 p.m. | Buffet Lunch |
| 2:00 p.m. - 3:30 p.m. | Voting Systems Policy and Procedure (Anna Svizzero, Joe Burns, SBOE) |
| 3:30 p.m. - 3:45 p.m. | Break |
| 3:45 p.m. - 4:30 p.m. | Local Campaign Finance Update: Disclosure Filing Discussion (Liz Hogan, Bill McCann, SBOE) |
| 4:30 p.m. - 5:00 p.m. | General Questions and Answers (SBOE Staff) |
| 6:00 p.m. | Reception |
| 7:00 p.m. | Sit-down Dinner |

Wednesday April 29 2009

- | | |
|---|--|
| 8:30 a.m. - 10:30 a.m.
(Buffet breakfast will NOT be available before 8:30 a.m.) | Breakfast: (will include a BEST PRACTICES awards ceremony for county boards so we ask all conference attendees to attend even if you are NOT purchasing your breakfast at the Holiday Inn) |
|---|--|

New York State Board of Elections' Annual Conference Registration Form

April 27-April 29, 2009 Holiday Inn on Wolf Road, Albany, NY

(Please complete this form even if you are NOT staying at the Holiday Inn and mail or fax the form (FAX number: 518-473-8315) AT YOUR EARLIEST CONVENIENCE but NO LATER than Friday, April 3, 2009 to: Donna Mullinley or John Conklin, State Board of Elections.

Your County Board Name: _____
 Number of persons from your county board attending the conference: _____

Please TYPE or PRINT below, names and titles of persons attending the conference:
 Check (✓) EITHER two night package plan (and your Tuesday night dinner choice) OR walk-in meals you want to purchase OR that you are NOT buying any meals

NAME	TITLE	TWO-NIGHT PACKAGE PLAN [OR] <input type="checkbox"/>	Monday Dinner* (4/27) \$51.00	Tuesday Breakfast (4/28) \$18.00	Tuesday Lunch (4/28) \$17.40	Tuesday Dinner* (4/28) \$61.00 SELECT ENTREE BELOW	Wednesday Breakfast (4/29) \$18.00 [OR]	NOT BUYING ANY MEALS
1.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		
2.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		
3.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		
4.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		
5.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		
6.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		
7.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		
8.						<input type="checkbox"/> NY Sirloin <input type="checkbox"/> Chicken Breast		

(* Dinner prices include: one hour of hotel complimentary cheer with hors d'oeuvres, dinner & 20% Service Charge)

Special dietary needs _____
 (please give name of person and explain dietary need(s))

Walk-in meal tickets and the \$20.00 conference registration fee (for non-package plan attendees) should be paid for at the SBOE registration table by cash or check ONLY.....no vouchers or credit cards please.

New York State Board of Elections ♦ 40 Steuben Street ♦ Albany, NY 12207-2108



REGISTRATION INFORMATION

TWO NIGHT PACKAGE PLAN RATES: Below are rates based on a (2) night stay, April 27, 2009 – April 30, 2009. If you require lodging OTHER THAN what is listed below, (i.e. Sunday, April 26, 2009, please see the Early Arrival / Late Departure information on the Hotel's Reservation Form.

Package Plan Rate Includes:

- Two Nights of Lodging at the Holiday Inn Albany on Wolf Road (April 27th and 28th, 2009)
- Monday, April 27th Reception and Dinner
- Tuesday, April 28th Breakfast, Lunch, Reception, and Dinner
- Wednesday, April 29th Breakfast
- \$20.00 Conference Fee

Single Occupancy	TAX EXEMPT	\$443.40 per room (Two Night Package Plan)	NON-TAX EXEMPT	\$494.35 per room (Two Night Package Plan)
Double Occupancy	TAX EXEMPT	\$314.40 per person (Two Night Package Plan)	NON-TAX EXEMPT	\$347.28 per person (Two Night Package Plan)

IMPORTANT: HOLIDAY INN ALBANY ON WOLF ROAD GENERAL INFORMATION

ROOM CANCELLATION: Cancellations and Changes will not be Accepted After Monday, April 20, 2009 at 3pm. There will be no refunds after 3pm on April 20, 2009

CHECK IN TIME: 4pm **CHECK OUT TIME:** 12 noon

COMPLIMENTARY AIRPORT SHUTTLE SERVICE: Leaves the Hotel every 30 minutes on the Half Hour beginning at 4am and runs until 12 midnight. Call Hotel directly at 518-458-7250 for more details.

CHECK CASHING POLICY: No Personal Checks Cashed. ATM is available on property.

DRY-CLEANING / LAUNDRY: Yes, Laundry is to be Dropped off by 8:30am and it will be back by 6pm on the same day Monday – Friday. Washers and Dryers are also available on site.

PETS: \$35.00 per night no refundable fee. Call Hotel Directly at 518-458-7250 to make arrangements.

DIRECTIONS TO THE HOLIDAY INN ALBANY ON WOLF ROAD

From NYC and South

Take the New York State Thruway North to Exit #24. Bear Right through the toll and take the I-87 North (Airport / Montreal) Exit. Follow I-87 North to Exit #4 (Wolf Road / Albany Airport Exit). At the bottom of the ramp, turn right on Wolf Road. The Holiday Inn will be on the Left about ¼ of a mile.

From Canada and North

Follow the I-87 South (the Northway) to Exit #4 (Albany Airport Exit). Turn Left at the first Traffic Light. At the next light turn left onto Route 155. Go under the underpass and at the light turn right onto Wolf Road. Follow Wolf Road for approximately ¼ mile. The Holiday Inn will be on the Left.

From Buffalo and West

Take the New York State Thruway / I-90 East to Exit #24. Bear Right through the toll and take the I-87 North (Airport / Montreal) Exit. Follow I-87 North to Exit #4 (Wolf Road / Albany Airport Exit). At the bottom of the ramp, turn right on Wolf Road. The Holiday Inn will be on the Left about ¼ of a mile.

From Boston and East

From the Massachusetts Turnpike, Take Exit #B1 (I-90 Extension). Follow I-90 for approximately 15 Miles. Take Exit #1N towards Montreal / Saratoga (I-87 North). Follow I-87 North to Exit #4 (Wolf Road / Albany Airport Exit). At the bottom of the ramp, turn right on Wolf Road. The Holiday Inn will be on the Left about ¼ of a mile.

NYS BOARD OF ELECTIONS

ANNUAL CONFERENCE

Monday, April 27, 2009 – Wednesday, April 29, 2009
Holiday Inn Wolf Road ~ 205 Wolf Road ~ Albany, New York 12205
Phone Number: 518-458-7250 Fax Number: 518-458-7377

**** ALL STARRED ITEMS MUST BE COMPLETED OR YOUR RESERVATION FORM WILL BE RETURNED FOR COMPLETION. ****

CONTACT INFORMATION

**** NAME:** _____
**** COMPANY / AGENCY:** _____
**** OTHER PERSON (S) IN ROOM:** _____
**** ADDRESS:** _____
**** CITY / STATE / ZIP CODE:** _____
**** BUSINESS PHONE NUMBER:** () _____ **** FAX NUMBER:** () _____
**** HOME PHONE NUMBER:** () _____ **** EMAIL:** _____

RESERVATION INFORMATION

**** DATE OF ARRIVAL:** ____ / ____ / ____ **** DATE OF DEPARTURE:** ____ / ____ / ____
**** ROOM PREFERENCES** One Bed Two Beds Smoking
(based on availability)

RATES AND PACKAGE INFORMATION

The below rates are inclusive of service charge and tax where applicable and will include: Reception and Dinner on Monday – Breakfast, Lunch, Reception and Dinner on Tuesday – Breakfast on Wednesday – Overnight Accommodations on Monday and Tuesday. Package rates are for a minimum of (2) nights and include Monday and Tuesday ONLY. The packages can not be transferred to other dates.

<input type="checkbox"/> ** Single Occupancy Tax Exempt – \$443.40 per room	<input type="checkbox"/> ** Single Occupancy Taxable - \$494.35 per room
<input type="checkbox"/> ** Double Occupancy Tax Exempt – \$314.40 per person	<input type="checkbox"/> ** Double Occupancy Taxable - \$347.28 per person
<input type="checkbox"/> Early Arrival (arriving prior to Monday, April 27, 2009) - \$129.00 per room per night	<input type="checkbox"/> Late Departure (departing after Wednesday, April 29, 2009) - \$129.00 per room per night

CANCELLATION: *If you find that you need to cancel your reservation please do so by 3pm on April 20, 2009. Reservations cancelled after 3pm on April 20, 2009 will be billed the full amount of the package.*

PAYMENT INFORMATION

A check deposit is not required. If you wish to send a check it should be made payable to the Holiday Inn Albany on Wolf Road. All reservations will require either a Credit Card or a Purchase Order which must be provided at the time the reservation is submitted.

**** CREDIT CARD NUMBER:** _____ **** EXPIRATION DATE:** _____
**** NAME OF CARD HOLDER:** _____ **** SIGNATURE:** _____
**** PURCHASE ORDER:** _____ **** NAME OF AGENCY:** _____

TAX EXEMPTION INFORMATION

Exemption from NYS and Local Taxes will only apply if the Hotel is supplied with the proper Exemption Certificate prior to arrival. Tax Exemption Forms should be included when submitting your Reservation Form to the Hotel. Please note that your form of payment must match your Exemption Form to be considered exempt. If the Exemption Form is not on file prior to arrival, you will be billed as part of the Taxable Package.

RESERVATION CUT OFF DATE: MARCH 27, 2009

ALL RESERVATION FORMS MUST BE RECEIVED TO THE HOTEL NO LATER THEN 3PM ON MARCH 27, 2009. AFTER THIS DATE THE HOTEL WILL OFFER THE BEST AVAILABLE RATE AND MEALS WILL NEED TO BE RESERVED THROUGH THE BOARD OF ELECTIONS.

Other Hotels in close proximity to The Holiday Inn

1. Courtyard By Marriott
168 Wolf Road
Albany, New York (518)482-8800

2. Desmond Hotel
660 Albany Shaker Road
Albany, New York (518)869-8100

3. Hampton Inn
10 Ulenski Drive
Albany, New York (518) 438-2822



State of New York
STATE BOARD OF ELECTIONS
 40 STEUBEN STREET
 ALBANY, N.Y. 12207-2108
 Phone: 518-474-8100 Fax: 518-486-4068
 www.elections.state.ny.us

James A. Walsh
 Co-Chair
 Gregory P. Peterson
 Commissioner
 Todd D. Valentine
 Co-Executive Director

Douglas A. Kellner
 Co-Chair
 Evelyn J. Aquila
 Commissioner
 Stanley L. Zalen
 Co-Executive Director

January 16, 2009

Marcus Cederqvist
 Executive Director
 New York City Board of Elections
 32 Broadway, New York, NY 10004

George Gonzalez
 Deputy Executive Director
 New York City Board of Elections
 32 Broadway, New York, NY 10004

Dear Mr. Cederqvist and Mr. Gonzalez:

We note with interest your claim that NYSBOE was asked to address all mail to the attention of Deputy Executive Director George Gonzalez.

During the Primary Election day, September 9, 2008, Pamela Perkins and George Gonzalez did orally ask Commissioner Evelyn Aquila and Deputy Public Relations Director Robert Brehm, when they visited the offices of the NYC Board of Elections, to henceforth direct all mail to the attention of Mr. Gonzalez. Mr. Brehm gave those instructions upon his return to Albany the next day. However, the three boxes of registrations at issue had already been sent.

The request to personally deliver all mail to the NYC Board of Elections is not practical given our situation with regards to manpower and budget. We'll continue to only use reputable state contracted mail services.

We'll endeavor to work closely with you. We're open to meeting and discussing this and other issues on a regular basis. The New York City and State Board of Elections should strive to work together on meeting the challenges ahead.

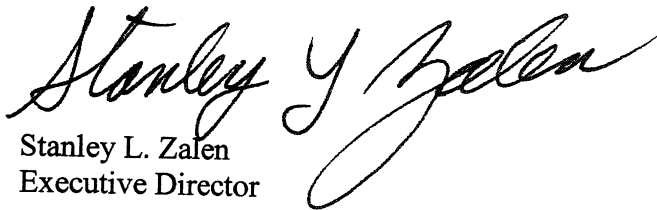
We look forward to scheduling a meeting in the near future.

RECEIVED
 GO. BOARD OF ELECTIONS
 IN THE CITY OF NEW YORK
 2009 JAN 20 PM 4:53

Sincerely,



Todd D. Valentine
Executive Director



Stanley L. Zalen
Executive Director

cc: Commissioners of Elections in the City of New York
Hon. Christine C. Quinn, Speaker of the New York City Council
Hon. Simcha Felder, Chair of the Committee on Governmental Operations

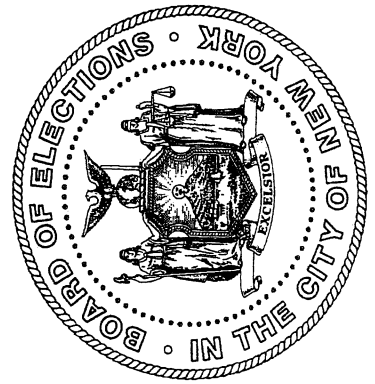
TDV/mer

The Board of Elections in the City of New York



Overview of
HAVA Compliance Projects
DRAFT

FYI



February 17, 2009

Progress on HAVA Implementation BOE in NYC Situation: Anatomy of a "Catch 22"

- Despite a timeline that included certification of replacement voting machines in November 2008, NYSBOE has not yet certified new voting systems
- NYSBOE has informally indicated at the staff level that both scanners are likely to be certified
- The Federal Court Order to implement a new voting system in NYS in Fall 2009 is independent of NYSBOE certification and is in effect regardless of when NYSBOE certifies (if ever); however
- State Law requires that new voting system must be certified by NYSBOE prior to purchase and use. Nonetheless, New York State (including BOE in NYC) must implement new voting system in Fall 2009 if federal judge takes no further action. This the "Catch 22" for the counties.
- Federal Judge and DOJ clearly know NYSBOE has missed its certification date but have remained silent

Progress on HAVA Implementation
Results from Last Year & Steps Taken Toward New Voting System (Plan A)

- **Last Year's (2008) Experience:**
 - BOE in NYC selected and ordered BMDs last year before Mar. 1st
 - BOE in NYC was hard pressed to implement BMDs in time for the Primary Election Sep. 9th.
 - BMDs do not count votes and did not replace lever machines in 2008
- **Steps Taken by BOE in NYC for 2009:**
 - Planned and is executing system selection process to assist Commissioners in selection of new voting system
 - Issued Request for Information December 17, 2008 and scheduled demonstrations with the vendors for the public and a public hearing
 - Working with DCAS to have new machine facilities and renovated facilities ready for new voting machines
 - Planning to consolidate lever machines into warehouses to make room for renovations for new voting machines

Progress on HAVA Implementation BOE in NYC This Year's Challenge

- **State** - NYSBOE could certify late and then declare its mission is accomplished
- **Voting System Vendors** - Vendors are planning machine production and will likely be able to deliver machines “just in time” and then declare its mission is accomplished
- **County Alternatives** -
 - **Alternative A** - Wait until certification before selecting a voting system.
 - **Alternative B** - Select a voting system now but not order system until certification

Progress on HAVA Implementation

BOE in NYC Alternatives

- **Alternative A** - Wait until certification before selecting a voting system
 - Advantages
 - Compiles with State Law which requires certification before purchase or use
 - Disadvantages
 - BOE Staff needs at least 6 months to prepare for new system so waiting will make it certain that full implementation will not be possible in 2009
 - If federal court later determines (as DOJ has proposed) that state law must give way to federal law, BOE will be at risk of non-compliance with a federal court order
- **Alternative B** - Select a voting system now but do not order system until certification
 - Advantages
 - Proactively positions BOE in NYC to comply with Federal Court Order
 - Allows BOE staff to at least attempt implementation in Fall 2009 notwithstanding time constraints
 - Disadvantages
 - BOE would select a system that has not been certified
 - It is possible that system selected is not certified

Progress on HAVA Implementation BOE in NYC Possible Actions

- **Under Alternative A**
 - If BOE waits until certification, it runs the risk that court will determine that it did not comply with order
 - BOE could resolve to communicate with court that implementation is not reasonable and seek a compromise solution
- **Under Alternative B**
 - Select one of two voting systems very soon (schedule calls for March 24th selection)
 - Prepare requisition and submit it to OGS (schedule calls for March 31st requisition)
 - Finalize project organization
 - Execute new voting system project now in full expectation that implementation will occur in Fall 2009
 - Should implementation not be required in Fall 2009, all effort will apply to subsequent implementation

Progress on HAVA Implementation How did we get here? - Background (1 of 3)

- **November 2007 - DOJ Filed Motion** - DOJ filed a motion in Federal Court against NYSBOE for non-compliance through further delay in implementing new voting systems. DOJ concluded that the Judge may need to appoint a Special Master to execute the Court's orders
- **December 20, 2007 – Federal Court Hearing** - Judge Sharpe hears case and orders SBOE to submit a single Compliance Plan by January 4, 2008
- **January 4, 2008 – SBOE Submitted Plan** – SBOE submitted a single plan to the Judge. Plan required:
 - **BMDs**
 - NYSBOE to provide a list of authorized BMD systems on Jan 23, 2008 (Done)
 - Each county to select one of the authorized BMDs and place an order (number of machines and quantities of each service) by Feb 8, 2008 (Done)
 - **New Voting Systems**
 - NYSBOE to certify new voting systems by Nov 2008 (Not Done).
 - Each county to select a new voting system in Dec. 2008
 - Each county to implement a new voting system (replace all lever machines) for the Fall Elections in 2009.

Progress on HAVA Implementation How did we get here? - Background (2 of 3)

- **Jan 11, 2008 – DOJ Submitted Response** - DOJ submitted a response to NYSBOE Plan and proposed a Supplemental Remedial Order
 - State law and procedures “must give way” to federal law requirements and new voting systems must be compliant with HAVA (and not necessary with state law and rules)
 - Mandate concurrent NYSBOE certification for Plan A New Voting Systems and Plan B BMD systems
 - NYSBOE should certify Plan A Voting Systems so that counties may be able to use such systems in the Fall 2008 elections, if they “wish”
 - Require immediate notification of any deviation from court ordered plans and reserve the right to appoint a Special Master
- **Jan 15, 2008 - SBOE Replied** – NYSBOE replied to DOJ Response filed with federal court. SBOE requested a meeting with DOJ to resolve issues
- **Jan 16, 2008** - Federal Judge adopted DOJ proposed Supplemental Remedial Order and so ordered NYSBOE.
- **Jan 24, 2008** - NYSBOE issued list of certified BMDs which was challenged before the State Supreme Court.
- **Jan 7-31, 2008** - NYCBOE staff issued RFI, conducted vendors demos, analyzed response, conducted evaluation and prepared evaluation report to Commissioners.
- **Feb 1-8, 2008** - Days before the selection of BMD deadline of Feb 6th, the State Supreme Court upheld the challenges and the list was expanded to include many more alternatives.

Progress on HAVA Implementation How did we get here? - Background (3 of 3)

- **Feb 5, 2008** – Conducted Presidential Primary (using lever machines) while New York Giants Ticker Tape Parade occurred on Broadway.
- **Feb 8, 2008** – BOE Commissioners selected the Elections Systems & Services (ES&S) AutoMark as the BMD for NYC for the Fall 2008 elections.
- **Feb 11, 2008** – BOE issued OGS Order #1 for 1,798 ES&S AutoMark BMDs for Fall 2008
- **Feb 29, 2008** –BOE issued OGS Order #2 for the supporting accessories, services and supplies for the implementation of AutoMark for Fall 2008 elections.
- **Sep 9, 2008** – For Primary Election, BOE implemented at least one ES&S AutoMark BMD in each poll site.
- **Nov 4, 2008** – For General Election, BOE implemented at least one ES&S AutoMark BMD in each poll site.
- **Jan 6, 2009** – NYSBOE staff in public meeting indicates that certification may not occur until June 2009. NYSBOE staff states belief that many counties will not have time to implement new voting system for Fall 2009 elections.
- **Feb 11, 2009** – NYSBOE staff indicates in a phone conversation that to accommodate counties that are moving toward implementation in Fall 2009, these counties should:
 - Select voting system
 - Prepare requisitions
 - Submit requisitions to OGS
 - NYSBOE has advised OGS to hold requisitions until after NYSBOE certifies voting systems and then be prepared to immediately release purchase orders to voting system vendors

Progress on HAVA Implementation HAVA Compliance & Elections Timeline - Overview

2008

Jan	Mar	Jun	Sep	Dec
Select BMDs				
		Receive & Implement new BMDs		
		Conduct 2008 Primary Election	Conduct 2008 General Election	
	Change Poll Worker Recruitment & Training			
	Ready Pollsites			
	Change PW Recruitment & Training			
	Ready Pollsites			
	Acquire & Implement New Voting Machine Facilities			Select New Voting System

2009

Jan	Mar	Jun	Sep	Dec
		Receive & Implement New Voting System		
		Conduct 2009 Primary Election	Conduct 2009 General Election	
	Change Poll Worker Recruitment & Training			
	Ready Pollsites			Conduct Run-off
	Acquire & Implement New Voting Machine Facilities			

Progress on HAVA Implementation Summary

- **BOE Continuing to Advise the State** - BOE has been actively advising SBOE on aspects of the SBOE's role in these projects such as review of SBOE draft Regulation 6210 regarding testing and operation of pollsite voting systems.
- **BOE Still Dependent on State Actions for 2009** - There are still key milestones which the SBOE must achieve that directly impact the timing & progress of selection and implementation of new voting systems for 2009. By State Law, these systems must be certified by SBOE before a selection can be made by BOE.
- **Not Waiting** - BOE is not waiting for the SBOE and is proactively executing its projects to the limit of what is possible.
- **Daunting Task** – BOE faces huge challenges in accomplishing the full implementation of a new voting system under any circumstances, which has been made more difficult because of New York State's history with HAVA, the actions of DOJ and the orders of the federal court.
- **Moving Ahead** - As much as BOE is facing significant challenges, we are actively moving forward in the most comprehensive and proactive way possible.

Progress on HAVA Implementation Major Tasks for BOE in 2008 & 2009

- **Implemented BMDs for Fall 2008 Elections (Plan B)**
 - ❑ Examined and integrated new BMD EMS with existing BOE systems
 - ❑ Finalized, built-out and moved into temporary voting system facilities for setup & testing in all five (5) boroughs
 - ❑ Surveyed 1,369+ pollsites & remediated them to accommodate addition of BMD
 - ❑ Developed new procedures
 - ❑ Requested 8,616+ additional pollworkers (which was denied)
 - ❑ Conducted additional training for pollworkers & modified training for current 30,000 pollworkers
 - ❑ Educated the voters on existence and use of BMDs
- **Select & Implement New Pollsite Voting System (PVS) for Fall 2009 (Plan A)**
 - ❑ Find voting system facilities in all four (4) boroughs
 - ❑ Survey 1,369+ pollsites & remediate them to accommodate addition of PVS
 - ❑ Develop nearly complete re-work of all BOE election procedures
 - ❑ Revise pollworker recruitment
 - ❑ Conduct new training for 30,000+ pollworkers
 - ❑ Educate the voters on existence and use of new PVS
- **Secure Additional Office Space in Executive Offices at 42 Broadway**

Urging The New York State Legislature And The New York State Board Of Elections To Enact Laws, Rules And Regulations That Specifically Authorize The Continued Use Of Lever-Style Voting Machines

The Laws and Rules Committee (Chairman Bischoff and Legislators Cahill, Decker, R.S. Parete, Rodriguez, Shapiro, Cummings, Maloney and Roberts) and Legislators Legislators Aiello, Cummings, Fabiano, Felicello, Gerentine, Hansut, Harris, Maloney, Noonan, Petit, Roberti, Roberts, Ronk, Terrizzi and Zimet offer the following:

WHEREAS, for many decades Ulster County has successfully used mechanical lever-style voting machines, with very few problems, and is desirous of continuing to do so, and

WHEREAS, New York State enacted the Election Reform and Modernization Act of 2005 (ERMA) and other laws that require all lever machines to be replaced and prohibit the use of any lever machines in any future elections in New York State, and

WHEREAS, Ulster County believes that the continued used of lever-style voting machines is in the best interest of the public and should be permitted to be used in future elections, and

WHEREAS, New York State now has a transparent, secure, accurate and reliable electoral system using lever-style voting machines, and

WHEREAS, the New York State legislation relating to voting machines far exceeds the federal requirements of Help America Vote Act (HAVA), and

WHEREAS, the State's statutorily required elimination of lever-style voting machines is unnecessary, inappropriate, and costly to Ulster County taxpayers, and in these difficult economic times the cost to implement elections with these new machines will not be paid for New York State and is an unfunded mandate, now, therefore, be it

RESOLVED, that the Ulster County Legislature hereby requests the New York State Legislature and the New York State Board of Elections to enact laws, rules, and regulations that specifically authorize the continued use of lever-style voting machines, and be it further

RESOLVED, that the Clerk of the Ulster County Legislature shall forward copies of this resolution to Governor David Paterson, New York State Comptroller's Office, Senate Majority Leader Dean G. Skelos, Senate Minority Leader Malcolm Smith, Assembly Speaker Sheldon Silver, Assembly Majority Leader Ron Canestrari,

Resolution No. 47 February 11, 2009

Urging The New York State Legislature And The New York State Board Of Elections To Enact Laws, Rules And Regulations That Specifically Authorize The Continued Use Of Lever-Style Voting Machines

Assembly Minority Leader James N. Tedisco, New York State Senators John J. Bonacic and William J. Larkin, Jr., New York State Assemblymen Kevin A. Cahill, Clifford W. Crouch, Peter Lopez and Frank K. Skartados, the New York State Association of Counties, the Executive Directors of the New York State Board of Elections Todd Valentine and Stanley Zalen, the New York State Board of Elections Commissioners James Walsh, Douglas Kellner, Evelyn Aquila and Gregory Peterson and members of Congress Maurice Hinchey and United States Senators Charles Schumer and Kirsten Gillibrand,

and move its adoption.

ADOPTED AS AMENDED BY THE FOLLOWING VOTE:

AYES: 31 NOES: 0
(Absent: Legislators Aiello and Zimet)

Legislator Maloney motioned, seconded by Legislator Cummings to amend the resolution inserting a fourth "WHEREAS" as indicated in the body of the resolution.

MOTION ADOPTED BY THE FOLLOWING VOTE:

AYES: 31 NOES: 0
(Absent: Legislators Aiello and Zimet)

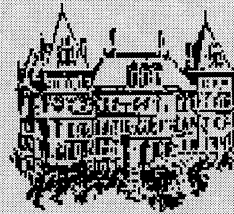
FINANCIAL IMPACT:
NONE

0227



2009 Legislative Program

THE ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK



2009 BUSINESS SESSION

Wednesday, February 18, 2009 • Hilton New York, NYC

Resolved, that the Official Delegates to the 2009 Annual Meeting of the Association of Towns of the State of New York have adopted resolutions on the following topics:

- Preserve and Strengthen Home Rule
- Mandate Relief
- Economic Stimulus
- Highway And Transportation Funding
- Water, Wastewater and Stormwater Infrastructure Aid
- Preserve and Strengthen Local Government's Role in the Siting of Energy Generation Facilities
- Preserve Town Land Use Authority in the Natural Gas Exploration And Extraction Approval Process
- Highway Mutual Aid
- Local Road Classification
- Reform of GML 207-c Disability Benefits for Law Enforcement
- Road Preservation Bonds
- Publication Of Legal Notices
- Reform Real Property Tax System
- Justice Court Security
- Inventory Of Utility Property
- Preservation Of Town Registrars Of Vital Statistics
- Retention Of Lever Voting Machines

To: The Governor of the State of New York

To: The Members of the New York State Assembly and Senate

*To: The Heads of the Several State Departments, Divisions,
and Other Agencies of New York State Government*

To: Members of the United States Congress

The resolutions contained herein were adopted by the Delegates to the 2009 Annual Meeting of the Association of Towns of the State of New York on February 18. As such, they were passed by a majority of the delegates present and, in respect to these issues, represent the legislative positions of the Association for 2009.

