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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

Application of

JOSEPH A. BELLO and EDWARD M. DANIELS Members of the HERALD SQUARE CHAPTER 126 OF DISABLED AMERICAN VETERANS, DEPARTMENT OF NEW YORK, INC.,

INDEX NO.: 18785/10

MOTION DATE:10-19-10
SUBMIT DATE:11-10-10
SEQ. NUMBER - 001

Petitioners,

For a Petition to set aside the Officer election results of the HERALD SQUARE CHAPTER 126 OF DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK, INC., held on Friday, June 4th, 2010,

-against-

DISABLED AMERICAN VETERANS, DEPARTMENT OF NEW YORK, INC., TONY LEE, WILLIAM KEITT, FLOYD TEASLEY and GEORGE E. PUGH,

Respondents.

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The following papers have been read on this motion:

Notice of Petition, dated 10-1-10.....1
Memorandum of Law in Support, dated 10-1-10.....2
affirmation in Opposition, dated 11-1-10.....3
Reply Memorandum in Support, dated 11-8-10.....4

This Petition pursuant to Article 4 of the CPLR for a judgment setting aside the June 4, 2010 election of Officers of Herald Square Chapter 126 of Disabled American Veterans, Department of New York, Inc. ("Chapter 126" and "DAVNY", respectively), and requiring new nominations and elections to be held, and for an order pursuant to CPLR 6301 enjoining the respondents Tony Lee, William Keitt, Floyd Teasley and George E. Pugh from acting as Officers of Chapter 126 of DAVNY is determined as hereinafter set forth.

As members of Chapter 126 of the DAVNY, the petitioners in this proceeding seek, *inter alia*, to set aside the results of its June 4, 2010 election of Officers. They maintain that the election was not conducted in accordance with the procedures set forth in the Chapter's by-laws. The respondents maintain that the petitioners have failed to exhaust their administrative remedies and that in any event, the election was properly conducted pursuant to Article 5, Section 5 of their Chapter's by-laws.

There is a history of disputes outlined in the papers before the Court, which need not be recounted in this decision. Suffice it to say that the current proceeding is the most recent in which two groups seek to control a local chapter of the Disabled American Veterans "DAV"), a national organization committed to the welfare of disabled veterans and their families. DAV has a New York State affiliate, DAVNY, and local Chapter 126 is at the center of this dispute. Chapter 126 operates under the auspices of the State and National organizations. The constitution and by-laws of Chapter 126 (paginated as one document) recognize the primacy of the National organization.

Insofar as is relevant to the current matter, the Chapter 126 by-laws provide in Article 1, Section 1, which section is entitled "Voting" that "Any person holding membership in this organization, and is a member of the chapter, may be eligible to vote on any an all questions

which may come before this membership. Robert's Rules of Order, Revised, with govern *except as hereafter specifically stated."* (Emphasis supplied.)

Sections 1 and 2 of Article VI of Chapter 126's by-laws provide that

> "the nominations of chapter officers shall take place at the regular January meeting of the chapter membership at which time the floor will be open to all nominations with discussion of the candidates [and] [t]he election for chapter officers shall take place at the regular February meeting of the membership of the chapter."

Sections 5 and 6 of Article VI of its by-laws provide that

> "[a]ll voting for officers and delegates shall be by written ballot except when there is unanimous acclimation [and], that [i]t shall require a majority of votes cast to elect a candidate for any office."

As is indicated below, the procedures set forth in Article VI were not utilized, but rather a Special Meeting was called at which the disputed election was held. The respondents rely on Article V, "Meetings", which contain in Sections 5 and 6, the following:

> Special Meetings may be called by the Commander whenever the Commander may deem necessary, or by twenty-five (25) or more members in good standing... The call of any Special Meeting shall state specifically the purpose for which it is called. No business other than that specified shall be discussed or transacted with the exception that a majority of those present may agree to the conduct of business other than that which is specified.

The reason given by the respondents for calling a Special Meeting to hold the elections is found in the affidavit of respondent George E. Pugh, a member of Chapter 126. He states that a Special Meeting for that purpose had been called in 2009, as a scheduled election in February of 2008 and a "regular" meeting in February 2009 "were cancelled by the host organization at issue for reasons we have not ascertained. I can tell this Court that none of the Chapter officers had anything to do with the cancellations and wanted the

elections to go forward. We can only surmise that petitioners somehow prevailed upon persons n the control of the voting areas to prevent the elections from taking place." Pugh Aff., at ¶ 6.

