

Phillips v Suffolk County Bd. of Elections
2005 NY Slip Op 30642(U)
August 4, 2005
Supreme Court, Suffolk County
Docket Number: 017878/2005
Judge: Jr., Paul J. Baisley
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MEMORANDUM

SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

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LOIS F. PHILLIPS, as Citizen Objector,

Decision and Order

Petitioner,

By: Baisley, J.S.C.

-against-

Dated: August 4, 2005

SUFFOLK COUNTY BOARD OF ELECTIONS,
ANITA S. KATZ, Commissioner of the Suffolk County
Board of Elections, and ROBERT L. GARFINKLE,
Commissioner of the Suffolk County Board of
Elections, together constituting the SUFFOLK
COUNTY BOARD OF ELECTIONS, and MICHAEL
J. CARACCIOLO,

INDEX NO.: 017878/2005

Respondents.

RESPONDENTS' ATTORNEYS:

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LLP

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In this proceeding pursuant to Article 16 of the Election Law, petitioner seeks an order disqualifying respondent Michael J. Caracciolo from seeking the Conservative Party nomination for Member of Assembly from the 1st Assembly District; invalidating the Conservative Party designating petition which purports to designate Michael J. Caracciolo ("Caracciolo") as the Conservative Party candidate for Member of Assembly from the 1st Assembly District at the primary election to be held on September 13, 2005; and declaring that there remains no Conservative Party committee on vacancies to designate a designee for the nomination for Member of Assembly from the 1st Assembly District.¹

¹ In separate proceedings commenced simultaneously with the instant proceeding, which are also determined herewith, the petitioner seeks to invalidate Caracciolo's designation as the Republican Party and Independence Party candidate for State Assembly member.

The submissions reflect that on or about June 7, 2005, respondent Caracciolo began circulating petitions designating him as a Conservative Party candidate for the position of member of the Suffolk County legislature from the 1st Legislative District. The submissions further reflect that on June 16, 2005, a vacancy in the State Assembly became available and that thereafter, Caracciolo began circulating petitions designating him as the Conservative Party candidate for the vacant Assembly seat. Both designating petitions were filed with the Suffolk County Board of Elections on or about July 13 and 14, 2005. On July 18, 2005, Caracciolo filed a declination of the designation as a Conservative Party candidate for the County Legislature.

The instant proceeding arises out of the claim of petitioner that the offices of State Assembly member and County legislator are incompatible, and that Caracciolo's intentional filing of designating petitions for incompatible offices was fraudulent and deceptive and "injurious to the rights of the electorate" under the principles enunciated by the Court of Appeals in *Lufty v. Gangemi*, 35 N.Y.2d 179, 359 N.Y.S.2d 273 (1974). Accordingly, petitioner alleges, respondent's designation as the Conservative Party candidate for Assembly member must be vacated, notwithstanding that respondent subsequently declined the designation as candidate for the County Legislature seat.

It is well established that "one may not simultaneously run for two public offices where one would be precluded from holding both offices at the same time." *Matter of Lawrence v. Spelman*, 264 A.D.2d 455, 694 N.Y.S.2d 143 (2d Dept. 1999). Where the "multiplicity of inconsistent candidacies" is intentional, and "absent acceptable excuse or justification," the Court of Appeals has determined that it is appropriate that none of the inconsistent candidacies should survive. *Lufty, supra*, 35 N.Y.2d at 182.

The Court finds, as the parties conceded at oral argument held before the undersigned on August 3, 2005, that the positions of State Assembly member and County legislator are incompatible. The record does not reflect, however, that the "multiplicity of inconsistent candidacies" here was "fraudulent and deceptive" such that the designating petitions should be invalidated.

The record reflects that the Assembly seat did not become vacant until June 16, 2005, after Caracciolo had commenced circulating petitions for the County Legislature seat (which he presently occupies as an incumbent). Although it appears that Caracciolo did not thereafter cease collecting signatures on the County legislature designating petition, that is not fatal to his continued candidacy for the State Assembly seat. In *Matter of Farbstein v. Suchman*, 26 N.Y.2d 564, 312 N.Y.S.2d 196 (1970), the designee informally announced, before the circulation of his designating petition was completed, that he would decline the designation. The Court held that "[t]he circulation of the designating petition set in motion a process in which both the Committee to Fill Vacancies and the signatories to the petition had a legal right to have a future vacancy in the designation filled. This would apply equally to those who had signed the petition after, as well as before, the informal announcement of intended declination." *Matter of Farbstein v. Suchman*, 26 N.Y.2d 564, 312 N.Y.S.2d 196 (1970).

It is apparent from the submissions that Caracciolo did not form an intention of declining the County legislator designation until after the petition process was already underway, when the Assembly seat vacancy was announced. As in *Farbstein*, the signatories to the County legislature designating petition, which named a committee to fill vacancies, had a legal right to have a future vacancy in the designation filled. Pursuant to Election Law §6-146, Caracciolo's declination of the County legislator designation could not become effective until the designating petitions were filed. There is no showing that in the circumstances of this case, the respondent intended to mislead the electorate by circulating

inconsistent designating petitions. Rather, it appears to the Court that the subsequently arising Assembly vacancy constitutes the "acceptable excuse or justification" for the inconsistent designating petitions which the Court of Appeals foresaw in *Lufty*. In light of the foregoing, the petition is denied and the proceeding is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: August 4, 2005

PAUL J. BAISLEY, JR.

J.S.C.