

Matter of Knapp v Haight
2013 NY Slip Op 34154(U)
May 22, 2013
Supreme Court, Dutchess County
Docket Number: 6431-11
Judge: Robert M. DiBella
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To commence the statutory time period of appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X

**In the Matter of:
Frances A. Knapp,
As Dutchess County Democratic Commissioner and
Dutchess County Board of Elections,
Petitioners,**

Decision & Order

-against-

Index # 6431-11

**Erik J. Haight
as Dutchess County Republican Elections
Commissioner and Dutchess County Board of
Elections,
Respondents.**

-----X

**In the Matter of:
Erik J. Haight,
Commissioner Dutchess County Board of Elections,
Petitioners,**

Index # 6687-11

-against-

**Fran Knapp,
and Dutchess County Board of Elections,
and City of Beacon,
Respondents.**

-----X

DiBella, J.

In these two Article 78 proceedings, the Commissioners of the Dutchess County Board of Elections each accuses the other of acting unilaterally and illegally in the performance of their official duties. By Stipulation and Order dated April 5, 2012, these proceedings were settled and discontinued. Pursuant to the Stipulation and Order, the Commissioners agreed inter alia to utilize the bipartisan review procedures mandated in

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the state Election Law for the determination of voter registration challenges (Election Law § 5-702) and absentee ballot applications (Election Law § 5-402).

On November 14, 2012, Commissioner Knapp filed the instant motion seeking an order of contempt against Commissioner Haight alleging various breaches of the Stipulation and Order. Commissioner Haight generally denies the allegations and cross-moves to dismiss. The motion and cross-motion are denied.

THE FACTS

In October 2011, Commissioner Haight brought an Article 78 proceeding against Commissioner Knapp alleging that Commissioner Knapp refused to correct Board of Elections records which erroneously listed two addresses in the wrong ward in the City of Beacon. Commissioner Haight also accused Commissioner Knapp of making "unilateral" changes to the voter registration records of "over forty-two individuals" to provide "a different delivery mechanism" of absentee ballots. (See Verified Petition under Index # 6687/11.)

Approximately a month later, on November 30, 2011, Commissioner Knapp brought an Article 78 proceeding against Commissioner Haight alleging that Commissioner Haight unilaterally spent over \$1,100 of taxpayer funds to send out misleading and inaccurate information to absentee voters, unilaterally directed an investigation and challenges to approximately 70 voters in the town of Millbrook and the City of Poughkeepsie, and unilaterally rejected absentee ballot applications.

Upon the recusal of the Supreme Court Justices in Dutchess County, these matters

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were assigned to this Court by Order of the Administrative Judge, Ninth Judicial District dated January 13, 2012. On January 31, 2012, the Court directed the parties and their attorneys to appear at a settlement conference on February 6, 2012. A second conference was scheduled and held on March 12, 2012. On April 5, 2012, the final provisions were drafted and the Stipulation and Order was executed by the parties, "so-ordered" by the Court and filed in the Dutchess County Clerk's Office.

The Stipulation and Order expressly restates settled law which is codified in Election Law §§ 5-702 and 5-402 and reminds the two Dutchess County Commissioners that the law applies to them. These two provisions and other express provisions of the Stipulation and Order require that, in order to challenge any voter registration application, the two Commissioners must follow the bipartisan review procedures mandated in Election Law § 5-702. In particular, Paragraph 1 of the Stipulation and Order states that: "Challenges to a voter's registration shall be handled by the Dutchess County Board of Elections as provided in Election Law § 5-702." Thereafter, section 5-702 of the Election Law is set forth in its entirety in the Stipulation. (See Stipulation and Order at 2, ¶ 1.) Pursuant to Election Law § 5-702, the Board of Elections shall cause a bipartisan team of regular or special employees of such board to conduct an investigation of the qualifications to register and vote, or cause a voter's check card to be prepared for each voter who was registered after being challenged or who was challenged after registration and, if requested by any member of the board, for any other voter. Section 5-702 goes on to state, "[t]he board shall forthwith deliver . . . such voter's check card to the head of the police . . . or . . . the

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sheriff.” The police or sheriff then have six days to investigate “whether the registrant resides, and how long he has resided, at the address at which he claims a residence, and to check the facts relating to why the voter was challenged.” (Emphasis added.) The Stipulation and Order also states that, “[a]ll changes to a voter’s registration record shall be subject to the same bipartisan review and audit procedures used by the Board of Elections for initial voter registration applications.” (Stipulation and Order, ¶ 12.)