With respect to the subject June 4, 2010 election, Pugh states as follows:

> [T]he claim that we did not follow the rules is pretextual. For while the by-laws mandate that nominations for elected office normally take place at the regular January meeting of the Chapter and the election at the February meeting, Article V § 5 permits the Commander or 25 members in good standing to call special meetings where necessary. And no written ballot is required where there is a unanimous acclamation. Due to the disruption caused by petitioners, we were ordered to hold elections in a special meeting. In his March 9, 2010 letter, Inspector Hartman noted our lack of a place to conduct meetings without disruption, and an his May 19, 2010 letter he noted that Article 1 § 1 of the Chapter's by-laws provides for the use of Robert's Rules of Order, and Robert's 'suggest that a special meeting may take place for the purpose of a specific stated reason.' [1]

Pugh Aff., ¶ 10.

In May, 2010, with the assistance of the respondent DAVNY, the respondents Lee, Keitt, Teasley and Pugh, as Acting Commander, Senior Vice Commander, Junior Vice Commander and Treasurer of Chapter 126 caused postcards to be mailed notifying Chapter 126 members that a "**SPECIAL MEETING FOR NOMINATION AND ELECTION OF CHAPTER OFFICERS FOR 2010-2011**" would be held on June 4, 2010. Upon learning that the postcards had been mailed, petitioner Bello's attorney contacted DAV's Inspector General Hartman by letter dated May 4, 2010, asking him to investigate and remedy what

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[1] The letters to which Pugh refers are from the Inspector General of DAV, Edward E. Hartman. They were written to petitioner Bello (March 9, 2010), and to Bello's attorney (May 19, 2010). Among other things, these letters refer, respectively, to unspecified "previous disruptions" as having caused the lack of a location for meetings, and to how the then-upcoming June 4 election would be held under Robert's Rules, which were to be utilized because the Chapter's by-laws were silent as to conducting a special meeting for the election of officers.

counsel referred to as the improprieties in the September 2009 elections and the upcoming 2010 elections, which he claimed had been and would be conducted in violation of Chapter 126's by-laws.

This prompted the May 19 letter by Hartman referred to by Pugh, as noted above. Hartman there concluded that "[a]s such, the special meeting for the purpose of nominations and election of officers for the 2010-2011 membership year will take place beginning at 6:00 p.m. on Friday, June 4, 2010, at 220 East 23rd Street, 7th floor, New York, New York," and that the September 2009 special meeting at which officers had been elected would not be readdressed.

The election was held as scheduled on June 4, 2010. DAVNY's Commander Leo Ortiz called the special meeting to order and asked the 17 members of Chapter 126 of the DAVNY in attendance to submit nominations for Commander. Respondent Pugh nominated respondent Lee for Commander. No further nominations were submitted. Ortiz then moved for a vote and asked all those in favor to respond with "yea." Some members did so while others remained silent. Ortiz declared respondent Lee elected to the position of Chapter Commander. The same procedure was followed in electing the Senior and Junior Vice Commanders. Respondent Keitt was the only member nominated for the office of Senior Vice Commander and Respondent Tealey was the only member nominated for Junior Vice Commander. And again, voting was done by voice, with some members responding "yea" and others remaining silent whereupon the respondents Keitt and Teasley were declared Senior and Junior Vice Commanders of Chapter 126 of the DAVNY, respectively.

"I]t is well settled that when a nongovernmental entity such as DAV provides timely and adequate relief, 'an aggrieved member must first exhaust that organization's remedies

before seeking redress from a court.' " *Daniels v New York State Department of Disabled American Veterans*, 40 AD3d 219, 220 (1st Dept. 2007), citing *Madden v Atkins*, 4 NY2d 283, 291 (1958); *Morgan v New York Racing Assn.*, 72 AD2d 740 (2d Dept. 1979). Pursuant to Article I, Section 2 of their by-laws, members of Chapter 126 of the DAVNY agreed:

> "to be bound by its Constitution and By-Laws, the Department of New York and the National Organization now in force or hereafter amended; and . . . not to bring any action in any court of law relating to the rights or privileges until all remedies provided by [that] chapter's, the Department or National Constitution and By-Laws have been exhausted."

However, the Court disagrees with the respondents that administrative remedies have not been exhausted in this particular case. At the local Chapter 126 level, the only mechanism, if one can fairly describe it as such, is found in Article 2, Section 5 of the by-laws, which provides for a Judge Advocate. His or her role is described as follows:

> The Judge Advocate shall be legal advisor to the Chapter. Upon request, the Judge Advocate shall render an opinion for all questions concerning parliamentary procedures, including the interpretation of the Constitution and By-Laws.

However, what is rendered by this official is an "opinion", and there is nothing to indicate that such opinion is binding on anyone. Moreover, nowhere among the papers before the Court is there any indication that this position ever was filled in Chapter 126. Indeed, in the list of officers contained in the DAV "Officer Report" forms for years 2006, 2007 and 2008 there is no space even allotted for such an official.