The adopted resolutions were first submitted to the Association's Resolutions Committee from one or more of its member towns. They were considered by the Committee and if found to be relevant to all towns, or town government as a whole, they were then forwarded to all member towns prior to the Annual Meeting. They were then put before the delegates for an affirmative or negative vote.

The Resolutions contained herein, if successfully enacted into law or placed in regulation, would either directly or indirectly increase the efficiency of town government and lower costs to its residents. At a time when much emphasis is being placed on studying ways to accomplish such goals, the Association and its members, representing almost half of New York State's population, urge that as legislative proposals are advanced that relate to the subjects contained in these resolutions, you will keep our positions and concerns in mind, with an intent toward embracing them as positive steps for the benefit of town government and its 8 million residents.

Please feel free to call upon the staff of this Association if you need assistance in resolving any issues relating to these resolutions.

Respectfully submitted:

G. Jeffrey Haber
Executive Director

Dated February 18, 2009

150 State Street
Albany, NY 12207
(518) 465-7933

Resolution No. 17
RETENTION OF LEVER VOTING MACHINES

WHEREAS, for many decades New York State has successfully used mechanical lever-style voting machines, with very few problems, and is desirous of continuing to do so; and

WHEREAS, the continued use of lever voting machines is in the best interest of the public and should be permitted to be used in future general elections; and

WHEREAS, the elimination of lever voting machines, as required by statute, is costly to taxpayers, will result in another burden upon the local taxpayers and will be confusing to the voting public without adequate time and education, **NOW THEREFORE BE IT**

RESOLVED, that the Association of Towns hereby requests the United States Congress, Governor of New York, New York State Legislature and the New York State Board of Elections to enact laws, rules and regulations and take all other needed actions to specifically authorize the continued use of lever voting machines.

2008-2009 Resolutions Committee

<u>NAME</u>	<u>OFFICE</u>	<u>TOWN</u>
Elizabeth Greene, Chairwoman	Councilwoman	Newburgh
Kenneth Andrews	Councilman	DeWitt
Don Barber	Supervisor	Caroline
Donald Castellucci	Councilman	Owego
Rebecca Connolly	Town Clerk	Somerset
Raymond J. Elliott	Town Justice	North Greenbush
Robert Giza	Supervisor	Lancaster
Dorothy Goosby	Councilwoman	Hempstead
Rebecca Haines	Town Clerk	Ellery
Cheryl Horton	Supervisor	Philadelphia
John LaPointe	Supervisor	Putnam
Carole Marsh	Supervisor	Pompey
Edward Mosher	Supervisor	Colesville
Elizabeth Ann Neville	Town Clerk	Southold
William Nichols	Hwy. Supt.	Belfast
Andrea Nilon	Assessor	Chester
Dennis M. Powers	Councilman	Elma
Jean Raymond	Supervisor	Edinburg
Robert Taylor	Supervisor	New Lisbon
Timothy Whitesell	Supervisor	Binghamton
John Walker	Supervisor	Sheridan
Gerald Geist, Ex-Officio	Councilman	North Castle

About New York's Towns . . .

New York State local government structure is made up of four general purpose municipal corporations: counties, towns, villages and cities. A town is a general purpose municipal corporation with Constitutional “home rule” powers. More than 8.1 million New Yorkers or nearly 50 percent of our population live in towns; in fact everyone in New York who lives outside a city or an Indian reservation lives in a town. There are more towns in New York than there are cities and villages combined.

About the Association of Towns . . .

The Association of Towns of the State of New York was established by town officials in 1933 as a means for united action of the towns of this State and of the officers thereof for the improvement and preservation of town government. In 1935, the Association organized the Town and County Officers Training School and obtained a charter from the Board of Regents to conduct training courses of both a regional and state-wide nature, for various town and county officers; including, town board members, clerks, tax collectors and receivers, assessors, finance officers, justices, attorneys, and planning and zoning board members. The Annual Meeting of the Association of Towns is a peak in the Association’s internal affairs each year. The group sessions for the respective officers provide not only formal instruction, but also a medium for the exchange of ideas and information. For the past 40 years, the annual meeting and training school has been conducted in New York City. As part of the Annual Meeting, town officials from around the state gather to vote on the Association of Town’s annual legislative program. The goals of the legislative program are many, including preservation of home rule and local authority, elimination of burdensome mandates and a means to strengthen the partnership between federal, state and local governments in order to foster our shared economic prosperity and to improve the quality of life for those who live, work and visit New York.

Com Mtg - Fy 1

WEDNESDAY, FEBRUARY 25, 2009

9:00 AM--ELECTION LAW ROOM 715 LOB (DIAZ)

Assembly Print:

- 1001 PAULIN, BRADLEY, GALEF, ESPAILLAT, FIELDS, GREENE, KAVANAGH--
An act to amend the election law, in relation to use of certain titles, initials or abbreviations of names as signatures on absentee ballots
- 1224-A JEFFRIES, COLTON, MOLINARO, JAFFEE, DIAZ, PEOPLES, KOLB, MILLMAN, BENJAMIN, KAVANAGH, PERRY, PERALTA, BOYLAND, LANCMAN, WEPRIN, WRIGHT, TOWNS, POWELL, ROBINSON, P. RIVERA--
An act to amend the election law, in relation to requiring voter approval for the abolition or modification of term limits for certain elected offices
- 1308 WRIGHT, KAVANAGH--
An act to amend the election law, in relation to employment of election inspectors
- 1436 WRIGHT--
An act to amend the election law, in relation to providing that designating petitions and independent nominating petitions may not contain candidates for the same public office from different political subdivisions
- 1559 COLTON, BROOK-KRASNY, WEINSTEIN, MAISEL, J. RIVERA, CYMBROWITZ, P. RIVERA, HEVESI, JACOBS--
An act to amend the election law, in relation to providing Russian language voting materials
- 2266 WRIGHT, AUBRY, BENJAMIN, GOTTFRIED, PERRY, CAMARA, JOHN, WEISENBERG, KAVANAGH, KELLNER, GREENE, PEOPLES--
An act to amend the election law, the criminal procedure law, the correction law and the executive law, in relation to enacting the "voting rights notification and registration act"
- 3432 BRADLEY, CAHILL, GALEF, PAULIN, KAVANAGH--
An act to amend the election law, in relation to court proceedings involving disputed election results
- 3910 GABRYSZAK, ALFANO, BACALLES, CLARK, EDDINGTON, ERRIGO, FINCH, GOTTFRIED, GUNTHER, JAFFEE, JOHN, KAVANAGH, LIFTON, MILLMAN, RAIA, WALKER, ABBATE, LUPARDO, GREENE--
An act to amend the election law, in relation to special ballots for victims of domestic violence

2009 FEB 24 PM 10:15

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Common Mtg

FY12



Malcolm A. Smith
Majority Leader and
Temporary President
of the Senate

New York State Legislative Session Calendar January — June 2009

The New York State Legislative Session Calendar establishes a schedule for the 2009 Legislative Session and provides dates important to the legislative process. The Session Calendar is intended to afford Members flexibility in conducting legislative business in Albany and planning activities within their home districts. The Session Calendar will foster orderly and timely consideration of legislation. Unforeseen events may require modification of the Session Calendar.



Sheldon Silver
Speaker of
the Assembly

JANUARY

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FEBRUARY

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JUNE

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- January 7 2009 Legislative Session convenes with Governor's State-of-the State Address
- January 12 Start of sessions
- January 19 Martin Luther King, Jr. Day

- February 16 Presidents' Day
- April 1 Beginning of new Fiscal Year
- April 8 Recess
- May 25 Memorial Day observed

Indicates session day

THE HINDS FIRM LLC

ATTORNEYS AND COUNSELORS AT LAW

FACSIMILE TRANSMITTAL SHEET

TO:	Steve Richman	FROM:	Terry Hinds, Esq.
COMPANY:	Board of Elections	DATE:	2/17/2009
FAX NUMBER:	1 212 487 5342	TOTAL NO. OF PAGES INCLUDING COVER:	3
PHONE NUMBER:		SENDER'S REFERENCE NUMBER:	718-801-9416
RE:	Certificate to selection new name and emblem		
		YOUR REFERENCE NUMBER:	

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Thank you,

*Community
FYI*

Terry Hinds, Esq.

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IN THE CITY OF NEW YORK

2009 FEB 17 PM 5:28

119 PENNSYLVANIA AVENUE, BROOKLYN, NEW YORK 11207
PHONE: (718) 801-9416 • FAX: (718) 228-5003

CERTIFICATE
(Pursuant to Section 6-138(3)(b) of the Election Law)
(selecting a different name/emblem for an independent body)

I, Glenn Diresto

residing at 345 Beach 86 Street Rockaway Beach, NY 11693

having been nominated by the Famalles First

Party, an independent body, as a candidate for the Office of City Council in the 32nd District

at the Special Election Election to be held on February 24

2009; and the Board of Elections in the City of New York, having made a determination,

pursuant to Election Law Section 6-138(3)(a), that the use of the name and/or emblem of the

Famalles First Party and the shooting star emblem

Party creates the possibility of confusion with the name/emblem of an existing party or an independent body that previously filed independent nominating petition for the same office; and

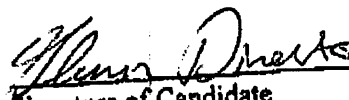
notice of such determination having been mailed to me by said Board on n/a

2009; I hereby select the name/emblem Together we can with the emblem 

Party as a different name/emblem, pursuant to Section 6-138(3)(b) of the Election Law.

2/17/09

Date


Signature of Candidate

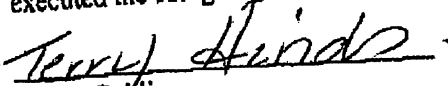
STATE OF NEW YORK)

COUNTY OF Kings)

ss:

On this 17 day of February, 2009, before me personally appeared Glenn Diresto

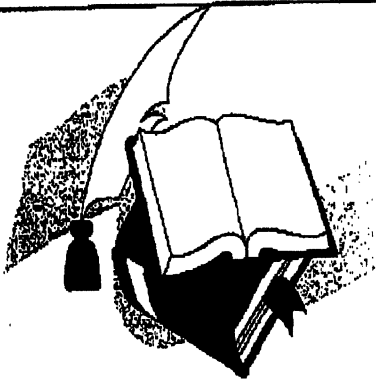
, to me known and known to me to be the individual described therein, and who executed the foregoing instrument, and he acknowledge to me that he executed the same.


Notary Public

TERRY HINDS
NOTARY PUBLIC, State of New York
No. 0011039510
Qualified in Kings County
Commission Expires July 14, 2011

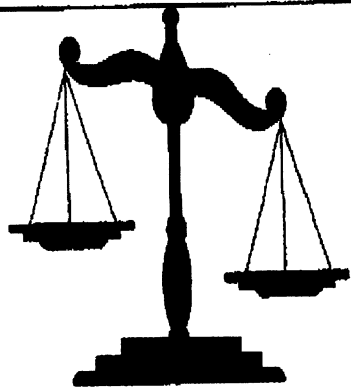
2009 FEB 17 PM 5:28

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IN THE CITY OF NEW YORK



**BOARD OF ELECTIONS
IN
THE CITY OF NEW YORK
LEGAL DEPARTMENT
32 BROADWAY, 7TH FL
NEW YORK, N.Y. 10004**

**TELEPHONE NO. 212-487-5338
FAX NO. 212-487-5342**



DATE: February 17, 2009

TO: Terry Hinds, Esq.

FAX #: 718-228-5003

FROM: Steven H. Richman, General Counsel

RE: Certificate to Select New Name and Emblem

Total Number of Pages including cover sheet 6

MESSAGE:

Per our conversation.

NOTE: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is NOT the intended recipient, or the employee or agent responsible for delivering the message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the United States Postal Service.

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GENERAL COUNSEL
BD. OF ELECTIONS
IN THE CITY OF NEW YORK

*Comm Mtg
Fy 1*

Short Form Order and Judgment

NEW YORK SUPREME COURT **2009 FEB 17 PM 3:19**
QUEENS COUNTY

Present: HONORABLE PHYLLIS ORLIKOFF FLUG IA Part 9
Justice

<p>_____ x</p> <p>IN THE MATTER OF THE APPLICATION OF NOREEN ELLIS and HAROLD CORNELL,</p> <p style="text-align: center;">Objectors,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">- against -</p> <p>GLENN DiRESTO,</p> <p style="text-align: center;">Respondent-Candidate,</p> <p style="text-align: center;">- and -</p>	<p>Index Number <u>1400</u> 2009</p> <p>Motion Date <u>February 9,</u> 2009</p> <p>Motion Cal. Number <u>12</u></p> <p>Motion Seq. No. <u>1</u></p>
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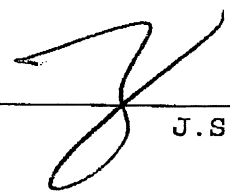
THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK _____ x

The following papers numbered 1 to 5 read on this application by petitioners (1) to declare invalid the nominating petition filed with The Board of Elections in The City of New York (Board) to nominate respondent DiResto as a candidate for the Office of Member of the City Council from the 32nd Council District, Queens County, in the special election to be held on February 24, 2009; and (2) to enjoin the Board from printing and placing the name of said respondent DiResto on the official ballot to be used for said special election.

	<u>Papers Numbered</u>
Order to Show Cause- Petition Affidavit-Exhibits..	1-4
Exhibit to Memorandum of Law.....	5

Upon the foregoing papers it is ordered and adjudged that the application is denied and the petition is dismissed for the reasons set forth in the order and judgment signed simultaneously herewith in the companion special proceeding entitled DiResto v Cornell, Index No. 1411/09.

Dated: February 17, 2009



J.S.C.

Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PHYLLIS ORLIKOFF FLUG IA Part 9
Justice

IN THE MATTER OF THE APPLICATION OF x
GLENN DIRESTO,

Index
Number 1411 2009

Petitioner-Candidate,

Motion
Date February 9, 2009

- against -

Motion
Cal. Number 13

HAROLD CORNELL and NOREEN ELLIS,

Motion Seq. No. 1

Objectors,

- and -

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK

x

The following papers numbered 1 to 8 read on this application by petitioner Glenn DiResto (1) to declare his nominating petition valid; (2) to direct the Board of Elections in the City of New York (Board) to print and place the name of petitioner as a candidate on the official ballots used in the 32nd Council District, Queens County, at the special election to be held on February 24, 2009; and (3) to enjoin the Board from printing, issuing or directing for use during the special election any ballots upon which petition's name does not appear.

	<u>Papers Numbered</u>
Order to Show Cause- Petition Affidavits-Exhibits..	1-4
Answering Affidavits-Exhibits.....	5-7
Exhibit to Memorandum of Law.....	8

Upon the foregoing papers it is ordered and adjudged that the application is determined as follows:

The Board, pursuant to Election Law § 6-138(3) (a), invalidated the independent nominating petition in issue because it contains the name "Families First" as the independent body making the

nomination, a name which is part of the name of a recognized existing political party, namely the "Working Families Party."

Election Law § 6-138(3)(a) provides as follows:

The name selected for the independent body making the nomination shall be in English characters and shall not include the name or part of the name or an abbreviation of the name or part of the name, nor shall the emblem or name be of such a configuration as to create the possibility of confusion with the emblem or name of a then existing party, or the emblem or name of an independent body selected by a previously filed independent nominating petition for the same office.

Under this section, courts have rejected names that included in some manner the name of an existing party (see Ottinger v Lorenzo, 35 AD2d 747, affd by McCarthy v Lawley, 27 NY2d 754; Mercantonio v Heffernan, 192 Misc 868, affd 274 App Div 880, affd 298 NY 661; In re Social Democratic Party, 182 NY 442).

Subsequent to these cases, however, the statute was amended to add paragraph (b) to subdivision (3). That paragraph reads as follows:

Notwithstanding the requirements of paragraph a of this subdivision, if the emblem or name selected for an independent body on any independent nominating petition is the same as that selected by any previously filed independent nominating petition for the same office, the board of elections with which such later petition was filed shall, not later than two days after the filing of such later filed petition, send notice of such duplicate selection of emblem or name by first-class mail, to the candidate for such office who was nominated by such later filed petition, and that the candidate to whom such notice is required to be sent may file with such board of elections, not later than seven days after such notice was mailed, a certificate selecting a different emblem or name.

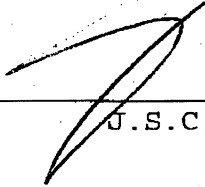
The statute clearly allows for a candidate who chose the same name, or part of the same name or emblem of another candidate, to choose a new name or emblem rather than have the petition invalidated.

This court is cognizant that the statute does not specifically provide for such relief where the independent nominating petition

uses the same name or emblem of an existing political party. Nevertheless, under the circumstances herein, where the Board sent a cure letter to another candidate for the same office in which the Board acknowledged that said candidate had used the emblem of an existing political party, (see Exhibit A to petitioners Memorandum of Law) fairness dictates that the petitioner herein, Glenn DiResto, be given the same opportunity to cure by choosing a new name and emblem. Moreover, the right to cure should be permitted in this instance inasmuch as the candidate has satisfied all other requirements to get his name on the ballot, including obtaining the requisite number of valid signatures on his petition. To invalidate his petition and remove his name from the ballot would, thus, deprive a significant number of voters in the district their opportunity to vote for a candidate of their choice.

Accordingly, the application is granted to the extent that the Boards determination invalidating the petition of Glenn DiResto is vacated. The candidate DiResto has two days from the date of this order to file with the Board a certificate selecting a new name and emblem for his independent nominating body that conforms with the requirements of Election Law § 6-138(3)(a). If petitioner fails to do so within the time period provided, the Board shall select the name and emblem (see Election Law § 6-138[3][f]).

Dated: February 17, 2009



J.S.C.

AT A TERM OF THE SUPREME
COURT OF THE STATE OF NEW
YORK, COUNTY OF RICHMOND, ON
THE 24th DAY OF FEBRUARY, 2009

PRESENT: Stephen J. Rooney J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of
John Tabacco, and Kenneth Mitchell, candidates
Petitioners,

-against-

The Board of Elections in
the City of New York, and

The New York City Police Department,
and

Tony Baker, Donald R. Pagano, Deborah Rose, and
Paul D. Saryian, candidates for City Council,
49th Council District, in Staten Island
Respondents.

Index No.

ORDER TO
SHOW CAUSE

X

Upon the annexed petition of the petitioner, verified on the 24th Day of February, 2009, and upon all of the papers and proceedings heretofore had herein, it is hereby

ORDERED, that respondents herein show cause before an I.A.S. term of this court held in and for the County of Richmond, at the Courthouse thereof, more specifically, before Justice Giacobbe's part, at the Courthouse at the Homeport, 355 Front Street, Richmond, New York, at 10:30 in the forenoon of the 4th Day of ^{March} February, 2009, or as soon

thereafter as counsel may be heard, why an order of this court should not be made and entered pursuant to the provisions of Articles Eight, Nine and Sixteen of the Election Law:

1. Determining the validity of affidavit ballots, emergency ballots, special ballots, absentee and military ballots cast for the public office of Member New York City Council, 49th Council District, in Richmond, New York, in the February 24, 2009 Special Election.

AS SCHEDULED

2. Ordering the respondent Boards of Elections and the Commissioners thereof, to certify the name of, one of the Petitioner Candidates as elected to the Public Office of Member of the City Council, 49th Council District, as may be appropriate, or alternatively enjoining the improper issuance of a certificate of election for the said public office,

3. Ordering the testing and inspection of any voting machines which have malfunctioned or been tampered with, and making appropriate findings of fact, orders preserving evidence, and adjustments to the canvass as may be just and proper in the premises,

4. Ordering that the canvass of the votes made by the Board of Elections on election night, and thereafter, be corrected and adjusted to reflect a proper tally of the votes for the said public office, together with such other, further, and different relief as this court may find to be just and proper, and it is further

JSC

ORDERED, that Respondent Board of Elections shall complete the recanvass of the voting machines in the 49th Council District as scheduled by the Board, and ~~that the said Board of Elections shall not count or canvass the paper ballots in the said election pending a final inspection of voting machines which may have malfunction or been tampered with and the hearing, review and determination of any issues raised regarding the voting machines by this Court, except as hereinafter provided, and it is~~

ORDERED, that the re-canvass of the ballots cast on voting machines shall commence on Tuesday, March 3, 2009 at the office / machine storage facility of the Richmond County Office of the Board of Elections in the City of New York designated for such canvass

AND RECANVASS

4

STATEN ISLAND
ORDERED, that the canvass of the paper ballots shall commence on March 3, 2009 at the office Richmond of the Board of Elections in the City of New York designated for such canvass, or at an agreed to time not less than 48 hours after the completion of the delivery of the ballot related materials to Petitioner's Counsel, and Respondent's Counsel or as otherwise specified herein, and it is

SL
JSC

ORDERED, that the order of business for the canvass and recanvass of ballots shall be as follows: 1) canvass / recanvass of Paper Ballots and BMD Ballots; 2) canvass of Absentee, Military, and Special Ballots ^{AND} ~~canvass~~ of Affidavit Ballots, and it is

ORDERED, that Respondent Board of Elections produce upon the day of the hearing of this order the ballots, ballot stubs, and ballot related materials, including canvass sheets

and other records which are the subject of this proceeding, and the determinations of the said Boards of Elections upon any objections and challenges to voters and/or ballots and/or applications therefor, and any other papers or worksheets relating thereto, and it is further,

~~ORDERED, that Respondent Board of Elections preserve inviolate and separate the ballots, ballot boxes (envelopes) and stubs and stub boxes (envelopes) and other papers related to this election for the 49th Council District, from all others, and it is further,~~

ORDERED, that the Respondent Board of Elections shall, upon the request of counsel, produce for the Petitioners, without the need for a subpoena, all documents (or copies thereof) including but not limited to, absentee ballot applications, absentee ballot envelopes (inner and outer envelopes), voter registration records [and the same materials for Special and military ballots], affidavit ballot envelopes (both sides), poll books, canvass sheets, machine breakdown reports, mechanic's or custodians' logs, election day court orders and other election related documents, prior to the canvass of ballots, and that the Board shall not take up the canvass or recanvass of ballots until at least 49 hours after the Petitioners' counsel, and Respondents' counsels shall be provided with copies of such documents and any other documentation relating to such ballots that is requested by counsel, and it is

~~ORDERED, that absent a stipulation of the parties hereto to the contrary, all the paper~~

ORDERED, that absent a stipulation of the parties hereto to the contrary, all the paper ballots of the subject political subdivision shall be counted and canvassed by the Board, and the representatives of all parties hereto shall keep and confirm a hand canvass of the said ballots, and report same to the Court, and it is further

22
J.S.C.

ORDERED, that the Respondent Board of Elections prepare all necessary records for the canvass of the votes in the subject political subdivision, including the registration records of voters casting paper ballots, absentee applications, pollbooks, and other related documents, forthwith, and it is further,

ORDERED, that the Respondent Board of Elections appoint Boards of Inspectors composed of two of the Commissioners of Elections thereof, or alternatively, any two clerks thereof (in each case, one of each political persuasion) for the purposes of conducting a canvass of all votes for the election to the City Council from the 49th Council District, said Boards of Inspectors shall be empowered to hear and make a determination upon any and all objections to the canvassing of any and all ballots pursuant to the provisions of Article 9 of the Election Law, and that said inspectors shall keep a record of all objections as required by law, and it is further,

ORDERED, that any attorney or his employee representing petitioners be admitted to the place of canvass or recanvass of the votes in this election and be allowed full participation in the administrative proceedings of the Boards of Elections held in relation thereto, without the need for production and filing of a poll watcher's certificate, and it is further,

ORDERED, that said Boards of Inspectors shall provide all parties to these proceedings with a record of the hand canvass of ballots made on election night, and shall canvass each and every vote unanimously found to be valid and/or proper by said Boards of Inspectors, except as hereinafter provided. Any and all ballots unanimously found to be invalid and/or

improper shall be laid aside and preserved by said Boards and shall not be canvassed, except as provided herein, and it is further

ORDERED, that said Inspectors shall preserve a record of all objections entered against the canvassing of any ballot, together with a record of the vote upon the objection thereon (sustained, overruled or split vote), and shall further preserve any ballot and supporting documentation upon a split vote of said Inspectors for the time necessary so that this Court may review same, however, in no instance shall said Boards of Inspectors compromise the secrecy of any voter's ballot by way of preserving an objection thereto in violation of Election Law 17-126 (1), (2) or (3); Article 2, Section 7 of the New York State Constitution and relevant provisions of Article 8 and Article 9 of the Election Law, and it is further

J.S.C.
ORDERED, that upon the unanimous vote of the Board of Inspectors to canvass any ballot objected to by the petitioners, *the said ballot and related documents shall be set aside and shall not be canvassed ONLY in the event Petitioners' counsel persists in the objection and requests same be set aside for this Court's review, and it is* ^{CONSISTENT WITH O'KEEFE AS PROSCRIBED BY JUSTICE TOMER}

ORDERED, that in the interests of justice, the efficient administration of the law, and judicial economy, the objection(s) of the petitioner hereto to any ballot, ballot envelope, affidavit, application or documents relating to the ballots of the 2009 General Election for the subject public office are hereby ordered to be preserved until the time of the canvass and recanvass of such ballots, the hearing before this Court, and any future contest

regardless of whether three days have elapsed, and all such ballots and documents shall be preserved for the review of this court, and it is

J.S.C. ORDERED, that the Respondent Boards of Elections commence the canvass of all paper ballots (Emergency, Affidavit, Absentee, Military, and Special) ballots in the 49th City Council District not earlier than 49 hours after the production of documents requested by counsel as provided herein, subject to the schedule set forth herein or by stipulation of the parties, but not earlier than two days after any hearing and determination which may be ordered by this Court relating to issues regarding the machine canvass and / or malfunctioning and or compromised voting machines, or as soon thereafter as the paper ballots and supporting records can be made available, and it is further

ANY ORDERED that ~~all~~ candidates objections to the ballots canvassed by hand on election night are hereby preserved until the time of the recanvass of said ballots, and it is

ORDERED, that the Board of Elections and Counsel for the Parties shall meet to establish a more complete schedule and order for the canvass of votes in the 49th City Council District.

And it is hereby,

ORDERED, that any **Military Ballots, Special Ballots, Absentee Ballots, and Affidavit Ballots** to be canvassed, in accordance with the above schedule or as soon as is practicable, with petitioners' representatives being present for the canvass thereof, and it is

ORDERED, that the Respondent Boards of Elections shall coordinate the said preservation and security of all voting machines with their respective Respondent Police Department, to ensure the integrity of the machines and the ballots cast thereon, and it is further,

ORDERED, that the Respondent Police Department impound and maintain protection of and guard over all paper ballots and all materials relating to the ballots of the 11th City Council District, by assigning an officer of said Police Department to each and every polling place and taking custody of the ballots and the ancillary papers relating to the subject election and maintaining same securely, and preserving same inviolate, until such time as the ballots and the ancillary papers relating to the subject election shall be delivered to the custody of the Board of Elections, at the Richmond County offices thereof, and it is

ORDERED, that Respondent Police Department keep and maintain records establishing a chain of custody for the subject ballots and election relates papers, and it is

ORDERED, that the Police Commissioner shall assure that all paper ballots, records and are secured and placed under 24 hour per day guard, or alternatively, at the Police

AL
JSC

Commissioner's option, shall assure that all such items are secured in a safe or locked storage facility of the Boards of Elections for which there are two separate locks required for access, with each commissioner of elections having a key or combination for only one of the two locks, and it is further

ORDERED, that the Board of Elections shall allow the parties hereto, together with the Court or the Court's designee, to inspect any BMD voting machines with irregular returns as needed, and to report the findings of said inspection to the Court, and it is

ORDERED, that any machine which is specified by any candidate as having irregular returns, or having been tampered with shall be and shall remain secured and impounded by the Respondent Board of Elections and Respondent Police Department, and

Sufficient reason appearing therefore, leave is hereby granted to the petitioners to submit on the date set for the hearing or the trial of this matter additional witnesses, exhibits, proofs and other evidence as may be necessary, and,

Sufficient reason appearing therefor, leave is hereby granted to the petitioners to amend his/her/their pleadings as may be necessary, and, that as is appropriate, the Petitioners may make a motion for the realignment of the parties hereto, and

SR
JSC

All rights and entitlements extended to the Petitioners in and by this Order and any subsequent order of the Court shall be interpreted so as to extend the same rights and entitlements to the Respondent Candidates, and

Sufficient reason appearing therefor, it is further

ORDERED, that pending the hearing and determination of this court upon the within petition, the respondent Boards of Elections are hereby TEMPORARILY ENJOINED AND RESTRAINED FROM CERTIFYING ANY CANDIDATE AS BEING THE CANDIDATE DULY ELECTED TO THE SUBJECT PUBLIC OFFICE, and it is further,

ORDERED that in the event the canvass and recanvass of ballots continues beyond the return date specified hereinabove, counsel for the parties hereto may adjourn same by stipulation, and counsel shall obtain approval of the Court by telephone of same immediately upon agreeing thereon, so that the canvass may proceed with all due speed, and,

UPON THE WRITTEN AND ORAL APPLICATION OF COUNSEL PURSUANT TO SECTION 304 OF THE CPLR IT IS HEREBY DETERMINED, that this, being Election Day, and the hour being 9:20 ^{2/24/09} P. M., that the Courthouse is closed, and that the Office of the County Clerk is closed, further, as this application has been made after business hours, and that these facts make the purchase of an Index Number, and a Request for Judicial Intervention and the accompanying filing IMPOSSIBLE, therefore it is

J.R.
J.S.C.

