

STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

In the Matter of the Application of GORDON BOYD,
A Voter Qualified to Vote in the November 7, 2017 General Election,

Petitioner,

DECISION AND ORDER

RJI No. 45-1-2017-1533

Index No. 20173418

-against-

WILLIAM FRUCI and ROGER J. SCHIERA,
as Commissioners of the Saratoga County Board of Elections,

Respondents.

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: A. JOSHUA EHRLICH
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This combined CPLR Article 78 and Election Law Article 16 proceeding and a separate motion by petitioner seeking production of certain designated records from the Saratoga County Board of Elections under Article 6 of the Public Officers Law (the Freedom of Information Law) all arise from the vote at the November 7, 2017 general election in the City of Saratoga Springs on a local proposition to decide if a new City Charter should be adopted.

First, the background. In 2016, the Mayor of the City Saratoga Springs appointed a

Charter Review Commission, and in 2017, the Commission recommended that a new charter be adopted which would replace the City's existing Commission form of government with a City Manager and City Council model.

The Commission's proposal was placed on the ballot as Proposition No. 4.¹ The proposition read as follows:

"Shall the new city charter proposed by the city charter commission be adopted?"

Voters had the choice to mark their ballot either "Yes" or "No" by filling in the appropriate circle.

Following the initial canvass of all voting machines in the City's 25 election districts, the tally was 4,205 "Yes" votes and 4,152 "No" votes, a difference of 53 votes. Absentee ballots were subsequently opened and canvassed and resulted in 242 additional "Yes" votes and 305 additional "No" votes. The combined tally was then 4,447 "Yes" votes and 4,457 "No" votes. In short, Proposition No. 4 was defeated by 10 votes.

On November 24, 2017, petitioner presented to this court a proposed order to show cause and verified petition.² The court signed the order to show cause after striking certain requests for temporary relief made ex parte. Respondent Roger J. Schiera, one of the two Saratoga County

¹There were three statewide propositions also on the ballot. All four propositions appeared on the reverse side of the paper ballots cast by voters and scanned into electronic voting machines.

²Petitioner was unable on November 24, 2017 to purchase an index number and file his proposed order to show cause and verified petition in the Office of the Saratoga County Clerk because November 24, 2017, the day after Thanksgiving, was an official County holiday and the Clerk's office was closed. Since petitioner alleged that November 24, 2017 was the last day to commence this proceeding, the court, as authorized by CPLR 304 (a), extended petitioner's time to November 29, 2017 to purchase an index number and file with the Clerk the signed order to show cause and verified petition.

Commissioners of Elections, was served on November 24, 2017 with a copy of the signed order to show cause and verified petition, and as directed, the initiating documents were filed by petitioner with the County Clerk on November 27, 2017. On November 30, 2017, the Board of Elections certified the November 7, 2017 election results, including the vote on Proposition No. 4.

In his petition, petitioner seeks an order, based principally on the narrow margin by which Proposition No. 4 was defeated, directing the Board of Elections to conduct a re-canvass of all the ballots cast in the City of Saratoga Springs by a hand count or alternatively by review of the so-called “.tif” files generated by the voting machines. In their amended answer, respondents object to a re-canvass of any type and assert that neither the Saratoga County Board of Elections nor the New York State Board of Elections has a policy or rule requiring a full re-canvass of close elections. Moreover, the Board of Elections contends that it conducted, post-election, its traditional audit of three percent of all voting machines pursuant to Election law 9-211 by randomly selecting by lot six election districts in the County and found no discrepancies between the totals reported on the machines and the papers ballots cast in those districts.³ Respondents further assert affirmative defenses that petitioner lacks standing to commence this proceeding and, if the merits were reached, that petitioner states no factual basis to justify a re-canvass.

Shortly after commencing this proceeding, petitioner filed a motion to compel respondents’ compliance with what petitioner describes as a Freedom of Information Law (FOIL) request that he filed on November 20, 2017 with the Board of Elections in which he seeks,

³None of the six was in the City of Saratoga Springs.

among other items, production of the so-labeled “.tif” files and unscanned ballots.⁴ In support of this motion, petitioner asserts that under FOIL, the requested records must be produced based on the holding in Matter of Kosmider v Whitney, 56 Misc 3d 354 (Sup Ct, Essex County 2017), a case in which the court granted a request that the electronic voting images of ballots cast in Essex County in the November 3, 2015 general election be disclosed under FOIL.⁵

In opposition to the motion, respondents principally contend that petitioner did not properly make a FOIL request to Saratoga County’s designated Records Access Officer, and therefore petitioner’s motion has no merit and in short, that there is not presented an issue under FOIL to be decided here. Respondents’ opposition is supported by the affidavit of Saratoga County’s designated Records Access Officer stating that a written FOIL request by petitioner concerning the November 7, 2017 general election has not been made to her.