Further, Bello had written to the highest official in the National DAV, the National Commander, who referred the response to Inspector General Hartman, and ultimately in the latter's later response to Bello's attorney he clearly indicated that petitioners' requests for

action regarding the upcoming 2010 election had been denied. As it is clear that DAVNY could not overturn the national DAV, this was final. No appeal from this DAV determination was offered, and the DAV National Constitution, Bylaws and Regulations provide no procedures that petitioners might have followed. The mechanism for hearing and appeal found in Section 16.2 and 16.3 refer to penalties assessed against a member of the organization only. By their own terms, these sections have no application to a request to investigate and act on a local chapter's election matters.

The only other potential avenue available to petitioners is found in the description of the duties of the National Judge Advocate, Section 7.5. However, his or her powers are restricted to providing opinions on questions "arising out of National Organization, inter-chapter and inter-department matters" – and requests for those opinions are to be made only by the National Commander, National Executive Committee, or the National Convention. The opinion becomes binding after the National Commander or, upon appeal, the National Convention, acts on it. However, as the question of the fairness of an internal local chapter election is clearly beyond the scope of such opinions (as this section refers only to *inter*-chapter matters), and local chapter members are not even mentioned as persons who could request an opinion, the petitioners could not apply to his official for a review of the Inspector General's decision.

Therefore, the Court concludes that the petitioners had exhausted the available internal avenues for review available to them before commencing the instant proceeding.

Accordingly, the Court turns to the merits of the disputed election. Pursuant to Section 618 of the Not For Profit Law, upon hearing the proof and allegations of the parties,

this Court has the power to "confirm the election, order a new election or take such other action as justice may require." It is in this context that the Court reviews the petitioners' claim that the refusal of the respondents to vacate the results of the special election of officers held on June 4, 2010 and to call another was arbitrary and capricious and in violation of lawful procedure.

Initially, the Court rejects as unsound the blanket contention, as articulated in Inspector Hartman's letter of May 19, 2010 to petitioners' attorney, that the language in Article I, Section 1 permits a special meeting to be called for the disputed elections because the by-laws are silent as to a special election of officers. Under that logic, the exception language found in Section 1 would be rendered meaningless. The conduct of elections is excepted from the use of Robert's Rules because it is "hereafter specifically stated", and thus the use of Robert's Rules should yield to the specific election procedures spelled out in the by-laws, as reproduced above. Put somewhat differently, the exception of specific election procedures from Robert's Rules, found in Article I, prevents the use of the more general power to call a special meeting in Article V to replace the election mechanisms set forth in Article VI. This is consistent with well established law that, in the areas of both statutory and contact interpretation, the specific provision controls a more general one with respect to a given subject. *See, e.g., Caba v Rai,* 63 AD3d 578 (1st Dept. 2009) [statutes]; *DeWitt v DeWitt,* 62 AD2d 744 (2d Dept. 2009) [contracts].

However, under respondents' view, these by-laws could be circumvented by no more than a simple declaration by the Chapter 126 Commander, operating under the general authority of Article V, sections 5 and 6, that he or she was calling a special meeting, and that

the subject of that meeting was to be a special election – whether or not the January-February dates, and a location, were available. The Court finds that position untenable

This not to say that under certain circumstances a special election would not be appropriate, and the Court has before it a factual dispute as to such need. Specifically, respondents contend that there was no place to hold the regular election meetings, and elsewhere in their papers they assert that petitioners themselves were disruptive and thereby prevented an orderly regular election meeting from being held. They point to an earlier suspension of Bello that had resulted from such behavior. However, the issue of the suspension is not before this Court and the fact of the suspension, by itself, does not answer the question as to whether calling the special meeting and election was necessary. Petitioners deny the charge that they were disruptive, and there is no dispositive proof before the Court. Although it is clear that a contentious election meeting was possible, that would not be enough to ignore the procedures set forth in the by-laws. A hearing therefore is necessary to determine whether calling the special election was necessary, or was simply used as a means to avoid the procedure set forth in the by-laws.

Assuming that a finding is made that there was a basis for, in effect, not following the procedure prescribed in the by-laws and calling the special election instead, there is also a dispute as to whether, as petitioners claim, the June 4, 2010 election was "rife with procedural defects" or was fairly conducted under Robert's Rules and/or the governing Chapter 126 and DAV documents, as respondents contend. That will also have to be a subject of the hearing. Should the hearing court answer both the foregoing questions in the affirmative, this petition should be denied on the merits and judgment entered in favor of

respondents. Should the hearing court answer either in the negative, judgment should be for the petitioners, and a new election should be held.

Accordingly, subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a hearing on **January 20, 2011,** at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

In view of the foregoing, the Court declines to issue the injunction against the individual respondents preventing them from acting as officers of Chapter 126. That determination must also be left to the hearing court, as it is inextricably tied to the issues identified above.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 3, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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