ORDERED, Petitioner is hereby granted leave of this Court to make a delayed filing of the within papers and shall file and pay for an Index Number and RJI within ^{24 hours} ~~five~~ days of the signing of this order with the County Clerk, within the time frames specified by the CPLR, and it is further

[Handwritten signature]
J.S.C.

ORDERED, that this special proceeding shall be deemed to have been commenced by the signing of this order pursuant to the provisions of CPLR 304, and the case law of the Appellate Divisions, and that service thereof may be made immediately,

Sufficient cause appearing therefore, it is further,

ORDERED, that petitioners shall cause a copy of this order together with all of the papers upon which this order was granted upon Respondent Board of Elections, by personally delivering same to the offices thereof, or by personally delivering same ^{PURSUANT TO CPLR 308 (1)} to any of the Commissioners, or Deputy Commissioners, Director or Deputy Director or Counsel, or other employee thereof authorized to accept service of papers, on or before ^{MARCH} February 5th, 2009, and upon Respondent Candidates, by personally delivering same to him ^{PURSUANT TO CPLR 308 (1)} or ^{MARCH} any attorney designated by him / her, on or before February 5th, 2009 and upon ~~respondent Police Department by personally delivering or mailing same to the main offices thereof or to the Corporation Counsel, on or before February 2009, alternatively,~~ at the option of the petitioner, service may be made upon any of the Respondents herein by ^{MAILING} ~~substituted service of either suitable age or mail with certificate of enclosing same in a securely sealed and post paid wrapper addressed to such respondents via Express Mail and depositing same with an office or depository of the United States Postal Service, on or before February 27, 2009, or by facsimile transmission to any of~~

[Handwritten signature]
J.S.C.

J.S.L.

the above named parties on or before February _____, 2009, or any other means of service allowed by the CPLR on or before February _____, 2009, and that such service shall be deemed good and sufficient service thereof.

DATED: February 24, 2009

ENTER:



JUSTICE OF THE SUPREME COURT

ROONEY SSC
2/24/09

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

X

**In the Matter of
John Tabacco, and Kenneth Mitchell, candidates
Petitioners,**

Index No.

-against-

VERIFIED PETITION

**The Board of Elections in
the City of New York, and**

**The New York City Police Department,
and**

**Tony Baker, Donald R. Pagano, Deborah Rose, and
Paul D. Saryian, candidates for City Council,
49th Council District, in Staten Island
Respondents.**

X

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petitioner respectfully shows:

- 1. Petitioners are candidates for the Public office of Member of the New York City Council, 49th Council District in the County of Richmond.**
- 2. Petitioners have standing under Article 16 of the Election law to bring this proceeding.**
- 3. Respondents Tony Baker, Donald R. Pagano, Deborah Rose, and Paul D. Saryian, are candidates for the office of Member of the New York City Council, 49th Council District in Richmond County which was voted upon at the General Election held therefor on the 4th day of February, 2009.**
- 4. The election in this City Council District is close according to the current tabulations available from the Board of Elections. The race has been hotly contested.**

5. **By Order of the Supreme Court, Appellate Division, issued on February 23, 2009, Petitioner Tabacco was restored to the ballot.**
6. **As a result of this late change to the ballot, the Board of Elections in the City of New York determined to conduct the subject election using ONLY paper ballots and handicapped accessible BMD's (ballot marking devices).**
7. **This will make for an unprecedented amount of paper ballots being used in this Special Election.**
8. **The paper ballots will be canvassed by hand on election night.**
9. **Because the contest is close, the final outcome may hinge upon the recanvass of v of paper ballots including election day ballots, affidavit ballots, absentee ballots and military ballots.**
10. **In addition there are irregularities which have been reported to the Petitioner from the various polling places in the subject District. Such irregularities will be more fully elucidated upon the hearing date before the Court. There was some confusion due to the last minute change in the ballot and the switch to paper ballots, in lieu of using lever voting machines.**
11. **As the Petitioners are all candidates for the same office, it is anticipated that after the election an appropriate motion to realign the parties will be made.**
12. **Respondent Board of Elections is responsible for canvassing the returns of the elections from the five boroughs of the City of New York and certifying the winner(s) of elections for the subject public office, acting in their capacity as the City Boards of Canvassers.**

13. **The Respondent Board of Elections has adopted the practise of opening and canvassing by mechanical device all absentee ballots beginning on the eighth day after the election in accordance with law.**
14. **Upon information and belief, Respondent B.oard intends to utilize mechanical devices to recanvass paper ballots cast at the polls.**
15. **The mechanical devices used to tabulate paper ballots by Respondent Board are prone to error, and are not as accurate as a hand count of the ballots.**
16. **The paper ballots cast on election night should be reviewed by the candidates (or their representatives) prior to the review of the absentee, affidavit, special and military ballots.**
17. **Because the Board is using only paper ballots, the calendar set byh the Board for recanvassing machines is inapplicable as written.**
18. **Therefore, a temporary order staying the immediate canvass of absentee ballots is requested, and will prejudice no candidate or party hereto.**
19. **The above captioned Police Department is charged with maintaining order during elections within the county and preserving the integrity of the machines, canvass sheets and ballots cast at elections, and is further required to act upon an order of this Court to assign officers to such task pursuant to the provisions of Article 9 of the Election Law.**
20. **This proceeding is commenced pursuant to the provisions of Articles Five, Eight, Nine and Sixteen of the Election Law, which confer authority upon this Court to determine and resolve any disputes arising out of or relating to the canvass of ballots and returns**

for public office, and to preserve the ballots and machines employed in a general election for a contest relating thereto.

21. This petition is brought to continue to preserve the ballots, review irregular and possibly fraudulent returns, preserve the voting machine (BMD) ballots and determine where Petitioner's candidates were deprived of votes by malfunctioning or tampered with voting machines, to protect the Petitioner's rights to have this Court review all determinations of the Boards of Elections as is provided for in the Election Law, more fully set the parameters for the recanvass and canvass of votes, allow for this Court to make adjustments in the canvass as may be necessary, enjoin any certification of election results which would prejudice the rights of the parties, and to bar or prevent any procedural defect which might be asserted to defeat this Court's determinations.
22. Moreover, in this a Special Election, the equivalent of a General Election, an injunction against issuance of a certificate of election might be the only remedy available so as to allow for the determination of the rightful claimant to the subject public office without resort to an action *quo warranto* by the Attorney General, or the appropriate body determining the proper claimant to the subject public office under the Constitution.
23. Subject to the supervision and review of this Court, the Respondent Board of Elections will be conducting a recanvass of the results of this election as required by law. This is scheduled for March 3, 2009.
24. Said recanvass, obviously, is not complete, and the petitioners await the final numbers to be compiled by the County Board of Elections.
25. Upon information and belief, the unofficial canvass of the votes cast on election day for the subject public office may be, and often is, incomplete and or inaccurate.

26. Further, upon information and belief, several of the BMD voting machines in the subject political subdivision may have malfunctioned or broken down and failed to count all of the votes cast for the petitioner.
27. It is unknown whether these ballots will be included in the Election Night canvass by the inspectors. These ballots are, by law, part of the “machine count”.
28. Such an occurrence may require the Court ordered testing of the subject voting machine(s) and the subsequent adjustment of the canvass to correct the error in vote totals, and / or the review of emergency ballots.
29. Continued impoundment and protection of the ballots, and any machines found to have functioned improperly or to have been tampered with is essential, because any lapse in security or breach of protective measures for the machines and ballots relating to this election would irreparably harm the petitioners, and, indeed, undermine public confidence in the electoral process.
30. Only a review of the final voting machine recanvass numbers from the Board of Elections and a physical inspection of the subject voting machines and related documents on file with the Boards of Elections will reveal any irregularity or fraud.
31. At the very least, the subject ballots and machines must be preserved for inspection and review in these proceedings or in view of a future contest.
32. Petitioner requests leave to and reserves the right to submit further proofs by way of witnesses, affidavits and evidence on the date set by this court for the trial and hearing of this matter, and to amend these pleadings to reflect the facts of the conduct of the subject election and/or facts adduced by the way of further investigation and/or a

canvass of the ballots for the election for the subject public office by the Boards of Elections.

33. In the course of the canvass of ballots there may be erroneous determinations made by the Boards of Elections, and such determinations may be sustained by a unanimous vote.

34. Without Court intervention at this juncture such ballot envelopes would be burst, the ballot removed therefrom and intermingled with others, depriving the petitioner of the ability to have the administrative determination of the Board of Elections reviewed by the Court.

35. In the event that there is a split vote and the count at the Boards of Elections, or the return date set by the Court is more than three days from the entry of an objection, absent a protective order of this Court, the ballot envelopes would be burst, the ballot removed therefrom and intermingled with others, depriving the petitioner of the ability to have the administrative determination of the Boards of Elections reviewed by the Court.

36. In the event there are unanimous votes of the commissioners or inspectors against the objections of the petitioners, the ballot envelopes would be opened, and the ability of this Court to review the objection and the ruling thereon would be mooted.

37. In past re-canvasses conducted in the City of New York, the Board of Elections preserved all ballots which were objected to by the parties so that there could be meaningful court review of any administrative determinations if needed.

38. In the event the Court chooses not to preserve objections which are unanimously rejected by the Board, it is requested, in the alternative that he Court employ the

objection preservation method adopted by the Supreme Court, Richmond County, Tomei, J., in O’Keffe v. NYC Board of Elections.

39. Failure to preserve objections would irreparably harm your petitioner.
40. Petitioners may request various information, data and documents to be provided by the Boards of Elections. This information is required for Petitioners to have a meaningful participatory role in the canvass of paper ballots.
41. In order to expedite the canvass, an order is requested providing for the production of documents before the canvass of ballots without the need for subpoena.
42. Copies of all documents produced by the Board of Elections should be furnished to all parties hereto who request same.
43. Moreover, without the information requested, this Court and your Petitioner will be unable to see that the mandates of the New York State Constitution, Article II, Section 7, which requires that identification of voters be made by their signatures “in all cases” are followed.
44. This information will allow for the full and proper implementation of Sections 8-302, 8-304, 9-104(1) (d), 9-209 (2) (a) (1) of the Election Law and other sections of the law which codify the Constitution’s mandate of signature verification to establish the identity of all voters.
45. The information requested by your petitioner is needed for the Petitioner to have the ability to participate in the canvass. The Election Law which entitles a candidate to have watchers present who may object to the casting or canvassing of any ballot or the refusal to cast or canvass any ballot, Election Law Section 9-209 (2)(d), to object to the

qualifications of any voter, and to have any determination reviewed by the Supreme court, Election Law, Section 16-106.

46. The canvass of ballots may include objections to affidavit and absentee ballots by voters who are not qualified to vote same.
47. The canvass of votes may include challenges to registrations of certain voters, requiring Court intervention to have law enforcement authorities verify registrations as required by the Election Law in an expedited fashion.
48. The failure to enforce the statute, and the inability adduce the underlying facts would irreparably harm your petitioner, and prevent a review on the merits of his challenges made on the basis of registration.
49. Upon information and belief, the State Board of Elections, and all local boards of elections in this state allow attorneys and those working for attorneys to be present in the polling place as poll watchers, without regard to the individual's place of residence within the state, so that they might participate in any administrative proceedings before the Boards on behalf of the candidate / committee that they represent.
50. Upon information and belief, respondent candidate(s) has previously and presently intends to use attorneys and their workers as poll watchers for the recanvass who are not residents of the County.
51. Upon and information and belief the Election Law fails to address the question of the participation of counsel in proceedings on election day at the polling place, or at the canvass and recanvass of paper ballots. The Election Law merely requires that a poll watcher be a resident of the County.

52. Moreover, any residency requirement for the circulation of petitions has been stricken by the Court of Appeals in LaBrake v. Dukes and McGuire v. Gamache. It is respectfully submitted that this residency requirement is similarly unconstitutional.
53. The relief requested to allow attorneys and those working for attorneys to be present in the Board of Elections Offices which are “polling places” as poll watchers without regard to their county of residence within the State of New York.
54. Additionally, no rational basis appears for the prevention of attorneys from outside the County from practicing law before the Boards of Election on or after Election Day, constituting an illegal and improper restriction on the practice of a state licensed profession.
55. Such applications are routinely granted by the Courts of this state to counsel’s personal experience.
56. Upon information and belief, the facts alleged in the paragraphs hereinabove, point to the fact that the final result of this election hinges upon the canvass of the various types of paper ballots mentioned hereinabove, as well as a review of the canvass of the machine cast ballots.
57. As this is a General Election, petitioner has requested that the Boards of Elections, acting in its capacity as the County Boards of Canvassers, be enjoined from certifying the results of this election until such time as these court proceedings are finally resolved and determined, and alternatively asked that a permanent injunction be issued against the issuance of an improper certificate of election. Absent such injunction Petitioner may lose her right to proceed directly before the courts of this state to correct the canvass of the returns of the general election, and the matter will be removed from the

jurisdiction of this Court, except by way of a *quo warranto* proceeding initiated by and at the sole discretion of the Attorney General of the State of New York, or such other means of relief as may be provided for in the Constitution.

58. The local Boards of Elections are required by law to recanvass all Special Elections within fifteen days of the election. A restraining order is requested to prevent certification ONLY in the event the proceedings before this Court extend beyond statutory deadlines for certification of the winner of this race, or is made prematurely by the Respondent Board.
59. No prior application for the relief requested herein has been made by the petitioners to any court.
60. The New York City Corporation Counsel has been notified that this application will be made to the Court.
61. At this time the Clerk's office is closed, preventing the required filing, as well as the purchase of an Index Number and a RJI.
62. Further, this application is being made after the close of regular business hours so that that fact alone would prevent filing.
63. Application is hereby made for a commencement of this proceeding by the signing of the accompanying Order to Show Cause, pursuant to CPLR 304 and the case law, Gravagna v. Board of Elections, 21 A.D.3d 504 (2nd Dept., 2005).
64. Petitioners hereby designate RICHMOND County as venue for the within action on the basis that it is the location of Board of Elections, which is ultimately responsible for certifying the results of the election, and all of the relevant records.
65. Petitioners have no other remedy at law other than that applied for herein.

66. Leave is respectfully requested and the Petitioners respectfully reserve the right to amend these pleadings as needed. Further, it is anticipated that an appropriate motion to realign the parties will be submitted to this Court.
67. While the Petitioners are competing candidates, they are united in interest in seeking security for the ballots, ballot boxes (envelopes) and stubs and stub boxes (envelopes) and other papers related to this election.
68. Leave is respectfully requested and Petitioners respectfully reserve their right to produce evidence in support of this petition by way of testimony, affidavits, and other evidence at the trial or hearing of this matter.
69. Leave is respectfully requested and the Petitioners respectfully reserve the right to make further applications to the Court for interim relief as may be needed.
70. Because of the foregoing, the petitioners are apt to be without any protection or Court supervision of the post election processes without the relief prayed for in the order to show cause.
71. These proceedings represent the Petitioner's only recourse under the Election Law.
72. These pleadings are hereby certified as non-frivolous by counsel.
73. Because the use of paper ballots in this election traces back to an order of the Supreme Court issued by Justice Giacobbe, it is respectfully submitted that this is a related case to *Tabacco v. Board of Elections*, and must be assigned to Justice Giacobbe.

WHEREFORE, Petitioner respectfully demands a judgment of this court ordering:

1. That the Police Department secure the ballots and machines used in this election, and account to the Court therefor;
2. Staying the canvass of paper ballots in accordance with the schedule set forth pursuant to the Order to Show Cause, and

3. Enjoining the canvass of the paper ballots pending the completion and finalization of the recanvass of the machine cast votes by the Boards of Elections, and
4. Ordering the continued security and impounding of voting machines which appear to have malfunctioned, or have been tampered with, and
5. Ordering the preservation, testing and Court inspection of voting machines (BMD's) which appear to have malfunctioned, been tampered with or to have been compromised, and
6. Ordering the respondent Boards of Elections and the Commissioners thereof, to preserve for the review of this Court all ballots, ballot envelopes, stubs and stub boxes, and documents relating thereto which may be subject to objection by the petitioner hereto at the Special Election held therefor on the 24th Day of February 2009, and
7. Determining the validity of paper ballots used at the polls, affidavit ballots, emergency ballots, absentee and military ballots cast for the subject public office(s), as may be required, and
8. Correcting, adjusting and finalizing the canvass of returns for election to the City Council from the 49th City Council District and further ordering that the Respondent Boards of Elections certify the appropriate candidate as duly elected to the said public office, and ordering the issuance of a certificate of election to him, or alternatively enjoining the issuance of an improper certificate of election,
9. Award such other, further, and different relief that this Court may deem to be just and proper.

DATED: February 24, 2009
Albany, New York



JOHN CIAMPOLI, ESQ.
677 Broadway, Suite 202
Albany, New York 12207
518 - 436 - 3865 / 518 - 527 - 1217

ATTORNEY'S VERIFICATION

STATE OF NEW YORK)
COUNTY OF ALBANY) s.ss:

JOHN CIAMPOLI, an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. He is the attorney for the petitioner JOHN TABACCO in this action.
2. He has personally reviewed the contents of this document with his client(s), and their campaign workers, and upon the conclusion of said review as to the facts alleged therein, believes same to be true.
3. He has personally reviewed the copies of election returns from each of the relevant the Boards of Elections, together with the other ancillary papers thereto, contacted each of the respondent boards, and upon the conclusion of the said review, believes the within allegations to be true, to his personal knowledge.
4. This affirmation is being used pursuant to the provisions of the CPLR and applicable case law, due to the fact that time is of the essence and that petitioner and his counsel are in different counties. Counsel having offices in the County of Albany and Petitioner(s) residing in the County of RICHMOND.

DATED: ALBANY, NEW YORK
February 24, 2009



677 Broadway, Suite 202
Albany, New York 12207
518 - 436 - 3865 / 518 - 527 - 1217

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

X

**In the Matter of
John Tabacco, and Kenneth Mitchell, candidates
Petitioners,**

Index No.

-against-

**ORDER TO
SHOW CAUSE**

**The Board of Elections in
the City of New York, and**

**The New York City Police Department,
and**

**Tony Baker, Donald R. Pagano, Deborah Rose, and
Paul D. Saryian, candidates for City Council,
49th Council District, in Staten Island
Respondents.**

X

**ORDER TO SHOW CAUSE
& VERIFIED PETITION**

**JOHN CIAMPOLI, ESQ.
677 Broadway, Suite 202
Albany, New York 12207
518 - 436 - 3865 / 518 - 527 - 1217**



Fy 1

REQUEST FOR JUDICIAL INTERVENTION

SUPREME Court,
QUEENS County

Index No. 44/33/2019
Date Purch.

For Clerk Only
IAS Entry Date
Judge Assigned
RJI Date

PLAINTIFF(S): ERIC A. ULRICH,
candidate/Petitioner

-against-

DEFENDANT(S): MIKE RICATTO, LEW SIMON and
GERALDINE CHAPEY
Candidate/respondents

-and-

FREDERICK UMANE, ET AL.
Commissioners, constituting the Board of
Elections in the City of New York,
Respondent.

Date issue joined: Not Applicable

Bill of particulars served: Yes No

NATURE OF JUDICIAL INTERVENTION (check ONE box only AND enter information)

- | | | |
|---|---|---|
| Request for preliminary conference | Notice of petition (return date) |) |
| Note of issue and / or certificate of readiness | Relief sought |) |
| Notice of motion (return date) | Notice of medical or dental malpractice action (specify |) |
| Relief sought | |) |
| <input checked="" type="checkbox"/> Order to show cause | |) |
| (Clerk enter return date) | Statement of net worth |) |
| Relief sought secure ballots and voting mach | Writ of habeas corpus |) |
| Other ex parte application (specify | Other (specify |) |

NATURE OF ACTION OR PROCEEDING (check ONE box only)

- | | | | |
|--|-------|--|-----------|
| Matrimonial | | Torts | |
| Contested | -CM | Malpractice | |
| Uncontested | -UM | Medical/Podiatric | -MM |
| Commercial | | Dental | -DM |
| Contract | -CONT | *Other Professional | |
| Corporate | -CORP | Motor Vehicle | -MV |
| Insurance (where insurer is a party, except arbitration) | -INS | *Products Liability | -PL |
| UCC (including sales, negotiable instruments) | -UCC | Environmental | -EN |
| *Other Commercial | -OC | Asbestos | -ASB |
| Real Property | | Breast Implant | -BI |
| Tax certiorari | -TAX | *Other Negligence | -OTN |
| Foreclosure | -FOR | *Other Tort (including intentional) | -OT |
| Condemnation | -COND | | |
| Landlord/Tenant | -LT | Special Proceedings | |
| *Other Real Property | -ORP | Article 75 (Arbitration) | -ART 75 |
| Other Matters | | Article 77 (Trusts) | -ART 77 |
| * | -OTH | Article 78 | -ART 78 |
| | | <input checked="" type="checkbox"/> Election Law | -ELEC |
| | | Guardianship (MHL Art 81) | -GUARD 81 |
| | | *Other Mental Hygiene | -MHYG |
| | | *Other Special Proceeding | -OSP |

RECEIVED
G.O. BO. OF ELECTIONS
IN THE CITY OF NEW YORK
2010 FEB 26 P 1:34

*If asterisk used, please specify further.

Check "YES" or "NO" for each of the following questions. Is this action/proceeding against a:

YES NO Municipality: (specify

YES NO Public Authority: (specify

YES NO Does this action/proceeding seek equitable relief?

YES NO Does this action/proceeding seek recovery for personal injury?

YES NO Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:

(This applies to all cases except contested matrimonials and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue):

Expedited: 0 - 8 months Standard: 9 - 12 months Complex: 13 - 15 months

Contested Matrimonial Cases Only: (Check and give date)

Has summons been served? No Yes. Date

Was a Note of No Necessity filed? No Yes. Date

Attorney(s) for plaintiff(s):

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone No.</u>
	THOMAS V. OGNIBENE	64-82 83 STREET MIDDLE VILLAGE N.Y. 11379	TEL. (718) 894-7070

Attorney(s) for defendants(s):

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone No.</u>
	UNKNOWN		

* Self Represented: parties representing themselves, without an attorney, should check the "Self Rep" box and enter their name, address and phone number in the space provided above for attorneys.

INSURANCE CARRIERS:

NONE

RELATED CASES: (If NONE, write "NONE" below)

<u>Title</u>	<u>Index #</u>	<u>Court</u>	<u>Nature of relationship</u>
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I affirm under penalty of perjury that, to my knowledge, other than as noted above, there are and have been no related or proceedings, nor has a request for judicial intervention previously been filed in this action or proceeding.

Dated: FEBRUARY 25TH, 2009

(Signature)

THOMAS V. OGNIBENE

(Print or type name)

PETITIONER FAX. (718) 355-9126

(Attorney for)

Attach rider sheets if necessary to provide required information.

SEQUENCE NO. 1

At an ~~En Parte~~ IAS Part 33
of the Supreme Court of the
State of New York, held in and
for the County of Queens, at the
Courthouse located at 88-11
Sutphin Boulevard, Jamaica N.Y.

DATE - On the 25 day of February 2009

PRESENT: HON. HON. JAMES J. GOLIA
JUSTICE

SUPREME COURT, QUEENS COUNTY
25-10 COURT SQUARE
LONG ISLAND CITY NEW YORK 11101

In the Matter of the Application of,

ERIC A. ULRICH

Candidate/Petitioner,

-against-

**MIKE RICATTO, LEW SIMON and
GERALDINE CHAPEY,**

Candidates/Respondents,

-and-

**FREDERIC M. UMANE, JULIE DENT,
JAMES J. SAMPEL, JOSE MIGUEL ARAUJO,
JUAN CARLOS "J.C." POLANCO, NAOMI C. SILIE
NANCY MOTTOLA-SCHACHER, JUDITH D. STUPP
GREGORY C. SOUMAS AND MARYANN YENELLA,**
Commissioners, Constituting the Board of Elections
in the City of New York,

Respondents.

For an Order pursuant to the Election Law Section 16-106,
16-112, Article 8 and Article 9, directing the respondent
Board of Elections in the City of New, to preserve and
Protect the absentee, military and affidavit ballots cast,
And to protect and secure the Voting Machines used in
The Special Election held on the 24th day of February, 2009
For the Public Office of Member of the Council of the City
Of New York 32nd District.

-----x
TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Upon the annexed petition of ERIC A. ULRICH, petitioner/candidate, duly verified on
the 25 day of February 2009, and all the papers and proceedings heretofore had herein, it is:

**NO MOTION FEE,
FILED ON
COMMENCEMENT.**

**ORDER TO SHOW CAUSE
TO SECURE BALLOTS**

Index No. 4433/2009

RECEIVED
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IN THE CITY OF NEW YORK
2009 FEB 26 P 1:34

ORDERED that the respondents SHOW CAUSE before this Court at an ~~Special~~ ^{Special} Election Part 33 in Room B10 at the Courthouse located at ~~88-11 Sutphin Boulevard,~~ ^{25-70 COURT SQUARE} ~~June 10,~~ ^{LIC} New York on the ~~10th~~ ^{and} day of ~~February~~ ^{March} 2009 at ~~10:00~~ ^{10:00} o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why an order should not be made directing the Board of Elections in the City of New York to:

DATE

1. Preserve those undetermined "paper ballots" objected to by petitioner or petitioners designees in the sealed envelope containing said ballots together with the voters information thereon, and **not cast** by the respondent Board of Elections, for further judicial review.
2. Preserve those "paper ballots" objected to by the petitioner or petitioners designees, and **otherwise cast** by the respondent Board of Elections, by making an exact photocopy of the ballot prior to casting the same and placing said photocopy in the original voter's envelope, sealing said envelope and placing that envelope with the ballots objected to and not cast, for further judicial review.
3. Provide at the count of the "paper ballots" the polling records, registrations record and absentee ballot applications, of the voters in the 32nd Council District, for review by the petitioner or his designees to determine compliance with the Election Law of the State of New York.
4. Protect, secure and seal the voting machines used in the special election in the 32nd Council District including the counters and mechanisms therein pending further order of this Court.
5. And for such other and further relief as to this Court may seem just and proper, and it is further:

SUFFICIENT REASON APPEARING THEREFORE, let service of a copy of this order and the papers upon which it was granted be deemed timely and sufficient service if made as follows:

DATE

1. Upon the respondent Board of Elections in the City of New York, at 32 Broadway New York, New York, on or before February 27 2009, by delivering to and leaving a true copy of this Order and annexed papers with one of the members, or the chief clerk, or deputy chief clerk, or such other person as may be designated by the board to receive such service.