Clearly, that statute provides a two step investigatory process for evaluation and investigation of voter registration issues. First, the registration applications are reviewed in house, by a bipartisan team of Board of Elections employees. Second, if the issue cannot be adequately investigated and resolved in house, then the Board may request the police or the sheriff to assist in the investigation. The sheriff has six days to investigate and report.

The facts underlying the instant contempt motion occurred in or about August of 2012. In anticipation of a September 13, 2012 primary election, “two stacks” of voter registration applications were delivered to and accepted by an employee at the Dutchess County Board of Elections. Several days later, Commissioner Haight examined these registration forms and he unilaterally concluded that “the forms had been altered.” (Affidavit in Opposition, sworn to November 27, 2012.)

According to Commissioner Haight;

“I suspected that the dates had been altered in an effort to allow these registrants to vote in the primary election. Based upon this reasonable suspicion of criminal conduct I sought the counsel of Election Law attorney, James Walsh, Esq., and was

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advised by counsel to contact the Dutchess County Sheriff. I followed this advice." (Id.)

Apparently upon receipt of Commissioner Haight's call, Detective Stelmach of the Dutchess County Sheriff's Office responded to the Board of Elections, spoke with Commissioner Haight, and thereafter seized the two stacks of original voter registration applications and removed them from the Board of Elections. In place of the originals, Commissioner Haight alleges that he "insisted" that copies of the original records be made and the copies retained at the Board of Elections.

All this was done unilaterally within a matter of an hour or two without any consultation by Commissioner Haight with Commissioner Knapp. In fact, Commissioner Haight did not follow the bipartisan procedures mandated by the Election Law or the Stipulation and Order. He did not "cause a bipartisan team of employees to investigate the matter", nor did he "cause a voter's check card to be prepared" as provided in Election Law § 5-702. He did not even notify or allow Commissioner Knapp the opportunity to review the documents before he unilaterally authorized their removal from the Board of Elections. Instead, he decided to skip these steps and unilaterally cause a Sheriff investigation to be undertaken. Ultimately, as he also concedes, none of these applications were challenged as no "criminal conduct" was found.

In response to these actions, Commissioner Knapp brought the instant application seeking an order of contempt against Commissioner Haight. Upon the recusal of all the Supreme Court Justices in Dutchess County, the matter was again assigned to this court by Order of the Administrative Judge dated January 14, 2013.

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Commissioner Knapp contends that Commissioner Haight's unilateral actions violate the "unequivocal mandate" of the Court. Commissioner Haight has a different view. He contends that the provisions of the Stipulation and Order apply only when a formal challenge is made to a voter's residence, and since he did not file a formal challenge and the issue involved alleged "alteration" instead of improper residence, the procedures in the Election Law and the Stipulation and Order were not "initiated." (Affidavit in Opposition sworn to November 27, 2012, ¶ 12.) He also contends that his actions were in accordance with his attorney's advice so he should be shielded from a finding of contempt.

Upon careful review, this Court finds that Commissioner Haight's contentions are generally unpersuasive.