First, the motion. Public Officers Law Article 6 sets the procedure to be followed when access to public records is sought. Section 87 (1) requires that a municipal agency promulgate rules and regulations governing access to records while Section 89 (3) and (4) outline the procedure by which FOIL requests must be handled, including providing for an administrative appeal process within the government agency when a FOIL application is denied and further specifying that only after such internal appeal, may an aggrieved applicant commence a proceeding under CPLR Article 78. Here, in its opposition, respondents include a copy of the County’s “Application for Access to Records” form which identifies the county official to whom

⁴A copy of a FOIL request is not included in the motion.

⁵The case has been appealed to the Appellate Division, Third Department. Oral argument was held January 10, 2018.

the completed form should be returned by mail, fax, or e-mail and states that in the event the application is denied, the procedure to be followed is to appeal the denial to the County's designated appeals officer.

Here, once again, petitioner fails to show that a FOIL request was served on the County's designated Records Access Officer. The facts here are significantly different from those in Kosmider. In Kosmider, as noted in Footnote 1 of the trial court's opinion, the County of Essex elected to treat the petitioner's direct request to the County's Board of Elections "as a request for public records under FOIL" and handled the petitioner's request as if a proper FOIL request had been made. In this case, accepting that a written request was made by petitioner to the Saratoga County Board of Elections, the County of Saratoga has not elected to treat that request as one properly made under FOIL, but rather asserts as a defense to petitioner's motion that neither the requirements of the Public Officers Law nor the County's standard FOIL procedures have been satisfied. In this case, the County was never given the opportunity to review and to either deny or grant petitioner's requests and, as well, if the request were denied and an appeal taken, to have its appeals officer review the matter. Clearly, petitioner has not followed the FOIL procedure and of course, did not exhaust his administrative remedies before making the instant application.

Petitioner's motion for an order to compel the Board of Elections to comply with his denominated FOIL request and produce the records sought is denied, without costs.

Now, the merits of petitioner's Election Law Article 16 proceeding. Election Law 16-106 (2) allows any voter to contest a canvass of election returns. Petitioner therefore has standing to bring this proceeding.

Yet, as respondents argue, the results of the November 7, 2017 election have been

certified, and petitioner produces no facts to support the propriety of a re-canvass. Rather, the petition contains speculative statements made upon information and belief that “the unofficial canvas of the votes cast by machine for the subject Proposed New City Charter may be and often is, incomplete and/or inaccurate” (Verified Petition, paragraph 12) and “several of the voting machines in the subject political subdivision may have malfunctioned or broken down and failed to count all of the votes cast for the Proposed New City Charter” (Verified Petition, paragraph 13). These statements lack factual support. The only germane fact recited in the petition is that the Proposition No. 4 was defeated by 10 votes (Verified Petition, paragraph 3).

Although petitioner relies, in argument, on the practice followed by the New York City Board of Elections to require a manual re-canvass of paper ballots when, among other reasons, the margin of victory is less than 10 votes or one-half percent of the total votes cast in the particular contest, that practice has not been adopted by the New York State Board or the Saratoga County Board. Again, neither the New York State Board of Elections nor the Saratoga County Board of Elections mandates a re-canvass when an election result is close. Standing alone, the narrowness of the margin, absent evidence of voting machine malfunction or some other irregularity, does not justify granting the request either for a hand count of the preserved paper ballots or the production of all “.tif” files. “Before a court may grant permission to examine voting machines and paper ballots or direct a re-canvass, the petitioner must provide facts which support the claim that irregularities, discrepancies or errors occurred which affected the outcome of the election. Statements based on information and belief which fail to state the source of the information or the grounds for the belief are insufficient”. Matter of Bradley v D’Apice, 91 AD2d 691 (2nd Dept 1982).

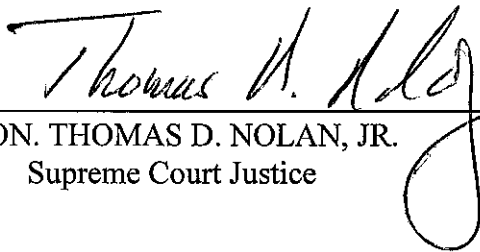
Again, petitioner presents no facts to support or justify his request that either a full hand recount of the ballots cast in the City of Saratoga Springs in the November 7, 2017 election be conducted or that the electronic “.tif” files generated by all the voting machines used in the City of Saratoga Springs the general election of November 7, 2017 be produced for petitioner’s inspection.

The petition is dismissed, without costs.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for respondents. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for respondents is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: February 6, 2018
Saratoga Springs, New York



HON. THOMAS D. NOLAN, JR.
Supreme Court Justice