DATE

2. On respondent candidates, by depositing on or before February 21 2009 in a branch Post Office or post office box, regularly maintained by the United States Postal service, a true copy of this Order and the annexed papers securely enclosed in a duly postpaid wrapper addressed to said candidates at the residence address set forth in their Independent Nominating Petition by U.S. Postal express mail next day delivery, or by Federal Express Overnight Delivery or by UPS Express Overnight Delivery.

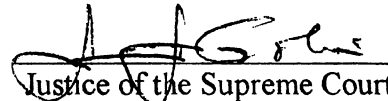
UPFRONT
ORDER

~~ORDERED, That the Board of Elections shall produce on the return of this Order to Show Cause and on any adjourned date, the aforesaid ballots, affidavits, applications for absentee ballots, and the official poll enrollment and registration records of all voters in the 32nd Council District of the City Council of the City of New York, as objected to and preserved hereinabove and any other papers, records, reports and findings pertaining to said ballots.~~

JG
JSC

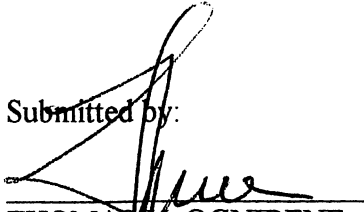
Dated: February 25 2009

SO ORDERED,


Justice of the Supreme Court

HON. JAMES J. GOLIA

Submitted by:



THOMAS V. OGNIBENE
Attorney at Law
Office & P.O. Address
64-82 83rd Street
Middle Village New York 11379
Tel: (718) 894-7070
Fax: (718) 355-9126

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X

In the Matter of the Application of,

ERIC A. ULRICH

Candidate/Petitioner,

-against

**MIKE RICATTO, LEW SIMON and
GERALDINE CHAPEY,**

Candidates/Respondents,

-and-

**FREDERIC M. UMANE, JULIE DENT,
JAMES J. SAMPEL, JOSE MIGUEL ARAUJO,
JUAN CARLOS "J.C." POLANCO, NAOMI C. SILIE
NANCY MOTTOLA-SCHACHER, JUDITH D. STUPP
GREGORY C. SOUMAS AND MARYANN YENELLA,**
Commissioners, Constituting the Board of Elections
in the City of New York,

Respondents.

For an Order pursuant to the Election Law Section 16-106,
16-112, Article 8 and Article 9, directing the respondent
Board of Elections in the City of New, to preserve and
Protect the absentee, military and affidavit ballots cast,
And to protect and secure the Voting Machines used in
The Special Election held on the 24th day of February, 2009
For the Public Office of Member of the Council of the City
Of New York 32nd District.

-----X

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petitioner **ERIC A. ULRICH**, by his attorney Thomas V. Ognibene, an attorney duly licensed to practice law in the State of New York, affirms under penalty of perjury and respectfully alleges and shows this Court on information and belief as follows:

1. That the petitioner was and is a candidate for election to the Public Office of Member of the City Council in the City of New York 32nd District, **Queens County** voted at the Special Election, held on the 24th day of February 2009.
2. That at said election there were four candidates as follows:
 - a. The petitioner, ERIC A. ULRICH, People First Party , residing at 101-24 91 Street Ozone Park, N.Y. 11416
 - b. MIKE RICATTO, Voice of the People Party, residing at 132-22 Cross Bay Boulevard, Ozone Park, N.Y. 11417.
 - c. LEW SIMON, Good Government Party, 134 Beach 122 Street Rockaway Park, N.Y. 11694
 - d. GERALDINE CHAPEY, Community First Party, 107-10 Shore Front Parkway, Rockaway Park Apt. 9H N.Y. 11694
3. That at all times hereinafter mentioned, **THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK** was and is charged with the responsibility of the supervision of the conduct of official elections held in the City of New York, including the counting and tallying of all votes cast in the election, including the voting machine count, the “re-canvass” of said machines and the canvass of absentee, military and special ballots and ballots cast by voters with registration poll records missing on the day of the election, or voters who have not had their identity previously verified or have moved after registering (hereinafter referred to as the “paper ballots”), for the Public Office of Member of the City Council in the City of New York 32nd District, voted at the Special Election, held on the 24th day of February 2009, pursuant to New York State Election Law Section 9-209.
4. That subsequent to the closing of the polls at 9p.m. on February 24th 2009 the Board of Elections performed a count or tally of the votes on the voting machines used in the 32nd Council District as follows:
 - a. ERIC A. ULRICH, People First Party.....3329
 - b. MIKE RICATTO, Voice of the People Party.....659
 - c. LEW SIMON, Good Government Party.....2577
 - d. GERALDINE CHAPEY, Community First Party.....866

5. The Board of Elections has not conducted a “recanvass” of the voting machines and there is no official machine count, and on information and belief there remains a sufficient number of uncounted “paper ballots” to change the result of the “unofficial” machine count as detailed in paragraph “4” hereinabove.
6. Pursuant to Election Law Section 9-209 the Board of Elections must conduct a canvass or count of said ballots not later than eight (8) days after the February 24th, 2009 Special Election.
7. At that canvass or count the designated inspectors appointed by the Board of Elections have the exclusive authority pursuant to New York State Election Law to determine the eligibility of any voter and the validity or invalidity of any ballots so cast by such voters.
8. Your petitioner or his designee may be present at such canvass or count and may object to the refusal to canvass or count any ballot on the grounds that such voter is a properly qualified voter in the 32nd Council District, or to the casting or canvassing of any ballot on the grounds that the voter is not a properly qualified voter in the 32nd Council District, including but not limited to, referring to the polling records, registration records and applications for absentee ballots for the voters in the 32nd Council District to determine if those records conform to the requirements of the Election Law of the State of New York.
9. When any such objection is made, the Board of Elections inspectors shall proceed to determine such objection as follows:
 - a. If the Board inspectors cannot agree on the validity of the ballot (undetermined), they may set the ballot aside for three days, at which time the ballot may be opened and counted.
 - b. If the Board inspectors agree that the ballot is valid they may open the ballot envelope and cast the ballot immediately.
10. In either case, once the ballot has been separated from its sealed envelope and cast, there is no mechanism to further evaluate its validity and no opportunity for judicial review.
11. Accordingly the petitioner is herein requesting that an order issue not only preserving those ballots which the Board of Elections inspectors could not

determine the validity thereof (As per paragraph 9 a. above), but further requiring the Board of Elections to preserve those ballots they determine to be valid (as per paragraph 9.b above), by following the procedure established in O'KEEFE v.GENTILE, 1Misc. 151, 757 N.Y.S. 2nd 689, Supreme Court Kings County 2nd department, (a copy of which is annexed hereto for the convenience of the Court), by photocopying the cast ballot and resealing it in its original envelope and placing it with the "undetermined" ballots.

12. **It is expected that the Board of Elections may begin the count of such ballots on Tuesday March 3rd, 2009 and your deponent respectfully requests a return date prior to such count.**
13. Furthermore, since the machine vote is not official until the recanvass pursuant to Election Law 9-208, your petitioner respectfully requests that the respondent, Board of Elections in the City of New York be directed to **IMMEDIATELY** protect secure and seal the voting machines used in the special election in the 32nd Council District including the counters and mechanisms therein to prevent tampering therewith, pending a further order of this Court.
14. The petitioner has no other remedy in law or equity except as prayed for herein.
15. No other application for the relief herein requested has been made to any other court in any jurisdiction.

WHEREFORE the petitioner respectfully prays for an order directing the **Board of Elections in the City of New York to:**

1. Preserve those "paper ballots" objected to by petitioner or petitioner's designees in the sealed envelope containing said ballots together with the voters information thereon, and **not cast** by the respondent Board of Elections because their inspectors could not agree as to the validity thereof, for further judicial review.
2. Preserve those "paper ballots" objected to by the petitioner or petitioner's designees, and **otherwise cast** by the respondent Board of Elections, by making an exact photocopy of the ballot prior to casting the same and placing said photocopy in the original voter's envelope, sealing said

envelope and placing that envelope with the ballots objected to and not cast, for further judicial review.

3. Provide at the count of the “paper ballots”, the polling records, registrations record and absentee ballot applications, of the voters in the 32nd Council District for review by the petitioner or his designees to determine compliance with the Election Law of the State of New York.
4. Protect, secure and seal the voting machines used in the special election in the 32nd Council District including the counters and mechanisms therein pending further order of this Court.
5. And for such other and further relief as to this Court may seem just and proper.

Dated: Middle Village, New York
February 2009

Yours, etc.,

THOMAS V. OGNIBENE
Attorney at Law
Office & P.O. Address
64-82 83rd Street
Middle Village New York 11379
Tel: (718) 894-7070
Fax: (718) 355-9126

Docket 7105/2003

Westlaw

1 Misc.3d 151
1 Misc.3d 151, 757 N.Y.S.2d 689, 2003 N.Y. Slip Op. 23466
(Cite as: 1 Misc.3d 151, 757 N.Y.S.2d 689)

Page 1

Supreme Court, Kings County, New York.
In the Matter of Rosemarie O'KEEFE, as a Candidate for the Public Office of Member of the Council of the City of New York from the 43rd Councilmatic District, County of Kings, Petitioner,
v.
Vincent GENTILE, et al., Respondents.
March 4, 2003.

Genadi Dushbar, Brooklyn, for Stephen Harrison, respondent.
Ezra Glaser, Brooklyn, for Carlo Scissura, respondent.
Michael A. Cardozo, Corporation Counsel (Paul Marks of counsel), for Board of Elections in City of New York and another, respondents.
Robert Allan Muir, Brooklyn, for petitioner.
Steven Richman, New York City, for New York City Board of Elections/Brooklyn Committee.

In proceeding to preserve and secure all absentee ballots, official military ballots, federal ballots, emergency ballots, and affidavit ballots, used in special election, the Supreme Court, Kings County, Special Election Part, Albert Tomel, J., held that preservation of challenged ballots was necessary to ensure effective judicial review of elections inspectors' findings that ballots should be counted.

ALBERT TOMEL, J.
***152** In this proceeding brought pursuant to Article 16 of the Election Law to preserve and secure all absentee ballots, official military ballots, federal ballots, emergency ballots, and affidavit ballots, used in the Special Election held on February 25, 2003 for the public office of Member of the Council of the City of New York from the 43rd Council District County of Kings the court finds as follows:

Ordered accordingly.

West Headnotes

On February 25, 2003, a Special Election was held for the public office of Member of the Council of the City of New York from the 43rd Council District. On February 28, 2003, the City Board of Elections conducted a recanvass of the voting machines. After the recanvass, the machine vote total for each candidate in the 43rd Council District was as follows: Rosemarie O'Keefe, 3077 votes; Vincent Gentile, 3,043 votes; Joanne Seminara, 2632 votes, Stephen Harrison, 751 votes; and Carlo Scissura, 674 votes. As of March 1, 2003, the City Board of Elections had received approximately 700 paper ballots, including absentee and/or military ballots, emergency ballots and affidavit ballots. The canvass of the paper ballots is scheduled to commence on Wednesday, March 5, 2003.

Elections 144 ↪ 255

III Elections

144-145 Count of Votes, Returns, and Canvass
144-145 k. Preservation or Disposition of Ballots. Miscellaneous Cases
Preservation of challenged ballots was necessary to ensure effective judicial review of city board of elections inspectors' findings that ballots should be counted; under current procedure, if inspectors agreed not to sustain objection, although envelope was indorsed, ballot was removed from envelope and counted, and there was no method for linking ballot to particular envelope. *Mickney v. Election Law Bd.*, 2003 WL 12, page 1, 16-112.

Under the canvassing procedure set forth in the Election Law, the Paper ballots are counted by two Board of Elections inspectors (board of inspectors), one Democrat and one Republican. The board inspectors decide, in the first instance, whether or not the information accompanying the ballot is suffi-

****689** Thomas G. Fry, New York City, and Henry J. Berge, New York City, for Vincent J. Gentile, respondent.

****690** John W. Carroll, New York City, for Joanne Seminara, respondent.

cient to allow it to be counted. Section 2-212 of the Election Law ***153** states that any party lawfully present may object to the casting or canvassing or the refusal to cast or canvass any ballot. That section goes on to provide that, when such an objection is made, the board of inspectors shall "proceed to determine such objection and reject or cast [count] such ballot according to such determination." If the two inspectors agree to sustain the objection, the envelope is not opened and the ballot is not canvassed. However, in the event that the two inspectors agree not to sustain an objection, although an endorsement to that effect must be endorsed on the envelope, the ballot is removed from the envelope and canvassed (counted).

It is with respect to this latter situation, that the attorneys for the interested candidates seek relief from this court pursuant to ***154**. The candidates' attorneys argue that if there is no judicial review before a challenged ballot is counted, as a practical matter, there would never be any meaningful judicial review of an objection that the vote was being improperly cast because, once a ballot has been counted, there is no mechanism for specifically linking that ballot to a particular envelope. Therefore, there is no method by which the court, upon determining that a particular envelope was defective, could order that the ballot not be counted. In opposition, the City Board of Elections, relying primarily upon ***691**, argues that this court lacks the authority to vary the statutory procedure set forth in ***155** for the judicial review of ballots challenged by a candidate or his or her representative.

Pursuant to ***156**, this court, on such conditions as may be proper, is authorized to direct the examination of any ballot or voting machine on which a candidate's name appeared, and the preservation of any ballots in view of a prospective contest. As the candidates' attorneys correctly note, once a challenged ballot is separated

from the information submitted by the voter on the envelope and counted, this court's judicial review pursuant to Election Law § 2-212 is rendered ineffective. Indeed, once the ballot is counted among the others, it is questionable if there could be any meaningful judicial review in the event the court finds that a particular voter was not entitled to cast a ballot. Furthermore, since such defects, if any, would not appear on the face of the ballot, a subsequent recanvass would be futile (*see Matter of Progress of Monroe County Election Counters v. Board of Inspectors of Monroe County Board of Elections*, 199 AD2d 213, 757 N.Y.S.2d 689, 2003 N.Y.S.2d 689).

***154** Under these circumstances, the court finds it appropriate to take steps to preserve the challenged ballots for an effective judicial review of the board of inspectors' determination. As stated by the court in *People v. Board of Inspectors of City of New York*, 199 AD2d 213, 757 N.Y.S.2d 689, "[i]f such is not done and the proposed objections are disallowed by the board of inspectors, any judicial review of that determination will be thwarted by the deposit of the ballot in the ballot box." Thus, the court hereby orders that, if the objections are made and are not sustained by the Board of Inspectors, the latter shall open each such envelope and make a photocopy of the ballot before canvassing the ballot, then place the photocopy of the ballot in the envelope, reseal the envelope and endorse on the envelope a notation that the objection was not sustained and that the ballot has been canvassed and a photocopy thereof resealed pursuant to this order.

Contrary to the City Board of Elections' contention, the Second Department's decision in *People v. Board of Inspectors of City of New York*, 199 AD2d 213, 757 N.Y.S.2d 689, does not dictate a different result here. In that case, four Democratic mayoral candidates, Fernando Ferrer, Mark Green, Alan G. Hevesi and Peter F. Vallone had asked the court, *inter alia*, to establish a procedure allowing for expedited judicial review of Board of Elections rulings as to whether a paper ballot

1 Misc.3d 151

1 Misc.3d 151, 757 N.Y.S.2d 689, 2003 N.Y. Slip Op. 23466

(Cite as: 1 Misc.3d 151, 757 N.Y.S.2d 689)

Page 3

should be counted. The key dispute between the four candidates and the Board of Elections was over whether challenges to the board of inspectors' decisions concerning the counting of a paper ballot could be immediately taken to a judge. The Queens Administrative Judge, Steven W. Fisher, appointed a judge to sit at the Board of Elections to immediately rule on individual objections to the Board's decision on paper ballots. On appeal, the Appellate Division held that Justice Fisher had no authority to modify the statutory procedure set forth in *Section 1-100* for judicial review of challenged ballots, or the authority to vary the Board of Elections' statutory procedure for the canvassing of affidavit ballots (see *Section 1-100*). Justice Fisher's order, which provided for an immediate review of challenged ballots, precluded the board of inspectors from rejecting or counting a challenged ballot in the first instance, as set forth in *Section 1-100*, thus, resulting in a modification of the statute.

Here, however, the remedy fashioned by this court-requiring the Board of Elections, in the event the two members of the board inspectors**692 agree that a challenged ballot should be counted, to make a copy of the ballot before it is counted and *155 seal it back inside the ballot envelope-effectively preserves the ballot for judicial review, and in no way modifies the statutory procedure for judicial review or impinges upon the board of inspectors' ability to make a determination and count challenged ballots.

For the reasons stated herein, it is hereby ordered, that in the event the board of inspectors does not sustain an objection to a ballot, if made, that the board of inspectors shall open each such envelope and make a photocopy of the ballot before canvassing the ballot, and then place the photocopy of the ballot in the envelope and reseal the envelope and endorse on the envelope a notation that the objection was not sustained and that the ballot has been canvassed pursuant to this order.

N. Y. Sup., 2003.

O'Keefe v. Gentile

1 Misc.3d 151, 757 N.Y.S.2d 689, 2003 N.Y. Slip Op. 23466

END OF DOCUMENT

VERIFICATION

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

THOMAS V. OGNIBENE, being duly sworn, deposes and says:

That deponent is an Attorney at Law duly licensed to practice law in the State of New York and makes this affirmation under penalty of perjury. Deponent is the attorney of record for the the petitioner/candidate ERIC ULRICH in the within proceeding and resides at 64-82 83rd Street Middle Village NY 11379; that deponent has read the foregoing OSC & petition, and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, your deponent believes them to be true.

THOMAS V. OGNIBENE

AFFIRMED THIS 25TH Day of February 2009

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
In the Matter of the Application of,

ERIC A. ULRICH

Candidate/Petitioner,

-against

**MIKE RICATTO, LEW SIMON and
GERALDINE CHAPEY,**

Index No.

Candidates/Respondents,

-and-

FREDERIC M. UMANE, ET AL,
Commissioners, Constituting the Board of Elections
in the City of New York,

Respondents.

-----X
ORDER TOSHOW CAUSE WITH PETITION TO SECURE BALLOTS

Pursuant to 22 NYCRR 130-1-1, the undersigned, an attorney duly admitted to practice in the Courts of the state of New York, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document or not Frivolous.

THOMAS V. OGNIBENE
Attorney at Law
Office & P.O. Address
64-82 83rd Street
Middle Village New York 11379
Tel: (718) 894-7070
Fax: (718) 355-9126

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IN THE CITY OF NEW YORK
2010 FEB 26 P 1:34

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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D22377
G/kmg

AD3d

Argued - February 23, 2009

ROBERT A. SPOLZINO, J.P.
ANITA R. FLORIO
HOWARD MILLER
RANDALL T. ENG, JJ.

2009-01663

DECISION & ORDER

In the Matter of John A. Tabacco, appellant, v
John W. Vitucci, et al., respondents.

(Index No. 80054/09)

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G.O. BOARD OF ELECTIONS
IN THE CITY OF NEW YORK
2009 FEB 23
PM 2:18

In a proceeding pursuant to Election Law § 16-102, *inter alia*, to validate independent nominating petitions nominating John A. Tabacco as the candidate of the No Tax Party in a special election to be held on February 24, 2009, for the public office of Member of the New York City Council, 49th Council District, the petitioner appeals from a final order of the Supreme Court, Richmond County (Giacobbe, J.), dated February 20, 2009, which confirmed the report of a referee (D'Oca, R.), made after a hearing, and thereupon denied the petition, in effect, dismissed the proceeding, and directed the Board of Elections in the City of New York not to place his name on the appropriate ballot.

ORDERED that the final order is reversed, on the law, without costs or disbursements, the petition is granted, the independent nominating petitions are validated, and the Board of Elections in the City of New York is directed to place the name of John A. Tabacco on the appropriate ballot.

Under the particular facts of this case, including the initial validation of the independent nominating petitions by a committee of the Board of Elections in the City of New York (hereinafter the Board of Elections), which would result in the placement of the petitioner's name on the ballot, there was no basis for the Board of Elections to reconsider the issue of the sufficiency of the signatures (*see Matter of Pataki v Hayduk*, 87 Misc 2d 1095, *aff'd* 55 AD2d 861).

SPOLZINO, J.P., FLORIO, MILLER and ENG, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

February 23, 2009



Appellate Division
Supreme Court of the State of New York
Second Judicial Department
45 Monroe Place
Brooklyn, N.Y. 11201
(718) 875-1300

A. GAIL PRUDENTI
PRESIDING JUSTICE
JAMES EDWARD PELZER
CLERK OF THE COURT

MEL E. HARRIS
SUSAN H. HARKAVY
MARY-ELLEN SKENYON
DEPUTY CLERKS
MATTHEW KIERNAN
APRILANNE AGOSTINO
ASSOCIATE DEPUTY CLERKS

RECEIVED
GO BOARD OF ELECTIONS
IN THE CITY OF NEW YORK
2009 FEB 23 PM 5:18

FACSIMILE TRANSMITTAL

To: Steve Richman Fax #: 212-487-5342
Company: Bd of Elections Date: 2/23
From: Sue Harkavy Time:
Tot. # Pages: A.D. Fax #: (718) 858-2446

Urgent For Review Please Comment Please Reply As Requested

Comments:

*Tabacco Election Appeal
Decision*

URGENT

Comm Mtg
FY2

To be argued by: Janice Birnbaum,
Assistant Corporation Counsel
Time Requested: 10 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
In the matter of

JOHN A. TABACCO, Candidate Aggrieved,
Petitioner/Appellant,

Appellate Division

Docket No. 2009/1663

-against-

JOHN W. VITUCCI, Objector, and
THE BOARD OF ELECTIONS IN THE CITY OF
NEW YORK,

Respondents/Respondents.
-----X

-----X
**MEMORANDUM OF LAW OF RESPONDENT/RESPONDENT
BOARD OF ELECTIONS IN THE CITY OF NEW**

MICHAEL A. CARDOZO

Corporation Counsel for the City of New York

Law Department of the City of New York

By: Janice Birnbaum, Assistant Corporation Counsel

Cheryl Payer, Assistant Corporation Counsel

Counsel for Respondent/Respondent Board of

Elections in the City of New York

100 Church Street

New York, NY 10007

(212) 513-7970 (Birnbaum)

Richmond County Index No. 80054/2009

TABLE OF CONTENTS

Counterstatement of the Nature and Facts of this Case1

LEGAL ARGUMENT

POINT ONE

THE COURT SHOULD AFFIRM THE TRIAL COURT’S ORDER
DENYING THE PETITION AND ORDERING RESPONDENT
BOARD TO KEEP PETITIONER/APPELLANT’S NAME OFF
THE BALLOT FOR THE SPECIAL ELECTION FOR THE
PUBLIC OFFICE OF CITY COUNCIL MEMBER FROM THE
49TH COUNCIL DISTRICT.....6

CONCLUSION 13

APPENDIX

Petitioner/Appellant Tabacco's Papers Below

Order to Show Cause
Verified Petition

Respondent/Respondent Vitucci's Papers Below

Notice of Motion
Verified Reply of John Vitucci
Affirmation of Christopher P. Nalley, Esq.

Respondent/Respondent Board of Elections in the City of New York's Papers Below

Affirmation of Steven H. Richman
Affidavit of Marcus Cederqvist
Affirmation of Janice Birnbaum

Documents Admitted into Evidence (These documents are in the possession of the Supreme Court of State of New York, Richmond County, and upon information and belief, have been subpoenaed by Petitioner/Appellant for this appeal.)

Special Referee's report
The nominating petitions for Petitioner/Appellant maintained by Respondent/Respondent Board
Respondent/Respondent Vitucci's objections filed with the Board
The affidavits by Petitioner/Appellant's subscribing witnesses concerning residence

In addition, two additional sets of exhibits were offered by Petitioner/Appellant, were marked as exhibits, but were not admitted into evidence. They are 22 unnotarized statements and certain internet searches, apparently concerning various signatories whose addresses were objected to, where the objections were sustained.

COUNTERSTATEMENT OF THE NATURE AND FACTS OF THIS CASE

In January 2009, Petitioner/Appellant John A. Tabacco filed with Respondent/Respondent Board of Elections in the City of New York (hereinafter “Board”), nominating petitions for his candidacy for the public office of City Council member, 49th Council District, running on the No Tax Party, for the special election to be held on February 24, 2009. *Verified Petition*, ¶4. Thereafter, Respondent/Respondent John Vitucci filed objections to Petitioner/Appellant’s nominating petitions, (*id.* at ¶5), which resulted in the staff of the Board’s Staten Island office preparing a report on said nominating petitions in light of Respondent Vitucci’s objections (*id.* at ¶6).

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Although Petitioner/Appellant argues he was not notified that the review at the Board's Staten Island office would begin the next day (February 4, 2009), he acknowledges that he was present at the February 3rd meeting at which the February 4th review was directed. Moreover, at least three persons who were present at the February 3rd meeting attested to Petitioner/Appellant being present when the Clerk's review was directed to begin on the morning of February 4. *See* Affidavit of Marcus Cederqvist, ¶6; Affirmation of Steven H. Richman, ¶5; Affirmation of Christopher P. Nalley, ¶¶8-10. Moreover, Respondent Vitucci and his representative appeared on time for the review, but Petitioner/Appellant did not. Finally, even Petitioner/Appellant acknowledges that he received a telephone call at 11:45am on February 4 from the Board's Deputy Chief Clerk of Staten Island asking where he was. *Verified Petition*, ¶12. The Deputy Chief Clerk advised Petitioner/Appellant that Respondent Vitucci and his representatives were present at the Board's Staten Island office and were waiting for Petitioner/Appellant so that the review could begin. *Id.*; *see also*, Richman Affidavit, Exhibit A. (Official email of Respondent Board by Sheila Del Giorno, Chief Clerk, of the Board's Staten Island office, dated February 5, 2009.)

During the period of February 4-5, 2009, the Board conducted a recount of the signatures on Petitioner/Appellant's nomination papers, met with Petitioner/Appellant and his representative, along with Respondent Vitucci and his

representatives, and thereafter issued an amended Clerk's report. *Id.* at ¶13; Exhibit A and Exhibit B, (Amended Clerk's Report dated February 5, 2009). The Amended Clerk's Report reported that the petition contained 2666 signatures, of which 912 were valid. *Verified Petition*, ¶16; Richman Affirmation, Exhibit B. As Petitioner/Appellant concedes, 1367 valid signatures are needed to qualify to be placed on the ballot for the special election at issue.

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Report. The committee was composed of the four Board members who were available on February 12, the first day to schedule the hearing and provide notice to all. Richman Affirmation, ¶9.

Petitioner/Appellant had notice of the February 12th hearing, appeared at it with his counsel, and presented argument in favor of his maintaining placement on the ballot. *Verified Petition*, ¶¶32-35. Three committee members voted to adopt the Amended Clerks' Report concerning Petitioner/Appellant's petition and one abstained. *Id.* at ¶37. This resulted in the removal of Petitioner/Appellant's name from the ballot. Written notice of this determination was given to the Petitioner/Appellant.

On February 13, Petitioner/Appellant filed an order to show cause and verified petition seeking an order reinstating his name to the ballot. The order to show cause was returnable on February 19, before the Honorable Anthony I. Giacobbe. On the return date, Respondent Vitucci cross-moved to dismiss the petition because Petitioner/Appellant failed to present evidence from which to conclude that he had the requisite number of signatures to be on the ballot. Respondent Board opposed the petition and submitted supporting sworn statements from two people who attended the February 3rd meeting (Board Executive Director Marcus Cederqvist and Board General Counsel Steven Richman) attesting, *inter alia*, that Petitioner/Appellant and his representative were present when the Board

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The review began that afternoon and continued until 7:00p.m. when it was completed. The Special Referee took live testimony from one of Petitioner/Appellant's subscribing witnesses who was present at the review and whose residence was being challenged. The Special Referee also accepted two affidavits provided by Petitioner/Appellant providing similar documentation. The Special Referee also conducted a line by line review of the contested signatures at issue with Petitioner/Appellant and Respondent Vitucci.

