

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1466.3

CAE 09-02185

PRESENT: SMITH, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF DIANE M. TERRANOVA,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DINO J. FUDOLI, CANDIDATE, RALPH M. MOHR,
COMMISSIONER, ERIE COUNTY BOARD OF ELECTIONS,
NEW YORK STATE INDEPENDENCE PARTY COMMITTEE
AND EXECUTIVE COMMITTEE OF NEW YORK STATE
INDEPENDENCE COMMITTEE, RESPONDENTS-APPELLANTS,
DENNIS E. WARD, COMMISSIONER, ERIE COUNTY BOARD
OF ELECTIONS, RESPONDENT-RESPONDENT,
ET AL., RESPONDENTS.

RALPH M. MOHR, COMMISSIONER, ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENT-APPELLANT PRO SE.

JOHN CIAMPOLI, ALBANY, FOR RESPONDENTS-APPELLANTS NEW YORK STATE
INDEPENDENCE PARTY COMMITTEE AND EXECUTIVE COMMITTEE OF NEW YORK STATE
INDEPENDENCE COMMITTEE.

DENNIS E. WARD, COMMISSIONER, ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENT-RESPONDENT PRO SE.

JEROME D. SCHAD, WILLIAMSVILLE, AND JEFFREY MARION, FOR PETITIONER-
RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 27, 2009 in a proceeding pursuant to the Election Law. The order granted the petition.

It is hereby ORDERED that the appeal insofar as taken by respondents Dino J. Fudoli, candidate, and Ralph M. Mohr, Commissioner, Erie County Board of Elections, is unanimously dismissed and the order is modified on the law by granting the motion in part, denying the petition in part, vacating that part of the second ordering paragraph directing that the name of respondent Kathy Konst be removed from the general election ballot as a candidate for the office of Erie County Legislator in the 5th Legislative District on the Independence Party ballot line, vacating that part of the third ordering paragraph validating the certificate of substitution for petitioner as a candidate for election to the office of Erie County Legislator in the 5th Legislative District on the Independence Party ballot line, and vacating those parts of the fourth ordering paragraph

directing respondent Erie County Board of Elections to prepare the general election ballot with petitioner as a candidate on the Independence Party ballot line for the office of Erie County Legislator in the 5th Legislative District and enjoining that respondent from placing the name of respondent Kathy Konst on the Independence Party ballot line as a candidate for the office of Erie County Legislator in the 5th Legislative District and as modified the order is affirmed without costs.

Memorandum: Respondents Erie County Board of Elections Commissioner Ralph M. Mohr, New York State Independence Party Committee (Independence Party), the Executive Committee of the Independence Party, and Dino J. Fudoli (collectively, respondents) appeal from an order that, inter alia, determined that respondent Kathy Konst was disqualified as a candidate for Erie County Legislator in the 5th Legislative District and directed that her name be removed from the November 3, 2009 general election ballot as a candidate on the Democratic, Independence, and Conservative party ballot lines for that office, validated the certificates of substitution for petitioner from the Democratic and Independence parties for that office, and directed the Erie County Board of Elections (Board) to prepare the November 3, 2009 general election ballot with petitioner as the candidate of the Democratic and Independence parties for that office.

We agree with petitioner that Commissioner Mohr and Fudoli are not aggrieved by the order and therefore are not proper parties to this appeal (*see generally* CPLR 5511). With respect to the Independence Party, we conclude that it was aggrieved by the order because the certificate of substitution was not accompanied by an appropriate authorization pursuant to Election Law § 6-120 (3). Because a person not enrolled in a party may not be designated as a candidate of that party without such authorization (*see Matter of Independence Party State Comm. v New York State Bd. of Elections*, 297 AD2d 459, 460), petitioner's failure to file such authorization invalidated the certificate of substitution with respect to the Independence Party ballot line. We therefore modify the order accordingly.

In light of our determination, we do not reach respondents' remaining contentions.

Entered: October 30, 2009

Patricia L. Morgan
Clerk of the Court