While the individual allegations in the first proceeding may have dealt with post registration challenges to voter residence, the Stipulation and Order clearly sets broader policies to be utilized by the Board of Elections whenever a question is raised as to the qualification of a voter. Thus, Paragraph 1 of the Stipulation and Order says: "Challenges to a voter's registration shall be handled . . . as provided in Election Law § 5-702" (which requires bipartisan review). Paragraph 2 says: "When a challenge to a voter's registration is filed . . . both Commissioners . . . shall sign a receipt . . ." And, Paragraph 12 states, ". . . all changes to a voter's registration record shall be subject to the same bipartisan review and audit procedures used by the Board of Elections for initial voter registration applications." None of these operative paragraphs limit its application to post registration challenges relating solely to a voter's residence. If Commissioner Haight's interpretation

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was intended it would have been simple enough to add language limiting the requirement of bipartisan review procedures to post registration challenges related only to a voter's residence. Clearly the language of the statute as incorporated into this Stipulation and Order is broader than that suggested by Commissioner Haight. In addition, Commissioner Haight is mistaken when he contends that the issues in these contentious proceedings were limited to post registration voter residence issues. The "issue" which prompted the Court to order and conduct multiple settlement conferences was the inappropriate, unilateral, and unprofessional manner in which high public officials at the Dutchess County Board of Elections were conducting themselves in the performance of their official duties. This was the primary topic of discussion at all the settlement conferences. The purpose of the Stipulation and Order was not merely to address the specific voter registration issues allegedly presented in the "two stacks" of applications submitted prior to September 2012. In fact, those matters had already been resolved. Instead, the Stipulation and Order clearly restates statutory, bipartisan procedures which must be utilized by the parties.

The two commissioners of the Dutchess County Board of Elections are no strangers to litigation. In just the past year¹, their frequent and excessive partisan bickering has resulted in (1) the intervention of the State Board of Elections, (2) multiple proceedings in the state Supreme Court, (3) an action in the United States District Court², and (4) several

¹ Commissioner Haight was appointed to his current office in 2012.

² In the federal action, Commissioner Haight is being sued by numerous college students upon his unilateral refusal to allow them to register based on their alleged failure to supply their dorm name along with their address. Commissioner Haight did not

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"investigations" conducted by the Dutchess County District Attorney's Office upon accusations by one commissioner against the other. Since both Commissioners choose to hire private counsel at taxpayer expense and without proper authority³, their chronic inability to get along is more than just a minor inconvenience for the taxpayers of Dutchess County.

THE LAW

Pursuant to Election Law § 3-200, "there shall be a board of election in each county of the state." Each county board has at least two commissioners appointed by the county legislature upon recommendation of the "major political parties" (i.e. Democrat and Republican). Each commissioner serves for a term of two or four years and may be reappointed to consecutive terms without limit. An election commissioner may be removed from office for cause by the Governor but this is not the exclusive remedy for bad behavior. The office of County Commissioner of Elections is a high public office governed by applicable provisions of the Public Officers Law (Broome County v. Conte, 120 Misc 2d

contend that this information was necessary to identify or to permit proper contact with the registrants. Instead, he based his position on an old Dutchess County "policy" which he contends required the additional information. Apparently, Commissioner Haight is unaware that, such practices and policies are unconstitutional (see Williams v. Salerno, 622 F Supp 1271 [SDNY 1985], where the Federal District Court for the Southern District of New York held that the rejection of college student voter registration applications on the ground that campus dormitory addresses were inadequate to establish residence in the state was unconstitutional and the unilateral action of one county election commissioner in seeking further information of the students was not authorized and did not constitute board action unless both commissioners agreed).

³ See Public Officers Law § 18 , subd. 2 and the discussion infra at pp. 11-12.

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1050 [Sup Ct Broome County, 1983], aff'd 101 AD2d 905 [3d Dep't 1984]). Public Officers owe a duty of loyalty to the public and upon conviction of any felony or any misdemeanor involving a violation of his/her oath of office, their office may be declared vacant by the county legislature. In addition, a county legislature is not required to appoint or reappoint any person recommended by a political party (Eisberg v. Dutchess County Legislature, 37 F Supp 2d 283 [SDNY 1999], aff'd 181 F3d 82 [2d Cir. 1999]) and may reject any recommended or nominated individual (Matter of Thomas v. Wells, 288 NY 155 [1942]).