All parties appeared in Court the following day, February 20, at which time the Court heard the report of the Special Referee, heard additional oral argument, and admitted certain evidence. The Special Referee's report was heard and confirmed, which found that Petitioner/Appellant had 1163 valid signatures, 204 signatures less than the required amount of 1,367. *See* Order dated February 20, 2009. The Court issued the Order at approximately 12:30p.m. and this appeal was filed the same day.

LEGAL ARGUMENT

POINT ONE

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER DENYING THE PETITION AND ORDERING RESPONDENT BOARD TO KEEP PETITIONER/APPELLANT'S NAME OFF THE BALLOT FOR THE SPECIAL ELECTION FOR THE PUBLIC OFFICE OF CITY COUNCIL MEMBER FROM THE 49TH COUNCIL DISTRICT

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Petitioner/Appellant is mistaken. Under N.Y. Election Law § 6-154(2), Respondent Board is "empowered to make rules in reference to the filing and disposition of such [challenged nominating] petition, certificate, objections and specifications." On December 30, 2008, the Board adopted the *Independent*

Nominating Petition Rules for February 2009 City Council Special Elections, which it published widely. See Birnbaum Affirmation, Exhibit C, published at <http://www.vote.nyc.ny.us/pdf/documents/boe/AdoptedIndependentNominationRulesForFeb2009CityCouncilSpecialElections.pdf>. Rule J6 specifically provides:

The Board may reconsider any determination or the determination of any committee of the Board. In such event, the Board will provide notice to any objector, candidate and representative.

The Board notes that although Petitioner/Appellant does not directly question the Board's power to appoint a committee composed of less than all members to act on behalf of the Board, any such challenge is without merit since the Board is statutorily so-empowered under N.Y. Election Law § 3-212(5), as follows:

The board of elections of the city of New York, upon the affirmative vote of six commissioners, may adopt rules authorizing a number of commissioners less than the total membership of the board to act on behalf of the board on matters required to be performed by board of elections pursuant to the provision of this chapter, provided that such number shall be comprised of commissioners representing equally the two political parties entitled to representation on the board.

Hence, the statutory and regulatory scheme for the 2009 City Council special elections specifically empowered Respondent Board to appoint the second

committee to reconsider the Amended Clerks' Report. N.Y. Election Law §§ 6-154(2), 3-212(5), and Rule J5 and J6. Petitioner/Appellant did not address the statutory and regulatory scheme in his petition or in his appeal papers. The latter failure is particularly telling since both respondents-respondents raised the scheme in their opposition papers submitted to the trial court.

In addition, the relevant case law supports the Board's position. In *McDonell v. Cohen*, 252 A.D. 277 (1st Dept.), *aff'd*, 275 N.Y. 644 (1937), which is directly on point, the Appellate Division, First Department, ruled as follows:

The board of elections [in the City of New York] were within their rights when they reconsidered their original determination and rejected the petition. This ruling cast on the appellants the burden of establishing that the petition contained the required number of valid signatures. It was conceded upon the argument that this was not established by the record before us. The record does contain affirmative proof tending to support the ruling of the board.

The orders should be affirmed.

(Emphasis added.) The Appellate Division's ruling was affirmed by the Court of Appeals without opinion. *Id.*, 275 N.Y. 644-45 (1937).

Further, section 363 of N.Y. Jur.2d Elections is to the same effect:

Where a petition is invalid, it remains invalid even though it has been received and filed by the board of elections. The board of elections has not only the p

but also the mandatory duty to investigate and reject petitions which do not comply with the Election Law, and it is not bound by the time limit for filing objections to a petition. In other words, it must act and investigate, and if the petition is valid, place the name of the candidate on the ballot; if invalid, reject the petition; and it should act whether the objections are or are not filed. **Moreover, a board may reconsider its original determination and reject a petition, provided that it acts prior to the date of the primary election,** and any action taken by the board to invalidate a party designating petition after the primary election is invalid and void.

(Emphasis added.)

Petitioner's argument that the Board's reconsideration was illegal – to wit, *functus officio* – is without merit for two reasons. First, an entity is *functus officio* and therefore is without power to act, only when it has completed its appointed task and made its determination. In this case, the first committee deadlocked on whether to adopt the Amended Clerks' Report. It did not complete its task or make a determination. *Contrast, Schwartz v. Heffernan*, 304 N.Y. 474, 480 (1952) (When the clerk's report on Petitioner's petition showed 3,092 signatures of which 721 were invalid, leaving 2,371 valid signatures, and that report was not challenged or disputed by objectors and was duly adopted by the board, and only 350 valid signatures were needed to be on the ballot, Petitioner's name should have been placed on the ballot. Only upon the board's completion of its examination, which showed compliance with the statute, was the board *functus officio* and bound to put Petitioner's name on the ballot.) *See also, McDonnell*, [redacted] D. at 277.

Hence, the Hon. Anthony I. Giacobbe correctly ruled here that the Board's actions were legal and appropriate.

Finally, *Pataki v. Hayduk*, 87 Misc.2d 1095 (Sup. Ct. Westchester 1976), the case on which Appellant relies, is not controlling and is factually distinguishable, for in that case the Westchester County Board of Elections twice confirmed its determination by Commissioner letter that the candidate lacked sufficient valid signatures to be on the ballot. Because the candidate failed to properly apply for judicial review, her application was denied on jurisdictional grounds. Thereafter, a third letter "for some unapparent reason" was sent advising that the candidate would appear on the ballot, which was appropriately challenged by the objector. Under these facts the trial court found the earlier Commissioner determination was *functus officio* as there was no question that a final Board determination had been made that the candidate's nominating petitions lacked sufficient valid signatures. The facts in the instant case are markedly different. There was no official determination at the committee meeting on February 6, since the Commissioners present at that meeting voted 2 to 2 on whether to adopt the Amended Clerks' Report. Four days later, on February 10, at a full Board meeting, the Board voted unanimously to reconvene a committee to review the Amended Clerks' Report on February 12, since it appeared that Petitioner/Appellant lacked sufficient valid signatures to be on the ballot. Petitioner/Appellant concedes that he received notice

of that committee meeting and that he and his counsel appeared at the meeting and presented their claims to support his remaining on the ballot. However, the committee adopted the Amended Clerks' Report by a vote of 3 in favor and one abstention. Accordingly, Petitioner/Appellant's name was properly removed from the ballot.

Second, the statutory and regulatory scheme for the 2009 City Council special elections specifically empowered Respondent Board to appoint the second committee to reconsider the Amended Clerks' Report. N.Y. Election Law §§ 6-154(2), 3-212(5), and Rules J5 and J6. As noted above, Petitioner/Appellant never addressed the statutory and regulatory scheme, not even in his appeal brief.

Petitioner/Appellant's remaining arguments are without merit. Petitioner/Appellant knew that the signatures on his petitioners were being challenged no later than January 26, 2009, the date by which Respondent Vitucci filed his objections. *See Verified Reply* of Respondent Vitucci at ¶4 dated February 18, 2009. Petitioner/Appellant was in control of the identification of those challenged signatures and their defense. That the number was winnowed down to 245 following the Special Referee's review does not change the fact that Petitioner/Appellant knew whose signatures were being objected to and why in late January, and that he had ample opportunity to identify the objector's signatories whose signatures were defensible and present his defense. He did not do so.

Accordingly, his petition was correctly denied by the trial court, and the Board's removal of his name from the ballot was correct.

Respondent Board also brings to this Court's attention the fact that it is not possible to physically add Petitioner/Appellant's name to the ballot prior to the opening of the polls tomorrow, the Special Election Day. The pertinent details are set forth in the Supplemental Affirmation of Steven H. Richman, the Board's General Counsel, which is proffered herewith.

Finally, as a matter of equity and fair play, a candidate should not be permitted to have his or her name placed on the ballot if the candidate cannot demonstrate sufficient valid signatures to qualify.

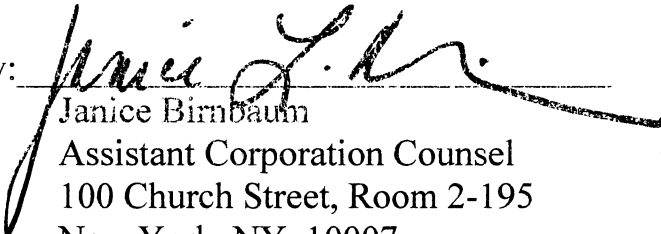
CONCLUSION

The trial court's Order should be affirmed in its entirety.

Dated: Staten Island, New York
February 23, 2009

Respectfully submitted,

MICHAEL A. CARDOZO
CORPORATION COUNSEL FOR THE CITY OF
NEW YORK
COUNSEL FOR RESPONDENT/RESPONDENT
BOARD OF ELECTIONS IN THE CITY OF
NEW YORK

By: 
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Assistant Corporation Counsel
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New York, NY 10007
(212) 513-7970

**CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)**

The foregoing memorandum of law was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes, and exclusive of pages containing the Table of Contents, proof of service, certificate of compliance, or any authorized addendums, etc. is 2,663.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
In the matter of

JOHN A. TABACCO, Candidate Aggrieved,
Petitioner/Appellant,

SIGNING
REQUIREMENT

-against-

JOHN W. VITUCCI, Objector, and
THE BOARD OF ELECTIONS IN THE CITY OF
NEW YORK,

Respondents.

On appeal from
Supreme Court of the
State of New York,
Richmond County,
Index No. 80054/2009

-----X
I hereby certify pursuant to 22 NYCRR § 130-1.1A that to the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers and the contention herein are not frivolous as defined in 22 NYCRR § 130-1.1(c).

Dated: Staten Island, NY
February 23, 2009

MICHAEL A. CARDOZO
CORPORATION COUNSEL FOR THE
CITY OF NEW YORK
Counsel to Respondent Board of Elections
in the City of New York

By: 

Janice Birnbaum

Assistant Corporation Counsel
100 Church Street, Room 2-195
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(212) 513-7970

To be argued by: Janice Birnbaum,
Assistant Corporation Counsel
Time Requested: 10 minutes

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BOARD OF ELECTIONS IN THE CITY OF NEW**

MICHAEL A. CARDOZO
Corporation Counsel for the City of New York
Law Department of the City of New York
By: Janice Birnbaum, Assistant Corporation Counsel
Cheryl Payer, Assistant Corporation Counsel
Counsel for Respondent/Respondent Board of
Elections in the City of New York
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Richmond County Index No. 80054/2009

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APPENDIX

Petitioner/Appellant Tabacco's Papers Below

Order to Show Cause
Verified Petition

Respondent/Respondent Vitucci's Papers Below

Notice of Motion
Verified Reply of John Vitucci
Affirmation of Christopher P. Nalley, Esq.

Respondent/Respondent Board of Elections in the City of New York's Papers Below

Affirmation of Steven H. Richman
Affidavit of Marcus Cederqvist
Affirmation of Janice Birnbaum

Documents Admitted into Evidence (These documents are in the possession of the Supreme Court of State of New York, Richmond County, and upon information and belief, have been subpoenaed by Petitioner/Appellant for this appeal.)

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Petitioner's argument that the Board's reconsideration was illegal – to wit, *functus officio* – is without merit for two reasons. First, an entity is *functus officio* and therefore is without power to act, only when it has completed its appointed task and made its determination. In this case, the first committee deadlocked on whether to adopt the Amended Clerks' Report. It did not complete its task or make a determination. *Contrast, Schwartz v. Heffernan*, 304 N.Y. 474, 480 (1952) (When the clerk's report on Petitioner's petition showed 3,092 signatures of which 721 were invalid, leaving 2,371 valid signatures, and that report was not challenged or disputed by objectors and was duly adopted by the board, and only 350 valid signatures were needed to be on the ballot, Petitioner's name should have been placed on the ballot. Only upon the board's completion of its examination, which showed compliance with the statute, was the board *functus officio* and bound to put Petitioner's name on the ballot.) *See also, McDonnell*, ___ N.Y. ___ (2018), ___ N.E.2d ___ (2018), ___ D. at 277.

Hence, the Hon. Anthony I. Giacobbe correctly ruled here that the Board's actions were legal and appropriate.

Finally, *Pataki v. Hayduk*, 87 Misc.2d 1095 (Sup. Ct. Westchester 1976), the case on which Appellant relies, is not controlling and is factually distinguishable, for in that case the Westchester County Board of Elections twice confirmed its determination by Commissioner letter that the candidate lacked sufficient valid signatures to be on the ballot. Because the candidate failed to properly apply for judicial review, her application was denied on jurisdictional grounds. Thereafter, a third letter "for some unapparent reason" was sent advising that the candidate would appear on the ballot, which was appropriately challenged by the objector. Under these facts the trial court found the earlier Commissioner determination was *functus officio* as there was no question that a final Board determination had been made that the candidate's nominating petitions lacked sufficient valid signatures. The facts in the instant case are markedly different. There was no official determination at the committee meeting on February 6, since the Commissioners present at that meeting voted 2 to 2 on whether to adopt the Amended Clerks' Report. Four days later, on February 10, at a full Board meeting, the Board voted unanimously to reconvene a committee to review the Amended Clerks' Report on February 12, since it appeared that Petitioner/Appellant lacked sufficient valid signatures to be on the ballot. Petitioner/Appellant concedes that he received notice

of that committee meeting and that he and his counsel appeared at the meeting and presented their claims to support his remaining on the ballot. However, the committee adopted the Amended Clerks' Report by a vote of 3 in favor and one abstention. Accordingly, Petitioner/Appellant's name was properly removed from the ballot.

Second, the statutory and regulatory scheme for the 2009 City Council special elections specifically empowered Respondent Board to appoint the second committee to reconsider the Amended Clerks' Report. N.Y. Election Law §§ 6-154(2), 3-212(5), and Rules J5 and J6. As noted above, Petitioner/Appellant never addressed the statutory and regulatory scheme, not even in his appeal brief.

Petitioner/Appellant's remaining arguments are without merit. Petitioner/Appellant knew that the signatures on his petitioners were being challenged no later than January 26, 2009, the date by which Respondent Vitucci filed his objections. *See Verified Reply* of Respondent Vitucci at ¶4 dated February 18, 2009. Petitioner/Appellant was in control of the identification of those challenged signatures and their defense. That the number was winnowed down to 245 following the Special Referee's review does not change the fact that Petitioner/Appellant knew whose signatures were being objected to and why in late January, and that he had ample opportunity to identify the objected signatories whose signatures were defensible and present his defense. He did not do so.

Accordingly, his petition was correctly denied by the trial court, and the Board's removal of his name from the ballot was correct.

Respondent Board also brings to this Court's attention the fact that it is not possible to physically add Petitioner/Appellant's name to the ballot prior to the opening of the polls tomorrow, the Special Election Day. The pertinent details are set forth in the Supplemental Affirmation of Steven H. Richman, the Board's General Counsel, which is proffered herewith.

Finally, as a matter of equity and fair play, a candidate should not be permitted to have his or her name placed on the ballot if the candidate cannot demonstrate sufficient valid signatures to qualify.

CONCLUSION

The trial court's Order should be affirmed in its entirety.

Dated: Staten Island, New York
February 23, 2009

Respectfully submitted,

MICHAEL A. CARDOZO
CORPORATION COUNSEL FOR THE CITY OF
NEW YORK
COUNSEL FOR RESPONDENT/RESPONDENT
BOARD OF ELECTIONS IN THE CITY OF
NEW YORK

By: 
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(212) 513-7970

**CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)**

The foregoing memorandum of law was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes, and exclusive of pages containing the Table of Contents, proof of service, certificate of compliance, or any authorized addendums, etc. is 2,663.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
In the matter of

JOHN A. TABACCO, Candidate Aggrieved,
Petitioner/Appellant,

SIGNING
REQUIREMENT

-against-

JOHN W. VITUCCI, Objector, and
THE BOARD OF ELECTIONS IN THE CITY OF
NEW YORK,

Respondents.

On appeal from
Supreme Court of the
State of New York,
Richmond County,
Index No. 80054/2009

-----X
I hereby certify pursuant to 22 NYCRR § 130-1.1A that to the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers and the contention herein are not frivolous as defined in 22 NYCRR § 130-1.1(c).

Dated: Staten Island, NY
February 23, 2009

MICHAEL A. CARDOZO
CORPORATION COUNSEL FOR THE
CITY OF NEW YORK
Counsel to Respondent Board of Elections
in the City of New York

By: 

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New York, NY 10007
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Comm Mt
Ky

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

-----X

In the matter of
JOHN A. TABACCO, Candidate Aggrieved,

Petitioner/Appellant,

APPELLATE DIVISION
DOCKET NO. 2009/1063

-against-

JOHN W. VITUCCI, Objector, and

THE BOARD OF ELECTIONS IN THE CITY OF NEW
YORK,

Respondents.

SUPPLEMENTAL
AFFIRMATION OF
STEVEN RICHMAN

-----X

I, STEVEN H. RICHMAN, an attorney in good standing, admitted to practice law before the courts of the State of New York, upon my oath, affirm the truth of the following statements under penalty of perjury:

1. I am the General Counsel to Respondent Board of Elections in the City of New York ("Board") in the above-captioned appeal. I submit this supplemental affirmation to address the practical issues concerning administration of tomorrow's special election in light of the emergency relief sought by Petitioner/Appellant Tabacco. I make this affirmation on the basis of information that I learned in my position as General Counsel to the Board from Board employees and contractors. I learned this information after the Hon. Anthony I. Giacobbe issued his decision and order on Friday, February 20, 2009 (the "Order").

2. Petitioner/Appellant Tabacco seeks reversal of that Order and the addition of his name to the ballot for the special election to be held tomorrow, Tuesday, February 24, 2009, for

the position of member of the City Council from the 49th Council District (which is located in Staten Island). Should this Court reverse the Order, there are a number of practical hurdles that cannot be overcome in time to add Mr. Tabacco's name to the ballot prior to the opening of the polls at 6:00 a.m. tomorrow.

3. By way of background, there are three methods to cast a ballot in New York City on an Election Day: mechanical lever machines, ballot marking devices ("BMDs"), and paper ballots. Lever machines are used by most voters. BMDs are used by voters with disabilities who cannot use the lever machines. Election Day paper ballots are used either as emergency ballots pursuant to N.Y. Election Law § 7-120 or affidavit ballots pursuant to N.Y. Election Law § 8-302(3)(c).

4. The printing and delivery of revised materials for the lever machines and Election Day paper ballots is done pursuant to City contract with Phoenix Graphics of Rochester, NY, the leading ballot printer in New York State, and will take a minimum of twenty-four to thirty-six hours after the order is placed. The timeframe for delivery of the BMD ballots, also from Rochester, is approximately twenty-four hours.

Mechanical Lever Machines and Election Day Paper Ballots

5. There are eighty-six (86) mechanical lever machines located at the forty-four (44) poll sites located within the 49th Council District.

6. If this Court orders the inclusion of Mr. Tabacco's name on the ballot, his name should be placed in the second column based on the Board's Independent Nominating Petition Rules for this special election. This means that all but one of the columns in the lever machines would have to be repositioned.

7. In accordance with N.Y. Election Law §§ 3-202 and 7-207, a bipartisan team of voting machine technicians is required to install, test and reseal each machine. That task would take a minimum of thirty (30) minutes per machine. There are no more than twenty (20) such teams available to reconfigure the machines.

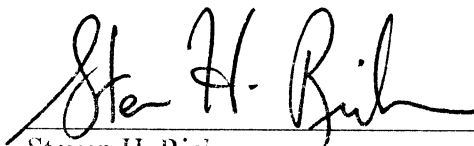
Ballot Marking Devices

8. Under New York State Board of Elections rules, a special ballot must be printed for use in a BMD. The ballot format is loaded into the device via a “smart card.” It takes approximately one hour to create the needed smart cards, including spares. The new smart cards have to be loaded and tested using the special BMD paper ballots at the poll sites by bipartisan voting machine technician teams, usually the same teams deployed to the poll sites to reconfigure the lever machines. Each BMD takes at least 45 minutes to load and test.

Conclusion

9. If this Court orders the inclusion of Mr. Tabacco’s name on the ballot, it is impossible for this Board to implement that order in time for the 6:00 a.m. opening of the polls tomorrow, Tuesday, February 24, 2009. It is the Board’s considered estimate, based on past experience, that the earliest that such an order could be implemented would be sometime in the late afternoon or early evening on February 24, 2009.

Dated: Kings County, New York
February 23, 2009



Steven H. Richman
General Counsel
Board of Elections in the City of New York

Index No. 800054/09 (Hon. Anthony I. Giacobbe, J.S.C.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the matter of JOHN A. TABACCO, Candidate Aggrieved,
Petitioner,

-against-

JOHN W. VITUCCI, Objector, and
THE BOARD OF ELECTIONS IN THE CITY OF NEW
YORK,

Respondents.

SUPPLEMENTAL AFFIRMATION OF
STEVEN H. RICHMAN

MICHAEL A. CARDOZO
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Attorney for Respondent Board of Elections in
the City of New York
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Janice Birnbaum, 212-513-7970
NYCLIS No.*

Due and timely service is hereby admitted.

New York, N.Y., 200.....

..... Esq

Attorney for.....

Comm mtg
FVZ

To Be Argued By
CHRISTOPHER P. NALLEY
Time Requested: 5 Minutes

**NEW YORK SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT**

=====

In the Matter of

JOHN A. TABACCO, Candidate Aggrieved,

Petitioner,

-against-

APP DIV
DKT.NO.

JOHN W. VITUCCI, Objector, and

**THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK**,

Respondents.

=====

BRIEF FOR RESPONDENT-OBJECTOR

=====

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Richmond County Index Number 80054/2009

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STATEMENT OF FACTS/PROCEDURAL HISTORY

Appellant JOHN A. TABACCO seeks appellate review of an Order of the Honorable Anthony I Giacobbe, Justice of the Supreme Court, Richmond County dated February 20, 2009 which denied the validating petition of the Appellant JOHN A. TABACCO, confirming the report of the Special Referee that the Appellant JOHN A. TABACCO had 204 less signatures that were required to place him on the ballot for the Special Election which is scheduled to occur on February 24, 2009 for the City Council seat in the 49th Council District which is located on Staten Island, New York.

That on or about the 15th day of January, 2009, there were filed with the BOARD OF ELECTIONS IN THE CITY OF NEW YORK (hereinafter referred to as "Board") certain papers allegedly constituting a petition purporting to be an independent nominating petition for the Special Election for the Appellant the abovementioned position.

That after the filing of the said independent nominating petition, written Objections by the Respondent JOHN W. VITUCCI (hereinafter referred to as Respondent-Objector) to the aforesaid purported independent nominating petition were filed in the office of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK timely.

Specifications of Objections were filed by the Respondent-Objector in support of the Objections to the purported independent nominating Petition with the same said BOARD OF ELECTIONS on or before the 26th day of January, 2009.

On January 26, 2009, the Respondent-Objector caused to be served by Certified Mail a duplicate copy of said Specifications of Objections upon Appellant **JOHN A. TABACCO** the candidate for the public office as set forth on said alleged independent nominating petitions.

On February 3, 2009, there was a scheduled hearing at the Board in respect to the Petition and Objections.

On February 3, 2009, on behalf of the Appellant a non-attorney representative appeared before the Board and presented a piece of paper indicating that the count in the Clerk's report for the Board of Elections was incorrect.(Affirmation of CHRISTOPHER P. NALLEY, Id., par 6¹).

Said representative alleged that if one counted of each and every individual page of the Clerk's report, the Appellant would have the requisite number of signatures. He submitted a piece of paper alleging the same. A copy of the same is

¹ Said Affirmation was part of the Respondent-Objector's reply to petition of Appellant in support of his Order to Show cause.

attached to Reply of Respondent submitted as Exhibit "A."

The Board directed the local Board to rework all of the specifications to find the correct count. (Id., par. "8").

Specifically, one of the Commissioners indicated that the Respondent Objector was to be present along with the Appellant or his representative. When asked when this would occur, it was indicated that another Candidate's specs were being worked on that day and if it couldn't be done that day, it would be done the next day at the Staten Island branch of the Board of Elections. (Id., par. "9").

At approximately 5:00 p.m., the Board informed all parties that the review of the Appellant's petition would begin any time between 9:30 a.m. and 10:00 a.m. the next morning at the local Board. (Id., par. "10").

Additionally the parties were informed that there would be a special meeting of the Board on Friday, February 6, 2008 and that a committee of four Commissioners would preside pursuant the rules of the Board that were adapted for this election. A copy of those rules was attached to Respondent's Reply papers as exhibit "B".(Id., par. "10").

Representatives of the Appellant appeared at the local Board at 9:30 a.m.

Subsequently Appellant's representatives were told by the chief clerk that none of the Appellant's representatives, or even the Appellant had appeared and that she was reaching out for the Appellant. (Id., par. "11").

Subsequently, Respondent-Objector was notified by said chief clerk that she finally talked to the Appellant at approximately 11:30 a.m. on Wednesday, February 4, 2009. The Appellant told the chief clerk that he did not know he was supposed to be at the Board of Elections on Wednesday and that he would have people there the next day. She asked if anyone could get there on that day and he said no. (Id., par. "12").

Respondent-Objector was informed by said chief clerk that Appellant was informed that because the Clerk's report had to be completed 24 hours prior to the next hearing date, that he had to come down on Thursday morning with all proof showing what signatures should be validated that were found non-validated by the Board at 9:30 a.m. so that same could be completed by 11:30 a.m., the latest. (Id., par. "13").

On Thursday morning February 6, 2008 representatives of the Appellant appeared at the local office of the Board, specifically the same non attorney representative, and that they presented no evidence to the Board, or chose not to go over the petitions line by line with employees of the Board concerning the signatures

that the Board had stricken. Rather, the same non attorney representatives who appeared in front of the Board on February 3, 2009, said he would present all his evidence to the Board at the hearing on February 6, 2009. (Id., par. "14").

On February 6, 2009, for the first time counsel appeared for the Appellant at the Board.

The chief clerk of the local Board submitted a letter to the Commissioners that was read into the record outlining her conversations with Appellant. (Id., par. "12").

The clerk's report was submitted showing that the candidate only had 912 signatures and that he was required to have 1367. Said report was attached to the Reply as exhibit "C". (Id., par. "17").

Counsel for the Appellant argued in general terms that of all of the signatures that were found not valid by the Board should be validated for the following reasons:

- a. that 110 of them were printed signatures;
- b. More than 200 were individuals that had moved and had not changed their address with the Board of Elections;
- c. four of the subscribing witnesses' addresses were different, but they had on February 3rd or 4th, filed a Change of Address with the Board of Elections. (Id., par. "18").

None of this evidence was submitted fully to the Board. It was just mentioned in general terms and a spread sheet was given indicating the signatures they thought

they should get back. (Id., par. “17”).

There was a discussion between the Commissioners and counsel concerning printed signatures, subscribing witnesses and change of addresses.

Ultimately a motion was made to accept the clerk’s report and there was a 2-2 vote as to whether the clerks report should be accepted. (Id., par. “18”).

It should noted that the Board of Elections Clerk's report was never amended at this hearing. (Id., par. “19”).

Rather, the Clerk's report stated that the Candidate only had 912 signatures when he needed 1,367 signatures. (Id., par. “20”).

During the February 6, 2009 Committee meeting, there was an issue concerning a prima facie objection that the emblem used by the Appellant was a star, which is the same emblem used by the Democratic Party in the State of New York, therefore it was in violation of Election Law Section 6-138 (3)(a). (Id., par. “21”).

It was decided by a vote of the committee that the issue of the emblem should be decided by the full Board at the next meeting date which was February 10, 2009. (Id., par. “22”).

On February 10, the full Board reconsidered the decision concerning the star emblem. The vote was 6-4 which allowed the Board of Elections to give a new emblem to the No-Tax Party. (Id., par. “23”).

It was subsequently brought to the Board's attention that the committee had voted 2-2 not to accept the Clerk's report and that the Clerk's report still indicated that the Appellant did not have the sufficient number of signatures to be placed on the ballot. The full Board had a discussion concerning this and the full Board decided to have another committee to consider this pursuant to Rule J6 of the rules adopted for this special election. (Id., par. “24”).²

Notice was given by the Board. The attorney's for the parties received a telephone that afternoon from Steven Richmond, General Counsel of the Board of Elections, a fax notification, which is attached to the Reply as Exhibit “D”, as well as a notification delivered via overnight mail, indicating that a hearing would be occur on Thursday, February 12, 2009 at 9:30 a.m. (Id., par. “25”).

On Thursday, February 12, 2009 at 9:30, all the parties appeared. Counsel for the Appellant argued that the Board should not reconsider the actions of the prior committee, and that only a full Board should decide this matter, citing several cases

² Appellant argues that hearing was closed but the Board was still meeting on other matter, albeit not concerning this Appellant's petition. It is true that both the Appellant and Respondent-Objector did leave the Board before this occurred.

concerning the same. (Id., par. “26-27”).

The President of the Commissioners of the Board of Elections who presided over this committee pointed out that pursuant to the Board of Elections rules, which were adopted for this special election, the Board may revisit a subcommittee's ruling upon full notice to all sides of argument. (Id., par. “28”).

At the February 12 hearing, Counsel for the Appellant, once again, in general terms presenting no evidence, attempted to state that the Appellant had the requisite number of signatures to put the Appellant on the ballot. They submitted in handwritten sheets various names which they submitted should be validated since some the subscribing witnesses whose addresses were not the same as the addresses in the Board of Election's records, filed a change of an address on February 3, 2009.(Id., par. “29”).

Additionally Appellant submitted a sheet that had voter registration numbers next to the names, stating that these people had moved within the district. No buff cards were presented. (Id., par. “30”).

Counsel for the Appellant admitted to the Board that even if the Board validated these signatures they would not have the requisite numbers unless the Board also validated printed signatures. (Id., par. “31-32”).

Appellant argued that printed signatures should be counted even though these signatures signed their voters' registration cards. (Id., par. "33").

The Board informed him that the policy, and the law, as the Board knows it is that if the party signs their voter registration cards but prints their name on the petition, it is not counted. (Id., par. "34").

Appellant submitted 22 unsworn statements of people who stated their printed name is also their signature.(Id., par. "35")

Appellant requested a line by line review. The Board asked Appellant why they did not present this evidence when they had the opportunity and Appellant replied they were not given the opportunity. (Id., par. "36-37").

A motion was made to accept the clerk's report and it was passed 3-0 with one abstention. (Id., par. "38").

On February 13, 2009, Appellant filed an Order to Show Cause requesting the Supreme Court to validate the petition of the Appellant and/or in the alternative declare that the Board of Elections acted arbitrary and capricious in ordering a reconsideration of the Committee of Commissioners action, or lack of action, on February 6, 2009.

Appellant submitted in exhibits “A”, “B” and “C” a list of four hundred and eight eight (488) signatures the Appellant argued that the Board was incorrect in invalidating.

Appellant alleged in his petition that two hundred and twenty-one (221) of these signatures(which he listed in his exhibit “A”) should be validated because they were struck because the subscribing witness’ address did not match the Board’s records.

Appellant further alleged in his petition that one hundred and sixty-nine (169) of these signatures(which he listed in his exhibit “B”) should be validated because they were struck because the signers’ addresses did not match the Board’s records.

Lastly Appellant argued in his petition that ninety-eight(98) of these signatures(which he listed in his exhibit “C”) should be validated because they were struck because the signers printed their name not signing them as they did in the Board’s records.

The Appellant properly served the said Order to Show Cause and the matter came before the Honorable Anthony I Giacobbe, Justice of the Supreme Court, Richmond County on February 19, 2009

Appellant argued initially, that the Court should declare that the Board acted

improperly when it reconsidered the sub committee actions on February 6, 2008.

Since the Commissioners voted 2-2 on whether the clerk's report should be accepted, no action was taken on the clerk's report, thereby resulting in the Appellant staying on the ballot.

Appellant argued that once this 2-2 vote occurred the Board became functus officio and was therefore without authority to reconsider the issue, citing various cases.

Respondent-Objector argued that pursuant to the Election the Board is authorised to make rules and regulations concerning petitions and objections to the same. (Id., par "41").

That the Board did indeed made specific rules for this petition process for this special election, which as indicated above was attached to the reply as exhibit "A" (Id., par 10)

That the Board was correct pursuant to its own rules to reconsider a decision of a sub committee.

Court reserved decision and then appointed a Special Referee to do a line by

line examination declaring the Appellant's exhibits "A" through "C" would be Appellant's Bill of Particulars.

Parties, with the Special Referee went to the Board's offices in Richmond County and conducted a line by line examination. Said examination concluded at 7:00 p.m. on February 19, 2009.

On Friday, February 20, 2009, all parties appeared at the Supreme Court.

The report of the Special Referee was read. It was slightly amended on consent of the Respondent-Objector because of two affidavits produced by the Appellant concerning two subscribing witnesses. Said report indicated that the Appellant was still short 204 signatures of the required signatures to place him on the ballot.

Respondent-Objector moved to confirm the report which was objected to by the Appellant.

After argument, the Court confirmed the report.

Court inquired whether the Appellant was ready to proceed to trial or submit any evidence.

Appellant submitted 22 unsworn statements of people who stated they printed their names as well as signing them. It should be pointed out that these 22 names were not included in the Appellant's exhibit "C". Although the said items were marked for identification, for the purpose of the record, they were not admitted into evidence and the Court was clear that the Court would not consider the same.

Further the Appellant submitted what he alleged were computed printouts which Appellant argued showed addresses for the signors consistent with the addresses they placed on the petition. Appellant argued that these documents showed that the signors moved and that their signatures should be validated.

Appellant conceded that these documents were not signed by anyone, nor were they affirmed or sworn to.

Once again for the purpose of identification Court indicated that the Court would mark same, but would not move them into evidence, nor consider them, nor give them any weight at all.

Appellant then argued once again that because of the actions of the Board, it was unable in the short period of time to come forward and present evidence. Appellant argued that if the Appellant brought forward 204 witnesses it would take more than 17 hours of testimony.

The Court pointed out that affidavits could have been presented.

Appellant argues in the short period of time from the night before to the morning of the 20th there was just not sufficient time to do so.

Court noted that this Order to Show Cause was submitted Friday, so that the Appellant had a week to obtain the evidence it needed.

Appellant argued that it did not know until the conclusion of the Special Referee's report what evidence they need.

After a brief recess the Court handed a written decision confirming the Special Referee's report finding that the Appellant was short 204 signatures.

Additionally, the Court stated that the Board clearly acted within the scope of its authority and within the bounds of applicable statutes and case law.

Furthermore the Court stated that on the record before it, it cannot be said that the Appellant was deprived of a meaningful opportunity to prosecute his case before either the Board of Elections or the Court.

POINT ONE

THE COURT'S DETERMINATION THAT THE BOARD OF ELECTIONS ACTED WITHIN THE SCOPE OF ITS AUTHORITY AND WITHIN THE BOUNDS OF APPLICABLE STATUTES AND CASE LAW WAS PROPER

Appellant argues that the Court erred when it ruled that the Board had authority to reconsider its committee's vote on the clerk's report on February 6, 2009.

Appellant argues, as it did below, that the lower court's ruling in Pataki v. Hayduk, 87 Misc. 2d 1095, 387 N.Y.S. 2d 591 (Sup. Ct. Westchester Co., 1976) should control.

It is respectfully submitted that the law in this State is that a board may reconsider its original determination and reject a petition, provided that it acts prior to the date of the primary election. New York Jurisprudence, Second Edition, Elections, § 363.

This is the ruling of McDonnell v. Cohen, 252 A.D. 277, 299 N.Y.S. 178 (1st Dep't 1937), order aff'd, 275 N.Y. 646, 11 N.E.2d 797 (1937) and order aff'd, 275 N.Y. 644, 11 N.E.2d 797 (1937).

Unlike Pataki, this case is exactly on point. The Court held "[t]he Board of

Elections were within their rights when they reconsidered their original determination and rejected the petition. This ruling cast on the appellant the burden of establishing that the petition contained the required number of valid signatures. It was conceded upon the argument that this was not established by the record before us. The record does contain affirmative proof tending to support the ruling of the board.”

Pursuant to Election Law Section 6-154 (2)”[e]ach such office or board is hereby empowered to make rules in reference to the filing and disposition of such petition, certificate, objections and specifications.”

Pursuant to Election Law Section 3-212(5):

The board of elections of the city of New York, upon the affirmative vote of six commissioners, may adopt rules authorizing a number of commissioners less than the total membership of the board to act on behalf of the board on matters required to be performed by boards of election pursuant to the provisions of this chapter, provided that such number shall be comprised of commissioners representing equally the two political parties entitled to representation on the board.

The Board adopted rules for this special election.

Rule J5 states:

Whenever there is not a quorum of Commissioners present on any day scheduled for Commissioners' hearings, a committee of the Commissioners shall rule on the Clerks' Reports. The committee is constituted pursuant to Election Law §3-212 (5). The committee shall consist of the largest equal number of Commissioners from each of the political parties represented on the Board who are available and designated by the President and Secretary of the Board, who may make such designation by telephone. In the absence of the President or the Secretary, the Commissioner of the same political party with the greatest length of service on the Board who is available shall make such designation. The President and Secretary, or senior Commissioners present shall attempt to confer with the other Commissioners of the same political party before making such designation. The committee shall serve only for that hearing date, or until a quorum of the full Board is present, whichever is shorter, unless the full Board shall provide otherwise.

Additionally, Rule J6 states:

The Board may reconsider any determination or the determination of any committee of the Board. In such event, the Board will provide notice to any objector, candidate and representative.

Therefore, once the full Board discovered that the committee did not accept the clerk's report that stated the candidate did not have sufficient number of signatures, the Board had the power, and it is respectfully submitted, acted properly under the Election Law and their rules in revisiting the issue.

How could the full Board allow a candidate on the ballot, when their own clerk's report indicated that said candidate did not have the requisite number of signatures?

Appellant argument that this reconsideration prejudiced him since he then was left in a position where he was without meaningful opportunity to present a defense to the Board's action is also not persuasive.

The Court below specifically ruled that on the record before it, it cannot be said that the Appellant was deprived of a meaningful opportunity to prosecute his case before either the Board of Elections or the Court

Specifications were filed on January 26, 2009.

Appellant had the opportunity to work these specifications and discover what problems there may or not be with his petitions and be prepared to address them.

On February 3, 2009, Appellant had that opportunity to present his case, but choose not to.

On February 4, 2009, Appellant had that opportunity to present his case, but choose not to.

On February 5, 2009, Appellant had that opportunity to present his case, but choose not to.

On February 5, 2009, Appellant had that opportunity to present his case, but choose not to. Rather he made general arguments that printed signatures should be counted.

On February 12, 2009, once again Appellant had the chance to present his case.

Appellant admitted that he needed the Board to rule that printed signatures were valid, even though the signors signed their name to their voters' registration cards.

Appellant informed the Board that he would not have enough signatures unless the Board so ruled.

He submitted only 22 statements, which were not sworn, of people who said the print their name as well as sign.

Clearly Appellant did not present credible evidence to the Board that would have validated his petition on that date.

From February 12 until February 19, 2009, the Appellant had the opportunity, with a three-day weekend in the midst of that time period to gather credible evidence to produce to the Court.

The argument that the Appellant had to wait for the Special Referee report is not persuasive.

Why wait? Why not have all your witnesses or affidavits available for the Special Referee?

Appellant specifically listed the signatures he felt should be validated and the reasons why. Therefore he knew what he was facing.

There is no question that the case law in this state is that a printed signature on a petition should be ruled invalid unless the voter's signature is similarly printed on the voters' registration card. Matter of Heffernan, 185 Misc. 742, 744, aff'd 269 AD 953, aff'd 295 NY 599.

This Court so ruled in Henry v. Trotto, 54 A.D.3d 424, 862 N.Y.S.2d 605,(2nd Dept., 2008), where this Court stated

“The Supreme Court correctly invalidated those signatures that were printed on the designating petitions where signatories had signed their registration forms in script and there was an absence of any credible evidence from them or subscribing witnesses attesting to the identity of those signatories. To prevent fraud and allow for a meaningful comparison of signatures when challenged, the signature on the

designating petition should be made in the same manner as on that signor's registration form. (Citations omitted)

Nor did the Appellant produce credible evidence concerning the 169 signatures of voters who signed the petition with a different address that was listed in the Board of Elections records.

Appellant argued that they moved within the 49th district and therefore their signatures should be counted

He submitted as his exhibit "B" various names and voter registration numbers.

The problem is that of the list he provided, 55 are registered out of the district of this election.

Here 55 people are listed as residing out of the district, not in the district as the Appellant alleged in his petition and also to the Board.

Additionally, it is respectfully submitted that the law is still that the signatures on an independent nominating petition are invalid where the addresses stated in the petition are different from those stated in the registration poll records of the election board. DiCrocco v. Power, 233 N.Y.S.2d 996 (Sup 1962), order aff'd without opinion,

17 A.D.2d 853, 233 N.Y.S.2d 1014 (2d Dep't 1962), order rev'd on other grounds, 12 N.Y.2d 762, 234 N.Y.S.2d 715, 186 N.E.2d 564 (1962)

In Robelotto v. Burch, 242 AD2d 397 (3rd Dept., 1997), a case that is most cited for the proposition that as long as the person had moved in the same jurisdiction where it would not effect his or her ability to vote, fact that his or her address is different does not invalidate the signature, evidence was presented that each of the challenged signers actually resided at the address set forth next to his or her signature. (At 398).

No evidence was produced to the Board nor to the Court that any of the listed signers in the Appellant's exhibit "B" actually resided at the address listed on the petition.

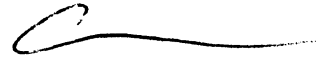
Clearly on the record before the lower court and this Court, Appellant never submitted any credible evidence which would validate enough signatures to allow this Appellant to be on the ballot Tuesday.

CONCLUSION

**THE ORDER OF THE SUPREME COURT DATED FEBRUARY 20, 2009
SHOULD BE AFFIRMED**

Dated: Staten Island, NY
February 22, 2009

RESPECTFULLY SUBMITTED



CHRISTOPHER P. NALLEY
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432 Forest Avenue
Staten Island, NY 10301
(718) 816-9060

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR 670.10.3 (f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

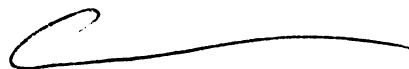
NAME OF TYPEFACE : TIMES NEW ROMAN

POINT SIZE: 14

LINE SPACING: DOUBLE

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 4270.

Dated: February 22, 2009



CHRISTOPHER P. NALLEY
Attorney for the Respondent

Commb
Fvz

To be argued by:
Vincent J. Messina Jr., Esq.
Time Requested: 15 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
In the matter of
JOHN A. TABACCO, Candidate Aggrieved,
Petitioner(s),

-against-

APP DIV
DOCKET NO.

JOHN W. VITUCCI, Objector, and

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,

Respondents.

-----X

BRIEF OF APPELLANT JOHN A. TABACCO

Respectfully submitted,

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Richmond County Index No. 80054/2009

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**STATEMENT PURSUANT TO
CPLR §5531**

1. The index number of the case in the court below was 80054/2009

2. The full names of the original parties were:

JOHN A. TABACCO, Petitioner,

JOHN W. VITUCCI and THE BOARD OF ELECTIONS OF THE CITY
OF NEW YORK, respondents.

and there has not been any change in the parties.

3. This proceeding was commenced in the Supreme Court, Richmond
County.

4. The petition was filed, and the action was commenced, on February 13,
2009. Issue was joined on February 19, 2009

5. This proceeding challenged the validity of the meeting of the Board of
Elections and subsequent determination of the Board which resulted in the
removal of the appellant from the ballot at the special election to be held on
February 24, 2009 for the public office of Member of City Council, 49th
Council District.

6. This appeal is from the order of the Hon. Anthony I. Giacobbe, J.S.C.,
dated and entered on February 20, 2009.

7. This appeal is on the original record pursuant to the provisions of the
Election Law.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Appellant JOHN A. TABACCO seeks appellate review of an Order of the Supreme Court, Richmond County (Giacobbe, J.S.C.) which held that the actions of the New York City Board of Elections which subjected the appellant to two (2) separate hearings, notwithstanding a vote in his favor at the first hearing, regarding the sufficiency of his petition for public office.

Appellant is a registered voter in the 49th Council District of the City of New York, is a candidate aggrieved as same is defined in the Election Law of the State of New York.

In the month of January, 2009, petitioner timely filed or caused to be filed with the New York City Board of Elections certain nominating petitions for his candidacy for the public office of Member of the City Council, 49th Council District, on the No Tax Party at the Special Election to be held on February 24, 2009. The aforesaid petitions were designated by the New York City Board of Elections as petition numbers RH09-02, RH09-03, RH09-04, RH09-05, RH09-75, and RH09-76. Appellant respectfully submits that said petition was, and is, in all respects, legally sufficient, including containing more than the number of valid signatures required to

place the name of the petitioner on the ballot in the aforesaid special election. The number of signatures required on the subject petition is one thousand three hundred sixty-seven.

Thereafter, respondent herein JOHN VITUCCI (hereinafter sometimes referred to as “respondent objector”) filed or caused to be filed certain objections to the designating petition. Said objections were designated by the New York City Board of Elections as objection number RH11-1.

Subsequent to the filing of the objections by respondent objector, the Clerk of the Richmond County Board of Elections prepared a report for consideration by the full Board of Elections. Thereafter, the New York City Board of Elections scheduled a hearing with respect to the Clerk’s report on February 3, 2009.

Appellant attended the aforesaid hearing, at which time he, through a non-attorney representative, provided the Board of Elections with evidence that the Clerk’s report was flawed in numerous ways. When asked how much time was necessary to review all the evidence provided by petition with respect to the objections made by respondent objector and correct other

deficiencies, the Clerk responded that it would take at least two (2) to three (3) days, due to budgetary constraints.

As a result, the Board of Elections directed the Clerk, appellant, and respondent objector to meet, review the documentation in appellant's possession, and provide a new report for consideration by the Board. The Board further voted to refer the matter to a subcommittee, which would meet on February 6, 2009. (Verified Petition, par. "9").

Immediately following the direction by the Board of Elections, appellant offered to begin the review immediately. However, appellant was advised by the Clerk that a review of another candidate's petition was already underway, and that petitioner would be notified when the review of his petition, and objections thereon, would take place. (Id., par. "10").

Appellant never received any notice, oral or written, with respect to the commencement of the aforesaid review. (Id., par. "11").

On February 4, 2009, at approximately 11:45 am, appellant received a telephone call from the office of the Clerk of the Board of Elections in

Richmond County, asking him where he was, and advising him that the objector, or representatives of the objector, were present at the Board of Elections offices in Richmond County and were waiting for him to begin the aforesaid review. (Id., par. 12).

Appellant advised the caller that he had never been notified of the date or time of commencement of the review, but that he would appear at the Board offices the following day, February 5, 2009. (Id., par. 13).

Appellant did in fact appear at the Richmond County office of the New York City Board of Elections on February 5, 2009, together with his representative and documentation demonstrating numerous errors in the aforesaid Clerk's report which, if corrected, provided him with more than a sufficient number of signatures to determine his petition to be valid. (Id., par. 14).

However, appellant was advised that there was insufficient time to review his documentation and still timely provide a proposed amended Clerk's report. Accordingly, none of appellant's documentation was

reviewed by the Clerk, and was referred to the subcommittee which was to meet the following day. (Id., par. 15).

The amended Clerk's report recommended a determination that the petition filed by appellant herein was invalid, due to a lack of valid signatures. The Clerk's report recommended that nine hundred twelve (912) signatures be determined to be valid.

On Friday, February 6, 2009, the aforesaid subcommittee met with respect to the amended Clerk's report. At that time, both the appellant and respondent objector appeared both in person and through counsel. Counsel for both parties were heard on the subject petition.

At the aforesaid subcommittee hearing, appellant provided both legal argument and documentary evidence which clearly and unequivocally proved that the subject petition contained more than the required number of valid signatures. (Id., par. 18).

Spirited discussion ensued between the commissioners who constituted the subcommittee. At the conclusion of such discussion, a motion was

made, and seconded, to accept the Clerk's report. Said motion failed by a vote of 2-2. The commissioners constituting the subcommittee were polled, and said vote was confirmed. (Id., par. 19).

The result of the aforesaid vote, as declared by counsel for the Board of Elections at the subcommittee hearing, was that appellant's name would be placed on the ballot for the subject special election.

At the subcommittee hearing, the commissioners also voted to refer to the full Board an issue **which was not the subject of any objection by anyone**, to wit: the appellant's use of a certain symbol for the No Tax Party. Said issue was to be considered by the full Board, consisting of all ten (10) members of the Board, on Tuesday, February 10, 2009.

Notwithstanding his attendance at the meeting of the full Board of Elections on February 3, 2009, this was appellant's first notification that the symbol chosen for the No Tax Party was at issue with respect to his petition. On the same date, appellant caused to be filed a document providing for a new symbol for the No Tax Party, pursuant to the provisions of the Election Law of the State of New York.

On Tuesday, February 10, 2009, appellant, both in person and through his counsel, appeared at the meeting of the full Board. Appellant's counsel was heard on legal argument with respect to the use of the symbol as well as the ability of the appellant to substitute a new symbol if necessary.

Notwithstanding the lack of standing of the respondent objector, the Board permitted counsel for the respondent objector, who was not present, to be heard as well. At the conclusion of the presentations of counsel, the Board a motion was made to permit the staff of the Board of Elections to substitute a new symbol of its choosing for the No Tax Party. Said motion was carried by a vote of 6-4.

Once again it was declared that the appellant's name would appear on the ballot for the subject special election, and that the party symbol would be chosen by staff of the Board of Elections.

The gavel then fell and the hearing was concluded. Appellant and his attorney, having been advised that the hearing was now closed and the matter concluded, then left the hearing room, and the building. Appellant remained at the Board offices for some time to respond to media inquiries. Upon the conclusion of same, appellant left the Board offices.

At no time was appellant, his attorney, or the person designated on the subject petition to be notified with respect to deficiencies in the petition notified that any further deliberation, discussion, or action was to be taken with respect to the subject petition, nor did same appear on the agenda of the Board of Elections for the said meeting and hearing. Moreover, no item appeared on the Board's agenda that day which indicated that any action was to be taken other than the hearing on the use of the symbol for the No Tax Party.

However, prior to the conclusion of the aforesaid meeting, long after the appellant, his attorney, and media covering the appellant's hearing had left the Board's meeting, the Board did indeed engage in further discussion with respect to the subject petition, without any notice or attempted notice

whatsoever to petitioner, his attorney, or the person designated on the subject petition to be notified with respect to deficiencies in the petition.

At the conclusion of said discussion, contrary to and in clear violation of law, the Board of Elections voted to reopen the hearing with respect to the respondent objector's objections, and referred the new hearing to a new subcommittee composed of four (4) entirely different commissioners than those who previously heard argument on and, by virtue of its vote, determined the validity of the subject petition. This new subcommittee was to hold a new hearing on Thursday, February 12, 2009. Notice of said hearing was thereafter sent to all counsel.

The aforesaid subcommittee did indeed meet on Thursday, February 12, 2009, and counsel for the appellant and objector were both heard. Counsel for the petitioner began their presentation by providing the Board with legal precedent which clearly demonstrated that the meeting of the Board was contrary to law for numerous reasons, including the fact that, since the prior subcommittee already conducted a hearing and voted with respect to the validity of the appellant's petition, the Board of Elections was now *functus officio*, and without the authority to rehear the matter.

Thereafter, counsel for the appellant submitted documentation and legal argument clearly demonstrating that the subject petition contained more than the valid number of signatures, and that the conclusions suggested in the Clerk's report were in error, and that the petition was valid in all respects. Appellant even offered, during the course of the hearing, to review the documentation with the Clerk and/or her staff in order to revise the Clerk's report to contain the correct recommendation that the petition was valid in all respects.

Notwithstanding the clear and unrefuted evidence as aforesaid, a motion was made, and seconded, to accept and adopt the suggested findings and conclusions in the Clerk's report, which suggested that the subject petition contained only nine hundred twelve (912) valid signatures. A vote was taken, and the report was accepted by a vote of 3-0, with one (1) abstention.

As a result of the aforesaid vote, appellant's name would not appear on the ballot for the subject special election herein.

On the very next day, Friday, February 13, 2009, appellant filed his petition to the Supreme Court and presented an Order to Show Cause, which was signed and entered by the Court, which averred that the determination of the Board of Elections was arbitrary, capricious, illegal and void for a number of reasons.

1. First, as aforesaid, the new hearing by the second subcommittee was illegal and contrary to law, since the Board, through the first subcommittee, had already finally determined the validity of the subject petition. As a result, the Board became functus officio, and without legal authority to rehear the matter of the objections of the respondent objector; and
2. Second, as was more fully set forth in Exhibit "A" annexed to the petition, the Board incorrectly invalidated two hundred twenty-one (221) signatures based upon an erroneous conclusion that certain witnesses placed an incorrect address in the witness statement of certain pages of the petition and;

3. The documentary evidence submitted to the Board at both subcommittee hearings, clearly demonstrates that all of said witnesses were registered voters in the State of New York at the times set forth in the respective pages of the petition, and thus eligible to witness said signatures; and

4. Third, as was more fully set forth in Exhibit "B" annexed to the petition, the Board incorrectly invalidated one hundred sixty-nine (169) signatures of voters who had moved within the 49th Council District. This error is not only in violation of the Election Law of the State of New York, but results in a disparate impact on minority voters and voters who rent, rather than own, their residences, and is in violation of the Constitution of the State of New York and the United States; and

5. Fourth, as was more fully set forth in Exhibit "C" annexed to the petition, the Board incorrectly invalidated one hundred ninety-eight (98) signatures of voters who utilize print signatures, rather than cursive writing, when signing the subject petition; and

6. At both the hearing before the Board and at the hearing before the Supreme Court in this matter, appellant provided statements, made subject to the same penalties as an affidavit, of twenty-two (22) additional signers of the petition indicating that they use print signatures as well as cursive signatures when signing their names. These documents were submitted to the subcommittee which reheard the respondent objector's objections on February 12, 2009 as well as Supreme Court; and

7. That as a result of the foregoing, it was clear that the subject petition contains one thousand four hundred six (1,406) signatures, more than the one thousand three hundred sixty-seven required for the subject petition to be valid.

Accordingly, appellant sought the following relief:

- a. Declaring the Independent Nominating Petitions of the appellant filed with the Respondent Board of Elections under the name "NO TAX PARTY", for election to the public office of Member of the New York City

Council, 49th District, in Staten Island, in the February 24, 2009 Special Election, to be legally valid and effective in all respects, and

b. Ordering Respondent Board of Elections to print the Appellant's name on the certified ballots for the Special Election in the 49th Council District to be held on February 24, 2008, and

c. Declaring the actions of Respondent Board of Elections' actions in voting to re-open a hearing on Petitioner's nominating petitions to be in contravention of law, null, void and without effect, and declaring the actions taken by Respondent Board after the re-opening of the hearing on Petitioner's nominating petitions to be in contravention of law, null, void and without effect, and

d. Enjoining the respondent Board of Elections, and the Commissioners thereof, from removing the name of the Petitioner Candidate from the ballot for the public office of Member of the New York City Council, 49th District, in Staten Island, in the February 24, 2009 Special Election, together with such alternative relief as may be requested, together with such other and further relief as this court may find to be just, proper, and equitable.

The petition in Supreme Court was returnable on Thursday, February 20, 2009. At that time, appellant immediately put forth his legal argument

that, due to the original determination by the subcommittee appointed by the Board of Elections, the Board became functus officio, and was without authority to submit the appellant to yet another review on the identical issue(s) of sufficiency.

After a brief recess, the Court decided to reserve decision and suggested that the parties stipulate to the appointment of a Special Referee with respect to “line-by-line” objections. Counsel indeed stipulated, and said Special Referee was appointed. The court further advised counsel that it would reconvene the following morning at 10:00 am to receive any additional testimony or evidence and hear argument.

All counsel and the Special Referee immediately went to the Board of Elections offices in Richmond County, and the review ensued. In addition to examination of Board records, testimony of witnesses was taken, and affidavits were received.

The review concluded at 7:00pm. At that time, it became apparent that, should the preliminary rulings of the Special Referee be sustained by

the Court, approximately two hundred forty-five (245) witnesses, or their affidavits, would have to be produced by appellant in fifteen (15) hours.

On Friday, February 20, 2009, the appellant offered for the Supreme Court's consideration voluminous documents which, appellant contends, demonstrate that the subject petition contained more than enough valid signatures to be deemed legally sufficient.

Most important, appellant's counsel argued, once again, with respect to the illegality of the fourth (4th) hearing of the Board of Elections on this matter, which was the second on the issue of sufficiency of signatures. Reciting the facts as set forth hereinabove, appellant urged the Supreme Court to invoke the doctrine of *functus officio*, declare the Board's determination to be null and void, and place the name of appellant on the ballot.

By decision dated February 20, 2009, the Supreme Court dismissed the petition. It is from this determination that appellant seeks judicial review.

POINT I

THE COURT BELOW ERRED WHEN IT DETERMINED THAT THE BOARD OF ELECTIONS COULD HOLD YET ANOTHER HEARING ON WHAT HAD PREVIOUSLY BEEN DETERMINED TO BE A VALID NOMINATING PETITION

The Board of Elections' action in submitting appellant to an additional hearing on the sufficiency of his petition was contrary to law. As such, the Supreme Court erred when it held that the Board had the authority to take such action.

As previously stated, the Board of Elections herein (1) first voted, via duly appointed subcommittee, in a manner which resulted in the name of the appellant appearing on the ballot, and then (2) subsequently appointed a second, different subcommittee which came to a contrary conclusion and result.

As a result, the facts herein are similar to those in Pataki v. Hayduk, 87 Misc.2d 1095, 387 N.Y.S.2d 591 (Sup.Ct. Westchester Co., 1976), wherein the Board of Elections sent out two (2) determinations indicating that the candidate's name would not be on the ballot, then sending out a

third, contrary correspondence indicating that the candidate's name would appear on the ballot. The court in Pataki provides the most comprehensive and thoughtful review of any of the reported cases on the issue:

“A Board of Elections exercises the ministerial function of examining the face of the petitions to determine their compliance with the requirements of the Election Law. Once the Board has completed this examination and made its determination it is *functus officio*. It is constrained to go no further. Schwartz v. Heffernan, 304 N.Y. 474, 109 N.E.2d 68; Mansfield v. Epstein, 5 N.Y.2d 70, 180 N.Y.S.2d 33, 154 N.E.2d 368.

The findings of the Board as to defects in the petition are presumptively correct. Application of Burns, 199 Misc. 1005, 106 N.Y.S.2d 993, *aff'd*. 278 App.Div. 1023, 106 N.Y.S.2d 1005, *aff'd*. 303 N.Y. 601, 100 N.E.2d 885.

The court may however review such determination and resolve issues of fact not appearing on the face of the petitions. Bednarsh v. Cohen, 267 App.Div. 133, 45 N.Y.S.2d 1, appeal denied 267 App.Div. 760, 45 N.Y.S.2d 934, motion denied 292 N.Y. 578, 54 N.E.2d 693; Frankel v. Cheshire, 212 App.Div. 664, 208 N.Y.S. 721; Application of Hanofee, 47 Misc.2d 787, 263 N.Y.S.2d 235, *aff'd*. 24 A.D.2d 729, 263 N.Y.S.2d 314, *aff'd*. 16 N.Y.2d 885, 264 N.Y.S.2d 547, 212 N.E.2d 56.

Once the Board made its determination on July 29th, 1976 its function terminated. Any question as to its authority to make that determination because it bore the signature of only one commissioner was resolved by the subsequent letter signed by both

commissioners, ratifying the original determination made on July 29th, 1976.

Any person aggrieved by such determination had redress to the courts upon compliance with the provisions of Section 330 of the Election Law. Failure of the respondent Allgaier to properly avail herself of those review procedures may not be blamed upon petitioners. **Nor was it incumbent upon petitioners who were satisfied with the determination to seek court review. They had a right to rely upon the finding of the board which was presumptively correct.** Application of Burns, supra.

The Election Law contains a meticulous timetable, provides for summary relief, protects the rights of aggrieved parties and is tailored to meet the needs of both the candidate and the electorate.

Once the Board of Elections takes the first step the gears are set in motion and the next step must then be taken by the person aggrieved whether candidate or nominee. The Supreme Court then may act and adequate machinery is set up for immediate review by the highest court if necessary. Time is the watchword. The candidate must have time to conduct a campaign. The electorate must have time to identify the candidates and make up its mind. The municipal body must have time to set up the ballot and prepare the voting machine.

There is no room for procrastination or retraction by the Board of Elections. Having made a determination it is functus officio. It may not reconsider, redecide and jam up the delineated procedure. Once the period of court review expires the door is closed. The election must go on.

The Board of Elections may not reverse the gears, reopen that door and upset the chain of events. Nor may respondent Allgaier be given a second bite at the apple by being given a second opportunity to court review the petitions, having forfeited her first. She should not be permitted to enter the back door after standing idly by while the front door was being closed.

Petitioners have effectively lost their right to court review. Not only have the fourteen (14) days expired but even if waived the time to appeal will be over before the facts can be heard. Tomorrow is the last day to appeal to the Appellate Division. The election will soon be upon us. Only confusion and chaos can result from delay.

To sanction this latest action of the Board would allow it to play God for its decision would be final beyond court review. **The purpose and intent of the Election Law would be deluded. The constitutional right to court review would be destroyed and the ultimate result would be devastating.**

The Board of Elections must therefore be estopped from re-opening its case and changing its decision.”

Pataki, 87 Misc.2d 1095 at 1096-1098 (emphasis added).

The court below completely ignored this sound legal analysis and reasoning, mistakenly relying on the holding in McDonnell v. Cohen, 252 A.D. 277 (1st Dept. 1937), aff'd, 275 N.Y.644 (1937). In McDonnell, it was

conceded by the appellant that the subject petition did not contain the requisite number of signatures.

However, such is not the case herein, where appellant vigorously maintained that his petition was valid in all respects and provided legal and documentary support for such position. Such actions and proofs also distinguish the appellant herein from the candidate in Schneeberg v. New York State Board of Elections, 51 N.Y.2d 814 (1980), wherein the candidate conceded that his petition was invalid.

Perhaps most important, at least one (1) subcommittee of the Board of Elections accepted appellant's arguments with respect to the validity of his petition, and ruled in a manner which kept his name on the ballot.

Most troubling in the case at bar is the timing of the Board's illegal actions. The result of same, so late in the process, left appellant in a position where he was without a meaningful opportunity to present a defense to the Board's actions.

As previously stated, the action of the Board came immediately prior to a holiday (President's Day) long weekend and holiday week. As a result, appellant, after the Special Referee concluded his review at 7:00pm on Thursday, February 19, 2009, was placed in a position of having to produce approximately two hundred forty-five (245) live witnesses or affidavits.

As a practical matter, appellant had only four (4) hours to complete this task during a holiday week. Simply put, if the actions of the Board are permitted to stand, there is nothing that prevents the Board from reconsidering a petition even on the day prior to election, thereby completely and utterly precluding judicial review, no matter how egregious the acts of the Board. Such a result should, it is respectfully submitted, not bear the imprimatur of this Court.

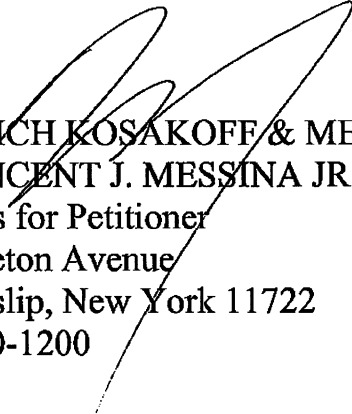
Accordingly, the determination of the Court below should be reversed in its entirety.

CONCLUSION

The determination of the court below should be reversed in its entirety.

Dated: Central Islip, New York
February 20, 2009

Respectfully submitted,



SINNREICH KOSAKOFF & MESSINA, LLP
BY: VINCENT J. MESSINA JR.
Attorneys for Petitioner
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**CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR §670.10.3(f)**

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
Point size:	14
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

-----X

In the matter of
JOHN A. TABACCO, Candidate Aggrieved,
Petitioner(s),

-against-

JOHN W. VITUCCI, Objector, and

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,

Respondents.

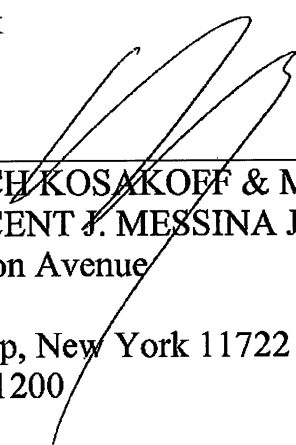
SIGNING
REQUIREMENT

Index No.
80054/2009

-----X

I hereby certify pursuant to 22 NYCRR §130-1.1-a that, to the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers listed below or the contentions therein are not frivolous as defined in 22 NYCRR §130-1.1(c).

Dated: Central Islip, New York
February 20, 2009


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Central Islip, New York 11722
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Comm Mt
FY1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
In the matter of
JOHN A. TABACCO, Candidate Aggrieved,
Petitioner(s),

-against-

NOTICE OF
APPEAL

JOHN W. VITUCCI, Objector, and

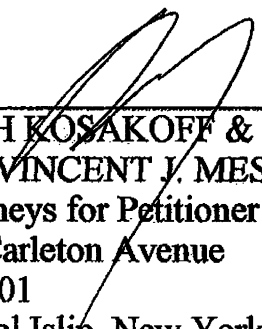
Index No.
80054/2009

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,
Respondents.

-----X

PLEASE TAKE NOTICE that petitioner JOHN A. TABACCO hereby
appeals to the Appellate Division, Second Department, from each and every
portion of the Order of the Hon. Anthony I. Giacobbe, J.S.C., dated and entered
herein in the office of the Clerk of the County of Richmond on February 20, 2009.

Dated: Central Islip, New York
February 20, 2009


SINNREICH KOSAKOFF & MESSINA, LLP
BY: VINCENT J. MESSINA JR., ESQ.
Attorneys for Petitioner
267 Carleton Avenue
Ste. 301
Central Islip, New York 11722
(631) 631-650-1200

**Supreme Court of the State of New York
Appellate Division - Second Judicial Department**

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form. (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

In the Matter of the Application of JOHN A. TABACCO, A
Candidate Aggrieved,

Petitioner-Appellant,

-against-

JOHN W. VITUCCI, Objector, and the BOARD OF ELECTIONS
OF THE CITY OF NEW YORK,

Respondents-Respondents.

Date of Filing of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type	<input checked="" type="checkbox"/> CPLR article 78 Proceeding	Filing Type	<input checked="" type="checkbox"/> Transferred Proceeding
<input checked="" type="checkbox"/> Civil Action	<input type="checkbox"/> Special Proceeding Other	<input type="checkbox"/> Appeal	<input type="checkbox"/> CPLR 5704 Review
<input type="checkbox"/> CPLR article 75 Arbitration	<input checked="" type="checkbox"/> Habeas Corpus Proceeding	<input type="checkbox"/> Original Proceeding	
Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.			
A. Administrative Review	D. Domestic Relations	F. Prisoners	I. Torts
<input type="checkbox"/> 1 Freedom of Information Law	<input type="checkbox"/> 1 Adoption	<input type="checkbox"/> 1 Discipline	<input type="checkbox"/> 1 Assault, Battery, False Imprisonment
<input type="checkbox"/> 2 Human Rights	<input type="checkbox"/> 2 Attorney's Fees	<input type="checkbox"/> 2 Jail Time Calculation	<input type="checkbox"/> 2 Conversion
<input type="checkbox"/> 3 Licenses	<input type="checkbox"/> 3 Children - Support	<input type="checkbox"/> 3 Parole	<input type="checkbox"/> 3 Defamation
<input type="checkbox"/> 4 Public Employment	<input type="checkbox"/> 4 Children - Custody/Visitation	<input type="checkbox"/> 4 Other	<input type="checkbox"/> 4 Fraud
<input type="checkbox"/> 5 Social Services	<input type="checkbox"/> 5 Children - Terminate Parental Rights		<input type="checkbox"/> 5 Intentional Infliction of Emotional Distress
<input type="checkbox"/> 6 Other	<input type="checkbox"/> 6 Children - Abuse/Neglect	G. Real Property	<input type="checkbox"/> 6 Interference with Contract
	<input type="checkbox"/> 7 Children - JD/PINS	<input type="checkbox"/> 1 Condemnation	<input type="checkbox"/> 7 Malicious Prosecution/Abuse of Process
B. Business & Other Relationships	<input type="checkbox"/> 8 Equitable Distribution	<input type="checkbox"/> 2 Determine Title	<input type="checkbox"/> 8 Malpractice
<input type="checkbox"/> 1 Partnership/Joint Venture	<input type="checkbox"/> 9 Exclusive Occupancy of Residence	<input type="checkbox"/> 3 Easements	<input type="checkbox"/> 9 Negligence
<input type="checkbox"/> 2 Business	<input type="checkbox"/> 10 Expert's Fees	<input type="checkbox"/> 4 Environmental	<input type="checkbox"/> 10 Nuisance
<input type="checkbox"/> 3 Religious	<input type="checkbox"/> 11 Maintenance/Alimony	<input type="checkbox"/> 5 Liens	<input type="checkbox"/> 11 Products Liability
<input type="checkbox"/> 4 Not-for-Profit	<input type="checkbox"/> 12 Marital Status	<input type="checkbox"/> 6 Mortgages	<input type="checkbox"/> 12 Strict Liability
<input type="checkbox"/> 5 Other	<input type="checkbox"/> 13 Paternity	<input type="checkbox"/> 7 Partition	<input type="checkbox"/> 13 Trespass and/or Waste
	<input type="checkbox"/> 14 Spousal Support	<input type="checkbox"/> 8 Rent	<input type="checkbox"/> 14 Other
C. Contracts	<input type="checkbox"/> 15 Other	<input type="checkbox"/> 9 Taxation	
<input type="checkbox"/> 1 Brokerage		<input type="checkbox"/> 10 Zoning	
<input type="checkbox"/> 2 Commercial Paper	E. Miscellaneous	<input type="checkbox"/> 11 Other	
<input type="checkbox"/> 3 Construction	<input type="checkbox"/> 1 Constructive Trust		J. Wills & Estates
<input type="checkbox"/> 4 Employment	<input type="checkbox"/> 2 Debtor & Creditor	H. Statutory	<input type="checkbox"/> 1 Accounting
<input type="checkbox"/> 5 Insurance	<input type="checkbox"/> 3 Declaratory Judgment	<input type="checkbox"/> 1 City of Mount Vernon Charter §§ 120, 127-f, or 129	<input type="checkbox"/> 2 Discovery
<input type="checkbox"/> 6 Real Property	<input checked="" type="checkbox"/> 4 Election Law	<input type="checkbox"/> 2 Eminent Domain Procedure Law § 207	<input type="checkbox"/> 3 Probate/Administration
<input type="checkbox"/> 7 Sales	<input type="checkbox"/> 5 Notice of Claim	<input type="checkbox"/> 3 General Municipal Law § 712	<input type="checkbox"/> 4 Trusts
<input type="checkbox"/> 8 Secured	<input type="checkbox"/> 6 Other	<input type="checkbox"/> 4 Labor Law § 220	<input type="checkbox"/> 5 Other
<input type="checkbox"/> 9 Other		<input type="checkbox"/> 5 Public Service Law §§ 128 or 170	
		<input type="checkbox"/> 6 Other	

Form A - RAD1 - Civil

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V2.0.060293

Appeal

Paper Appealed From (check one only):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: SUPREME

County: RICHMOND

Dated: FEBRUARY 20, 2009

Entered: FEBRUARY 20, 2009

Judge (name in full): HON. ANTHONY I. GIACOBBE, J.S.C.

Index No.: 80054/2009

Stage: Interlocutory Final Post-Final

Trial: Yes No If Yes: Jury Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? Yes No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? Yes No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: Order to Show Cause Notice of Petition Writ of Habeas Corpus

Date Filed: FEBRUARY 13, 2009

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:

County:

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:

County:

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This is an appeal of a Final Order of the Supreme Court, Richmond County, which dismissed a petition which sought to restore the name of appellant to the ballot for the public office of Member of New York City Council, 49th Council District, at the Special Election to be held on February 24, 2009.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

1. Did the lower court err when it failed to grant the petition based upon the doctrine of functus officio, when the a subcommittee of the respondent Board of Elections first voted in a manner which resulted in the appellant remaining on the ballot, then thereafter assigned a new subcommittee which voted for a different result?

Issues Continued:

2. Did the lower court err in failing to determine that the respondent Board of Elections erred in ruling against appellant with respect to the signatures on appellant's nominating petition specified in the petition herein?

Part B - Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	JOHN A. TABACCO	PETITIONER	APPELLANT
2	JOHN W. VITUCCI	RESPONDENT	RESPONDENT
3	BOARD OF ELECTIONS OF THE CITY OF NEW YORK	RESPONDENT	RESPONDENT
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
In the matter of
JOHN A. TABACCO, Candidate Aggrieved,

Petitioner(s),

-against-

JOHN W. VITUCCI, Objector, and

Index No.

THE BOARD OF ELECTIONS IN THE CITY OF NEW,
Respondents.

-----X

NOTICE OF APPEAL AND APPELLATE DIVISION RADI

SINNREICH KOSAKOFF & MESSINA, LLP
Attorneys for Petitioner

267 Carleton Avenue
Ste. 301
Central Islip, New York 11722
(631) 650-1200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
In the matter of
JOHN A. TABACCO, Candidate Aggrieved,
Petitioner(s),
-against-

NOTICE OF
ENTRY

JOHN W. VITUCCI, Objector, and

Index No.
80054/2009

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,
Respondents.

-----X
S I R S :

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and
Order duly entered in the office of the Clerk of the Supreme Court for the State of New
York, County of Richmond on February 20, 2009.

Dated: Central Islip, New York
February 20, 2009


Yours etc.

SINDBREICH KOSAKOFF & MESSINA LLP
BY: Vincent J. Messina Jr., Esq.
Attorney for Petitioner
267 Carleton Avenue, Ste. 301
Central Islip, New York 11722
(631) 650-1200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
In the Matter of
John A. Tabacco, Candidate Aggrieved,

Petitioner,

SPECIAL ELECTION PART

-against-

Index No. 80054/09
Hon. Anthony I. Giacobbe

John W. Vitucci, Objector and
The Board of Elections in the City of New York,

Respondents.
-----X

The following papers were used in this proceeding:

Order to Show Cause and Petition Annexed with Exhibits
Stipulation of Reference
Other Papers: multiple Affirmations in Opposition, various Affidavits

<u>Name of Candidate</u>	<u>Office</u>	<u>District</u>
John A. Tabacco	N.Y.C. Council	49 th District Staten Island

Upon the foregoing papers in this proceeding brought pursuant to Article 16 of the Election Law to declare valid the petition purporting to nominate the above-named person for the above-mentioned public office in the Special Election to be held on February 24, 2009, and upon this matter having been referred to Robert D'Oca, Special Referee to hear and report, and upon the hearing before said Special Referee and the report having been rendered, and upon oral argument and the evidence presented at trial, the candidate has been found to have 1163 valid signatures, 204 signatures below the required amount of 1,367. Thus, the report of the Special Referee is confirmed and the petition is denied.

The Court has considered the legal arguments of the parties, and in the Court's opinion, the Respondent Board of Elections clearly acted within the scope of its authority and within the bounds of applicable statutes and caselaw (*see, e.g., McDonnell v. Cohen*, 252 AD 277 (1st Dept.), *aff'd*, 275 NY 644, 646 (1937)). Moreover on the record before this Court it cannot be

said that petitioner was deprived of a meaningful opportunity to prosecute his case before either the Board of Elections or this Court.

Accordingly, under the facts and circumstances of this proceeding, and within the constraints of applicable statutes and caselaw, it is

ORDERED that the respondent Board of Elections in the City of New York shall keep off the ballot for the aforesaid Special Election the name of the above-named candidate.

ENTER

Dated: February 20, 2009

J.S.C.


Hon. Anthony I. Giacobbe
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X

In the matter of
JOHN A. TABACCO, Candidate Aggrieved,

Petitioner(s),

-against-

JOHN W. VITUCCI, Objector, and

Index No.

THE BOARD OF ELECTIONS IN THE CITY OF NEW,
Respondents.

-----X

ORDER AND NOTICE OF ENTRY

SINNREICH KOSAKOFF & MESSINA, LLP
Attorneys for Petitioner

267 Carleton Avenue
Ste. 301
Central Islip, New York 11722
(631) 650-1200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
In the matter of
JOHN A. TABACCO, Candidate Aggrieved,
Petitioner(s),

-against-

JOHN W. VITUCCI, Objector, and

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,

Respondents.

SUBPOENA
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Index No.
80054/2009

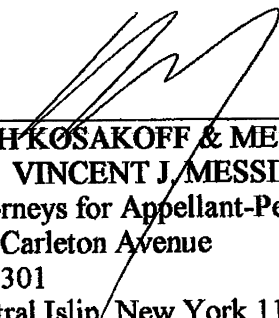
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THE PEOPLE OF THE STATE OF NEW YORK

TO: RICHMOND COUNTY CLERK

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before the Appellate Division, Second Judicial Department, on the 23RD day of February, 2009, at 10:00 o'clock in the forenoon of that day, and that you produce at the time and place aforesaid the entire original file in the within action, now in your custody, and all other deeds, evidences, and writings, which you have in your custody or power, concerning the premises.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.

WITNESS, the Hon. Anthony I. Giacobbe, one of the Justices of said Court, at Staten Island, New York, the 20th day of February, 2009.


SINNREICH KOSAKOFF & MESSINA, LLP
BY: VINCENT J. MESSINA JR., ESQ
Attorneys for Appellant-Petitioner
267 Carleton Avenue
Ste. 301
Central Islip, New York 11722
(631) 650-1200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
In the matter of
JOHN A. TABACCO, Candidate Aggrieved,
Petitioner(s),
-against-

AFFIDAVIT OF
SERVICE

JOHN W. VITUCCI, Objector, and

Index No.
80054/2009

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,
Respondents.

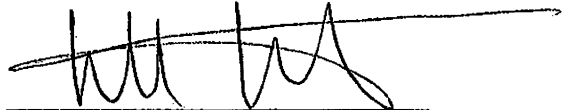
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State of New York :
 : s.s.:
County of Richmond :

TODD TABACCO, being duly sworn, deposes and says:

1. I am not a party to the above referenced action, am over 18 years of age, and reside in Staten Island, New York.
2. On February 20, 2009, I served the Decision and Order with Notice of Entry, and Notice of Appeal in the above captioned matter by depositing a true copy thereof enclosed in a post paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal system within New York State, addressed to each of the following persons at the last known address set forth after each name:

Janice Birnbaum
Asst. Corporation Counsel
Attorney for Respondent Board of Elections
100 Church Street
New York, New York 10007

Christopher Nallley, Esq.
Attorney for Respondent Vitucci
432 Forest Avenue
Staten Island, New York 10301



TODD TABACCO

Sworn before me this
20th day of February, 2009.



Notary Public

VINCENT J. MESSINA, JR.
Notary Public, State of New York
No. 52-4957240
Qualified in Suffolk County
Commission Expires October 16, 2009

Comm Mtg
FY2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X

In the Matter of
John A. Tabacco, Candidate Aggrieved,

Petitioner,

SPECIAL ELECTION PART

-against-

Index No. 80054/09
Hon. Anthony I. Giacobbe

John W. Vitucci, Objector and
The Board of Elections in the City of New York,

Respondents.

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- Stipulation of Reference
- Other Papers: multiple Affirmations in Opposition, various Affidavits

<u>Name of Candidate</u>	<u>Office</u>	<u>District</u>
John A. Tabacco	N.Y.C. Council	49 th District Staten Island

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The Court has considered the legal arguments of the parties, and in the Court's opinion, the Respondent Board of Elections clearly acted within the scope of its authority and within the bounds of applicable statutes and caselaw (*see, e.g., McDonnell v. Cohen*, 252 AD 277 (1st Dept.), *aff'd*, 275 NY 644, 646 (1937)). Moreover on the record before this Court it cannot be

said that petitioner was deprived of a meaningful opportunity to prosecute his case before either the Board of Elections or this Court.

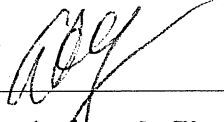
Accordingly, under the facts and circumstances of this proceeding, and within the constraints of applicable statutes and caselaw, it is

ORDERED that the respondent Board of Elections in the City of New York shall keep off the ballot for the aforesaid Special Election the name of the above-named candidate.

ENTER

Dated: February 20, 2009

J.S.C.



Hon. Anthony I. Giacobbe
Justice of the Supreme Court

*Community
F.Y.I.*



Appellate Division
Supreme Court of the State of New York
Second Judicial Department
45 Monroe Place
Brooklyn, N.Y. 11201
(718) 875-1300

A. GAIL PRUDENTI
PRESIDING JUSTICE
JAMES EDWARD PELZER
CLERK OF THE COURT

MEL E. HARRIS
SUSAN H. HARKAVY
MARY-ELLEN SKENYON
DEPUTY CLERKS
MATTHEW KIERNAN
APRILANNE AGOSTINO
ASSOCIATE DEPUTY CLERKS

FACSIMILE TRANSMITTAL

To:	<i>Steve Richman</i>	Fax #:	<i>212 487 5342</i>
Company:		Date:	<i>2/20</i>
From:	<i>Sue Harkavy</i>	Time:	<i>12 noon</i>
Tot # Pages:	<i>4</i>	A.D. Fax #:	(718) 858-2446

Urgent For Review Please Comment Please Reply As Requested

Comments: *Election Appeal Decisions*

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STATE OF NEW YORK
2009 FEB 20 PM 12:17

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22336
W/kmg/nl

____AD3d____

MARK C. DILLON, J.P.
RUTH C. BALKIN
ARIEL E. BELEN
CHERYL E. CHAMBERS, JJ.

2009-01498

DECISION & ORDER

In the Matter of Angel L. Del Villar, appellant,
v Digna Vekiarelis, respondent-respondent,
et al., respondent.

(Index No. 2806/09)

RECEIVED
G.O. BOARD OF ELECTIONS
IN THE STATE OF NEW YORK
FEB 20 PM 12:17

In a proceeding pursuant to Election Law § 16-102, inter alia, to validate an independent nominating petition nominating Angel L. Del Villar as the candidate of the Community First Party in a special election to be held on February 24, 2009, for the public office of Member of the New York City Council, 21st Council District, the petitioner appeals from a final order of the Supreme Court, Queens County (Strauss, J.), entered February 9, 2009, which granted the application of Digna Vekiarelis to dismiss the amended petition based on the petitioner's failure to strictly comply with the service provisions of the order to show cause, and dismissed the proceeding.

ORDERED that the final order is affirmed, without costs or disbursements.

“The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with” (*Matter of Master v Pohanka*, 43 AD3d 478, 480, quoting *Matter of Hennessey v DiCarlo*, 21 AD3d 505, 505). Even if we accept the petitioner’s interpretation of the service provisions of the subject order to show cause, he nevertheless did not timely effect service of the order to show cause, amended petition, and supporting papers upon the objector by any of the methods of service which he claims were permitted. Accordingly, the application to dismiss the amended petition was properly granted and the proceeding was properly dismissed.

DILLON, J.P., BALKIN, BELEN and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

February 20, 2009

MATTER OF DEL VILLAR v VEKIARELIS

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22337
C/hu

AD3d

Argued - February 19, 2009

MARK C. DILLON, J.P.
HOWARD MILLER
RUTH C. BALKIN
ARIEL E. BELEN, JJ.

2009-01496
2009-01497

DECISION & ORDER

In the Matter of Glenn DiResto, petitioner-respondent,
v Harold Cornell, et al., appellants, et al., respondent.
(Proceeding No. 1)

In the Matter of Noreen Ellis, et al., appellants, v Glenn
DiResto, respondent-respondent, et al., respondent.
(Proceeding No. 2)

(Index Nos. 1400/09, 1411/09)

RECEIVED
GO. BOARD OF ELECTIONS
IN THE CITY OF NEW YORK
2009 FEB 20 PM 12:21

In a proceeding pursuant to Election Law § 16-102, inter alia, to validate an independent nominating petition nominating Glenn DiResto as the candidate of the Families First Party in a special election to be held on February 24, 2009, for the public office of Member of the New York City Council, 32nd Council District, and a related proceeding, among other things, to invalidate that independent nominating petition, Harold Cornell and Noreen Ellis appeal from (1) a final order of the Supreme Court, Queens County (Flug, J.), dated February 17, 2009, which, inter alia, in effect, granted the petition, among other things, to validate, vacated a determination of the Board of Elections in the City of New York dated February 3, 2009, invalidating the independent nominating petition, and granted Glenn DiResto two days from the date of the final order to file a certificate with the Board of Elections in the City of New York selecting a new name for the independent body making the nomination in compliance with the requirements of Election Law § 6-138(3)(a), and (2) a final order of the same court, also dated February 17, 2009, which denied their petition, inter alia, to invalidate and dismissed that proceeding.

ORDERED that the final orders are reversed, on the law, without costs or disbursements, the petition, inter alia, to validate is denied, the petition, among other things, to invalidate is granted, and the independent nominating petition is invalidated.

February 20, 2009

Page 1.

MATTER OF DiRESTO v CORNELL
MATTER OF ELLIS v DiRESTO

An independent nominating petition nominated Glenn DiResto as the candidate of the Families First Party in a special election to be held on February 24, 2009, for the public office of Member of the New York City Council, 32nd Council District.

The Board of Elections in the City of New York (hereinafter the Board of Elections) invalidated the independent nominating petition pursuant to Election Law § 6-138(3)(a), finding that the name "Families First Party" included part of the name of an existing political party. The Supreme Court, *inter alia*, in effect, granted DiResto's petition, among other things, to validate, vacated the determination of the Board of Elections, and granted DiResto two days from the date of the final order to file a certificate with the Board of Elections selecting a new name for the independent body making the nomination.

We agree with the Supreme Court that the selection of the name "Families First Party" as the "independent body" (Election Law § 6-138[3][a]) nominating DiResto violated Election Law § 6-138(3)(a). Election Law § 6-138(3)(a) provides, "[t]he name selected for the independent body making the nomination . . . shall not include the name or part of the name . . . of a then existing party." Here, the name "Families First Party" violated Election Law § 6-138(3)(a), as it included the same root word as the existing party "Working Families Party" (*see Matter of Gleason v Tutunjian*, 154 AD2d 834; *Carey v Chiavaroli*, 97 AD2d 981; *Matter of McCarthy v Lawley*, 35 AD2d 126, 129, *aff'd* 27 NY2d 754; *Matter of Franco v Board of Elections of County of Nassau*, 64 Misc 2d 19, *aff'd* 35 AD2d 679).

However, the Supreme Court erred in granting DiResto the opportunity to select a new name for the independent body making the nomination. Although Election Law § 6-138 authorizes a board of elections to permit a candidate to select a new name for an independent body making the nomination when the original name selected for an independent body conflicts with a previously-filed independent nominating petition for the same office (*see* Election Law § 6-138[3][b]), there is no authorization for a board of elections to grant a candidate the opportunity to select a new name when, as here, the original name selected for an independent body includes the name or part of a name of an existing party (*see* Election Law § 6-138[3][a], [b]; *Carey v Chiavaroli*, 97 AD2d 981; *Matter of McCarthy v Lawley*, 35 AD2d at 129; *see generally* *Matter of Carr*, 94 AD 493, 496).

DiResto's remaining contentions are without merit.

Accordingly, the petition, *inter alia*, to validate should have been denied and the petition, among other things, to invalidate should have been granted.

DILLON, J.P., MILLER, BALKIN and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

February 20, 2009

MATTER OF DiRESTO v CORNELL
MATTER OF ELLIS v DiRESTO

Page 2.

229



STATE OF NEW YORK
UNIFIED COURT SYSTEM
100 CENTRE STREET
NEW YORK, NEW YORK 10013
(646) 386-4201

Comments
Fy1

ANN PFAU
Chief Administrative Judge

MARIA LOGUS, ESQ.
Chief of Staff

JOAN B. CAREY
Deputy Chief Administrative Judge
New York City Courts

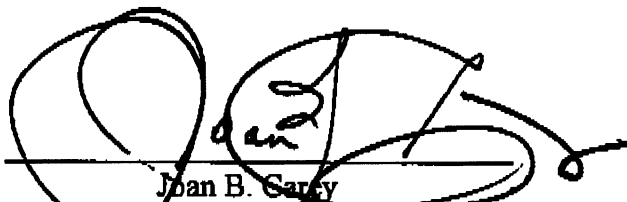
ADMINISTRATIVE TRANSFER ORDER #33

Pursuant to the authority vested in me, I hereby temporarily designate a Special Term, of the Supreme Court, Civil Branch, Queens County, for Election Matters relative to a Special Election to be held on Tuesday, February 24, 2009, to hear and determine all cases arising under the Election Law relating to eligibility for voting, and do assign the following Supreme Court Justices to hold such Special Term for Election Matters, in addition to their other assignments:

QUEENS COUNTY
Board of Elections
126-06 Queens Boulevard
Kew Gardens, New York 11475

7:00	A.M.	to	2:00 P.M.	Hon. Lee A. Mayersohn
2:00	P.M.	to	9:00 P.M.	Hon. Bernice D. Siegal

Dated: New York, New York
February 18, 2009


Joan B. Carey
Deputy Chief Administrative Judge
New York City Courts

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Staten Island Advance

City Council approves Board of Elections head South Shore attorney's first task is to settle North Shore Council race

Friday, February 27, 2009

By **PETER N. SPENCER**
ADVANCE STAFF WRITER

STATEN ISLAND, N.Y. -- The City Council approved the appointment of a new Staten Island Board of Elections commissioner at yesterday's Stated Meeting.

J.P. Sipp's first order of business: Help sort through a recount of votes and absentee and affidavit ballots from Tuesday's hotly contested special election on the North Shore. Sipp, who will replace outgoing Island commissioner Mary Ann Yenella, could be sworn in as soon as early next week.

Sipp, a 38-year-old native of the South Shore, lives in West Brighton with his wife and two daughters. He is a partner in a law firm there with his brother and his father, well-known Island attorney John Sipp. A graduate of Fordham University and Quinnipiac University Law School, he is also related to former Staten Island Savings Bank CEO John L.F. Sipp.

In keeping with the city's conflict-of-interest guidelines, Sipp said he plans to resign his post as law chairman of the Staten Island Republican Party. His legal expertise will likely come in handy, however, as the North Shore recount is likely to be embroiled in legal challenges for months.

"It's an interesting situation, to say the least," Sipp said.

Beyond the current election, Sipp said complying with the provisions of the Help America Vote Act (HAVA), including electronic voting, is the biggest challenge the BOE faces.

The city BOE comprises 10 commissioners -- one Republican and one Democrat from each borough -- appointed by their respective county parties to four-year terms, unless their respective parties decline to replace them. They meet once a week at board headquarters in Manhattan and also put in time at the borough office. Commissioners are paid at a per-diem rate of \$300, not to exceed \$30,000 in a year.

Ms. Yennella began working at the board in 1977 and had been deputy clerk since 2000. She was appointed to the BOE in 2005.

The BOE's current president, West Brighton attorney James Sampel, will likely remain in place. Former North Shore Assemblyman and Island Democratic Party chairman John Lavelle appointed Sampel in 2005.

Peter N. Spencer covers city government for the Advance. He may be reached at spencer@siadvance.com.

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Overtime champs

City's No. 1 added \$144,768 to base pay of \$91,210

BY FRANK LOMBARDI
DAILY NEWS CITY HALL BUREAU

THE LEAN TIMES have yet to catch up with city government's bonus babies — scores of workers are still racking up hefty six-figure overtime.

The king of New York overtime remains Pablo Martinez, a Board of Elections senior systems analyst who scored \$144,768 in overtime last year. He has been top overtime dog for several years.

Adding his base pay of \$91,210, Martinez made \$235,978. Not exactly A-Rod money, but it's still almost \$11,000 more than the mayor's official \$225,000 salary.

A list of the city's top 100 overtime earners was released yesterday after a Freedom of Information request by the Daily News.

A close No. 2 is John Murphy, an associate inspector with the Buildings Department, who built an overtime nest egg of \$135,892. With his \$68,708 base pay, he made \$204,600.

The FDNY's Bravest also put in plenty of extra hours. Robert Zerillo, a supervising communication electrician, was No. 3 with \$115,446 in overtime. With his base pay of \$85,921, he made \$201,367. Four of his FDNY colleagues were Nos. 4, 6, 8 and 10, respectively, on the list. All are communication electricians.

Officials of their respective agencies gave similar explanations for the high overtime: They hold essential, specialized jobs and have to put in a lot of hours because of workloads, staff shortages and no budget funds to hire additional staffers.

"Last year was a very hectic year, with a presidential primary and general election, special elections and regular elections," said Board of Elections spokeswoman Valerie Vazquez. "Our management information systems had to stay open, sometimes to midnight, and Pablo does the bulk of that work."

flombardi@nydailynews.com

The New York Times

Community
1/4/09

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February 25, 2009

Ulrich and Ferreras Are Victors in Council Elections

By TRYMAINE LEE

Special elections were held on Tuesday for three City Council seats in Queens and on Staten Island to fill vacancies left by candidates who were elected to other offices in November.

Eric A. Ulrich won in the 32nd Council District in Queens and Julissa Ferreras won in the 21st Council District, also in Queens.

With about 10,000 votes cast in the 49th Council District on Staten Island, Kenneth C. Mitchell was leading Deborah L. Rose by 34 votes, but numerous absentee ballots still remained to be counted. Mr. Mitchell or Ms. Rose will fill the seat formerly held by Michael E. McMahon, who was elected to the House of Representatives.

The winners will serve through the end of the year and will then need to run again in primaries and in the general election to keep their seats.

Mr. McMahon won the seat formerly held by Representative Vito J. Fossella, who did not seek re-election after a drunken driving arrest led to revelations that he fathered a child with a mistress.

There were 395 absentee ballots that remained to be counted in the Mitchell-Rose race, said Valerie Vazquez-Rivera, a Board of Elections spokeswoman. The absentee ballots will not likely be counted for another week, Ms. Vazquez-Rivera said.

Early returns showed Ms. Rose leading, but shortly after midnight Mr. Mitchell had moved ahead.

Ballots were cast in the district using paper ballots after a last-minute ruling added a candidate to the ballot.

Mr. Ulrich, a Republican, won the seat formerly held by Joseph P. Addabbo Jr. in the 32nd Council District. Mr. Addabbo was elected to the State Senate.

Mr. Ulrich, the Republican district leader, outspent each of the other candidates vying for the seat. Ms. Ferreras, a Democrat, won election in the 21st Council District in Queens, replacing her former boss, Hiram Monserrate, who was elected to the State Senate.

Ms. Ferreras, who was Mr. Monserrate's chief of staff, had her candidacy tainted by questions of financial irregularities at a charity she was involved with and the legal problems of her former boss: Mr. Monserrate was charged in December with domestic violence and weapons possession after he was accused of slashing his girlfriend in the face.

Ms. Ferreras is the first Latina to be an elected official in Queens, according to the Working Families Party, which was behind Ms. Ferreras' campaign.

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Success



STATEN ISLAND ADVANCE/BILL LYONS

Although he has declared victory, Ken Mitchell must wait for the recount as well as the tallying of absentee and affidavit ballots.



STATEN ISLAND ADVANCE/HILTON FLORES

Despite trailing her opponent after the initial count, City Council candidate Debi Rose said, "It's clear to us we could win this."

Election outcome very much up in the air

Mitchell's slim edge on Debi Rose could be undone by recount, off-site ballots

By **TOM WROBLESKI**
ADVANCE POLITICAL EDITOR

With a razor-thin margin separating Kenneth Mitchell and Debi Rose, it will be a week or more before North

Shore voters know who will next represent them in the City Council.

The Board of Elections (BOE) next Wednesday will begin its standard recount of the votes cast in Tuesday's special election, and also will begin counting crucial absentee and affidavit ballots that were not part of the election-night tally.

All the ballots are under lock and key at Staten Island

BOE headquarters in Clifton, said BOE general counsel Steven Richman.

A preliminary BOE tally on Tuesday had Mitchell leading Ms. Rose by 34 votes in the election, which was conducted entirely with paper ballots.

The Associated Press that night had Mitchell up by 241 votes, but BOE sources said yesterday that Mitchell's margin appeared to be just

91 votes.

They attributed the fluctuating totals to errors made while votes were being tabulated by election workers.

The new Council member will not be sworn in until after the BOE certifies the results following Wednesday's recount.

With the margin so tight, the absentee and affidavit

SEE ELECTION, PAGE A 11

ELECTION FROM PAGE A 1

N. Shore Council race still very much up in air

ballots could decide the outcome.

"It's not going to be over for a while," said Ms. Rose. "It's clear to us we could win this."

Richman said the week-long wait for the recount is standard board procedure, in order to allow absentee ballots that might still be in the mail to arrive.

Absentee ballots, including those sent by people serving in the military, will be counted in the election if they are postmarked by midnight Feb. 23.

"We'll take a look at everything on Wednesday," said Mitchell. "I think it will be a positive result for me."

Absentee ballots usually mirror the overall result, but Mitchell and Ms. Rose both did targeted outreach to regular absentee voters, so it's unclear whom those ballots would favor.

Absentee ballots are also frequently used by seniors, however, whom Mitchell counts among his voters.

Affidavits are filled out by voters whose names don't appear in the voter books at the poll site.

Political rule of thumb says that a larger percentage of affidavits is seen in communities with minority or transient voters, which could boost Ms. Rose, who is seeking to become the first African-American elected official in borough history.

"It's going to be the affidavits versus the absentees," said one BOE source. "It's going to be about lawyers hashing it out."

"It's going to be the affidavits versus the absentees. It's going to be about lawyers hashing it out."

— BOARD OF
ELECTIONS SOURCE

The BOE said 395 absentee ballots already had been received. The number of affidavit ballots is unknown.

Also set to be re-examined on Wednesday are ballots that were "improperly" marked by voters on election night.

Voters were told to use a pen to fill in an oval on the ballot near the name of the candidates they wanted to vote for.

But some voters said they were given confusing information about how to fill in the ballot.

Observers said that some voters circled their preferred candidate or placed an X next to the name.

Richman said that "if the voter's intent is clear, the board's standard is to count the ballot."

But deciding what constitutes a properly filled-in ballot could be a sticking point at next week's recount, with some observers believing that a protracted, Florida- or Minnesota-style legal dispute could ensue.

"It's going to go on for weeks," said one source.

Tom Wroblewski may be reached at wroblewski@siadvance.com. Read his polit.bureau blog at <http://www.siive.com/newslogs/politics/>.

Bill That Threatens City's Term-Limit Change Picks Up Support in Albany

BY JEREMY W. PETERS

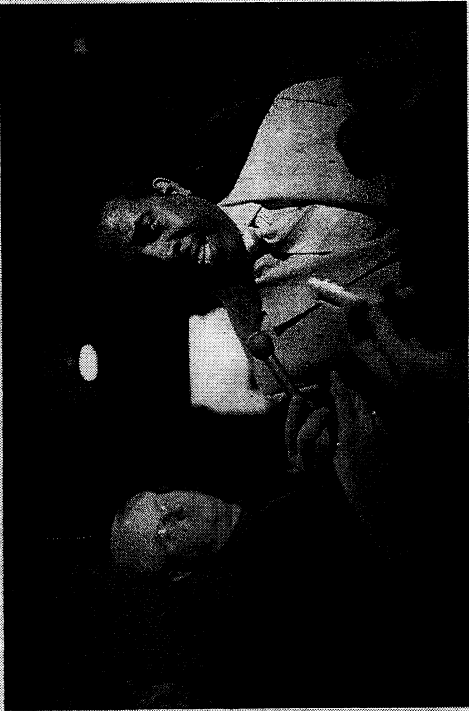
ALBANY — In what would be a rebuke to Mayor Michael R. Bloomberg, legislative committees in the State Senate and Assembly are poised to approve a bill that would effectively undo the law that allows the mayor to run for a third term this fall.

Supporters of the legislation, which would prevent city lawmakers across the state from revising term limits laws without a voter referendum, said Tuesday that they had the support they needed to advance the bills out of the appropriate committees in both houses.

The Assembly Committee on Election Law will vote on Wednesday morning. The Senate Elections Committee is scheduled to vote on March 10.

Three members of the Assembly committee, who spoke anonymously to avoid pre-empting their colleagues on the sensitive issue, said there were at least eight affirmative votes, the minimum needed to ensure approval.

The bill's chief sponsor in the



NATHANIEL BROOKS FOR THE NEW YORK TIMES

Senator Kevin S. Parker, shown in 2008, is behind a bill that would force New York City to hold a referendum on term limits.

Senate, Kevin S. Parker of Brooklyn, said of the majority needed on the Elections Committee: "We have it."

The bill would apply retroactively and require a referendum on term limits in New York City in May.

Still, the committees are only the first step toward approval in both chambers, and considerable questions remain about whether the measure will ever become law.

While the speaker of the Assembly, Sheldon Silver, and the

Senate majority leader, Malcolm A. Smith, have both said they would allow the bills to advance through the legislative process, it is not clear if a broader appetite exists to take the issue on. Approval in the Senate will prove particularly difficult because Republicans, who occupy 30 of the 62 seats, have solidly backed the mayor in the past.

The legislation would also have to be signed by Gov. David A. Paterson, and Mr. Paterson has expressed support for Mr. Bloomberg's efforts to run for a third term.

And even if the proposal did become law, it would likely face a challenge in the courts and a review by the Justice Department, which must sign off on most city and state measures that revise election law.

Regardless of the potential obstacles to passage, supporters of the measure said on Tuesday that few thought they would make it to this point, and they viewed committee approval as a significant milestone.

"Many of my colleagues have adopted the view that it is appropriate for the state Legislature to establish a uniform standard on the question of term limits," said Hakeem Jeffries, a Brooklyn Democrat who sponsored the legislation in the Assembly.

He added: "This effort is not anti-Bloomberg. But it is pro-democracy, and designed to provide the people of the city of New York with the opportunity to decide the way in which its municipal governance will take shape."

A spokesman for the mayor, Stu Loeser, declined to comment.

After the City Council approved the bill last October that loosened the term limits law and allowed the mayor and council members to serve 12 years rather than 8, some vocal members of the Legislature's New York City delegation began to strategize about how to stop the measure, viewing themselves as the last line of defense in an issue that has polarized city voters.

"I think it's important that we let the people decide," said Brian Kavanagh, a Democratic assemblyman who represents Manhattan. "This is a situation where 90 percent of New York voters think it should go to a referendum. And it shouldn't come as a surprise that many in the Legislature agree."

While Mr. Bloomberg enjoys high approval ratings, his handling of the term limits issue drew criticism. New York City voters have affirmed term limits twice in referendums, and many said the law should not be undone without another referendum.

It is also unclear how members of the Legislature, who are grappling with a \$15 billion budget deficit, will respond to term limits legislation at this time.

"Many argue that we should be exclusively focused on dealing with the economic crisis," Mr. Jeffries said. "But I believe that the integrity of our democracy is just as important, and we in the Legislature have the ability to multitask."

NEW YORK TIMES NEW YORK WEDNESDAY, FEBRUARY 25, 2009

LOCAL NEWS

Assembly panel OKs bill that could foil mayor's third-term bid

Bloomberg confers with city's 5 Republican county leaders in hopes of getting on their ballot line

By **PETER N. SPENCER**
ADVANCE CITY HALL BUREAU

While Mayor Michael Bloomberg was meeting with the city's five Republican county leaders yesterday in hopes of getting on their ballot line in November's election, some state lawmakers are betting on a long shot to throw a wrench into his third-term plans.

The state Assembly Election Committee yesterday passed the Term Limits Referendum Act, which would essentially undo a term limits extension passed by the City Council in October and require the city to re-submit the term limits question to voters come May. The legislation amends the state's current Election Law by mandating voter approval to change term limits in any municipality in the state.

Supporters of the bill say they have the votes to push it through the committees in each house, though there would be several more obstacles before it becomes law. First and foremost, it will need to go before the full Legislature for a vote, and many state legislators enjoyed Bloomberg's support in their campaigns. Next, it will need the signature of Gov. David Paterson, another Bloomberg ally, who many say is unlikely to sign it.

In the chance the bill makes it through that process, it will need to be cleared by the federal Department of Justice, which must sign off on all revisions of state and city election laws, according to Michelle Goldstein, the city's chief lobbyist in Albany. The time that would take would preclude any referendum before the June 1 deadline for candidates to file their petitions.

"It would cause tons of confusion with the Board of Elections and campaign finance law," Ms. Goldstein added. Assemblyman Michael Cusick (D-Mid-Island), nonetheless, said he'd probably give the bill his support. "I personally don't believe in term limits, but I have always said it should be voted on in a referendum," Cusick said.

Meanwhile, the mayor

seemed pleased after leaving the Metropolitan Club in Upper Manhattan after meeting with the GOP leaders for about an hour and a half yesterday. He called the meeting "constructive" but would not discuss details.

"It was a nice meeting," he said. "These are five county leaders, and we talked about

the economy, the economy of the country, the economy of New York City in particular. We talked about elections and politics, obviously."

The GOPers were equally vague about what was discussed in the closed-door powwow, which they referred to only as a "candidate screening."

For Bloomberg to be on the Republican ballot, he'll need approval from a majority of the county leaders. They would then need to give him a Wilson-Pakula — the technical name for permission a party must give to allow candidates who aren't enrolled members to run on their line.

The GOP leaders did not indicate when they expect to vote, or what they expect to get from Bloomberg in return for that vote.

"The most important thing for the five of us is to build and regroup the Republicans in the city," said Queens County GOP Chair Phil Ragusa.

Ragusa was more forthcoming when asked how he felt when Bloomberg left the party.

"It's like going home and your wife's says she's leaving you," he quipped.

Peter N. Spencer covers city government for the Advance. He may be reached at spencer@siadvance.com.

To Get G.O.P. Ballot Line, Mayor May Need Party Card

By MICHAEL BARBARO

So you want to run for mayor as a Republican? Just sign on the dotted line.

That's what Mayor Michael R. Bloomberg, a Democrat turned Republican turned independent, is likely to hear on Wednesday morning, when he is expected to ask the city's five Republican chairmen to let him run on their party's ballot line this fall.

Worried that Mr. Bloomberg is trying to "rent" the ballot without adhering to the party's principles, Phil Ragusa, the Queens chairman, said he would ask the mayor to register as a Republican — right then and there.

Mr. Ragusa said he even planned to bring the registra-

tion forms — and a pen — to the meeting, to be held at Manhattan Republican headquarters on East 83rd Street.

"If the guy wants to be a Republican, he should register as a Republican," Mr. Ragusa said. "It's as simple as that."

Signing the document, he added, "would be a symbol that he cares about the party again."

Matthew Mahoney, a Republican aide on the Bloomberg campaign, said the mayor would not change his party affiliation to Republican.

Mr. Bloomberg, who bolted from the Republican Party in 2007 as he considered running for president, is a man without a ballot line at the moment.

His campaign has reached out to three political camps — the Republican, Independence

and Working Families Parties — but each is nursing a grievance against him and has threatened to back his rivals in the race.

The Republicans are angry with the mayor for leaving the party, raising taxes and appointing few of their own to his administration.

At the meeting on Wednesday, Mr. Bloomberg is expected to argue that many of his accomplishments are in line with Republican aims. "The mayor is going to make his case on the merits: lower crime and anti-terrorist measures, accountability at our schools, balanced budgets and fiscal discipline," said Mr. Mahoney, who has reached out repeatedly to the Republican chairmen.

But Mr. Bloomberg may be in

for a frosty reception at Wednesday's session, which is billed as an informal interview. Jay Savino, the chairman of the Bronx Republican organization, said that the mayor "has abandoned the party and the principles we stand for."

One county chairman said he would ask the mayor why he can be trusted to govern as a Republican after failing to do so for the last four years. Another said he would ask Mr. Bloomberg why he has increased taxes and city spending — both of which run counter to Republican orthodoxy.

Given the grilling Mr. Bloomberg may receive, Mr. Ragusa considers his request to be benign. "I am not asking him to give blood," he said, "only to become a Republican."

THE NEW YORK TIMES NEW YORK WEDNESDAY, FEBRUARY 25, 2009

ELECTIONS

Money, influence and the fate of democracy in New York

When newspaper editorial boards and good-government groups give dry-sounding lectures about the need for political reform, they are talking about situations like the scandal unfolding at the city Board of Elections over the long-overdue modernization of New York's ancient, breakdown-prone mechanical voting machines.

New York, one of the last states to comply with federal laws and court orders requiring an upgrade of voting machines, is holding public hearings — the next is Wednesday night — on the pros and cons of different computerized voting systems.

But the public hearings may be window-dressing for a rigged process. It appears that critical decisions about how we tabulate votes — the very core of our democracy — are being influenced, and perhaps controlled, by lobbyists and political fixers more concerned about their power, perks and paychecks than the public

good. As watchdogs have warned for years, the private corporations that manufacture and service voting machines are salivating over the prospect of supplying New York with voting machines.

One company, Nebraska-based Election Software & Systems, has paid \$500,000 since 2005 to Davidoff, Malitro and Hatcher to lobby the City Council, the mayor's office, the Board of Elections and other bodies.

Sid Davidoff, the founder and principal of Davidoff, Malitro is a former aide to former Mayor John Lindsay and a member of New York's permanent government whose phone calls get returned.

The other leading firm, Sequoia Voting Systems, Inc., paid about \$172,000 to lobbyists be-

tween 1999 and 2005. New York State officials are on the verge of certifying new machines as adequate, after which local boards around the state — including the city Board of Elections — can select from the list.

It's widely expected that the final choice will be between ES&S and Sequoia.

But insiders at the Board of Elections, including several eyewitnesses, say the choice is being influenced by two political fixers, Queens Republican John Haggerty Jr. and Bronx Democrat Stanley Schlein.

Haggerty and Schlein wield vast — and improper — influence at the agency, say insiders, huddling with senior staff members and instructing board members on how to vote.

Both men, according to agency insiders, frequently come to the

board's offices in lower Manhattan, enter without signing the public visitor log, and even conduct personal business from the agency for hours on end.

The allegations, if true, are devastating. Schlein, a longtime election lawyer, routinely represents politicians before the board, which has the all-important power to remove candidates from the ballot.

More importantly, Schlein has been hired by Sequoia to lobby the board as it nears a final decision on which machines to use.

Haggerty, a former aide to Gov. George Pataki, worked on Mayor Bloomberg's 2005 campaign as the election expert who got Bloomberg's GOP opponent, Tom Ognibene, knocked off the ballot — a highly partisan role he may repeat this year. While Haggerty isn't registered as a lobbyist for any voting-machine companies, insiders at the board say he has been pushing for Sequoia to

win the contract. Marcus Cederqvist, executive director of the board, did not directly deny that Haggerty and Schlein hang around the board's offices.

"I haven't seen [Schlein] here at the board in quite a while," Cederqvist told me via e-mail, and wrote "I don't think [Haggerty] has been here for quite a while."

That's a far cry from flatly stating that politically wired nonemployees with vested interests do not get special treatment or access to the agency.

Schlein, through a spokesman, denied having improper access to the board's offices and personnel.

Actually, the whistleblowers are people who are disgusted by the prospect of our democracy being hijacked and distorted by paid mercenaries and political cronyism — disgusted and ready to fight back.

As we all should be. elouis@nydailynews.com



Errol Louis