Pursuant to Election Law § 3-212, subdivision 2, "all actions of the board shall require a majority vote of the commissioners prescribed by law for such board." (Emphasis added.) Thus, where a county board of elections has two members, both members are required to agree to constitute an official action of the board, and unilateral action by one commissioner does not constitute an official act of the board (Buhlmann v. Wilson, 96 Misc 2d 616 [Sup Ct Wayne County 1978]; Starr v. Meisser, 67 Misc 2d 297 [Sup Ct Nassau County 1971], reversed on other grounds, 39 AD2d 712 [2d Dep't 1972], aff'd 33 NY2d 748 [1973]; Slater v. Board of Supervisors of Cortland County, 61 Misc 2d 595 [Sup Ct Cortland County 1970]). Notably, these more definite provisions of the Election Law were not included in the Stipulation and Order.

Pursuant to Election Law § 3-216, any law enforcement agency shall assist in the investigation of voter registrations and render all other practical assistance, "whenever called upon by a board or elections." And, the request of one commissioner does not constitute an act of the board. This section also does not appear in the Stipulation and

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Order at issue in this proceeding.

Contempt is a broad remedy used in many areas of the law to enforce judgments and orders (see, e.g., CPLR 5104); protect the dignity and authority of the court (Judiciary Law § 750 et seq.); remedy a violation of the private rights of a party to a lawsuit (Judiciary Law § 753), or punish more serious contempts with criminal sanctions (Penal Law §§ 215.50 and 215.51). Where, as here, a party to an action or proceeding seeks to punish another party for an alleged violation of a court-ordered stipulation, the process and procedures are governed by the contempt provisions set forth in Judiciary Law Article 19, §§ 750-781.

Contempt, as defined in the Judiciary Law, may be either civil (Judiciary Law § 753) or criminal (Judiciary Law § 750), and the same conduct may constitute both a civil and a criminal contempt (DEP of NYC v. DEC of NYS, 70 NY2d 233 [1987]; Larisa F. v. Michael S., 122 Misc 2d 520 [Fam Ct 1984]). Criminal contempt is an offense against the authority of the judiciary while civil contempt seeks to vindicate the private rights of a party to a civil action (see generally, Siegel's New York Practice § 482).

Since criminal contempts as defined in the Judiciary Law are "petty offenses" the full panoply of Constitutional rights afforded to those accused of serious crimes are not available (see U.S. v. Martinez, 686 F2d 334 [5th Cir. 1982]; U.S. v. Nunn, 622 F2d 802 [5th Cir. 1980]; U.S. v Bukowski, 435 F2d 1094 [7th Cir. 1970]) and, in particular, the accused is not entitled to be charged by indictment of a grand jury (see Nunn, and Bukowski, id.). Instead, the accused is entitled to the procedural due process guaranteed

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by the due process clauses of the Fifth and Fourteenth Amendments (Taylor v. Hayes, 418 US 488 [1974]). This requires notice and a reasonable opportunity to be heard (U.S. v. Lumumba, 741 F2d 12 [2d Cir. 1984]).

To sustain a finding of civil contempt, the party seeking contempt must establish, by clear and convincing evidence, (1) that a lawful court order clearly expressing an unequivocal mandate is in effect, (2) that the party charged has actual knowledge of its terms, and (3) that the offender's conduct or inaction defeats, impairs, impedes or prejudices the moving party's rights (Gonzalez v. Hunter, 50 AD3d 1262 [3d Dep't 2008]).

A finding of criminal contempt requires proof beyond a reasonable doubt (Bloom v. Illinois, 391 US 194 [1968]) which establishes, (1) the existence of a clear and definite order of the court, (2) that the party charged has actual knowledge of its terms, and (3) willful disobedience (Holtzman v. Beatty, 97 AD2d 79 [2d Dep't 1983], citing United States v. Powers, 629 F2d 619 [9th Cir. 1980]).

Since criminal contempt requires a higher burden of proof and proof of willfulness, it might be assumed that its breach carries greater penalties. However, this is not always the case. A criminal contempt punishes conduct that threatens the dignity of the court, and is limited to a fine not to exceed \$1,000 or 30 days in jail, or both. A civil contempt seeks to address the actual impairment of the private rights of a party. Thus, a fine may be assessed in any amount sufficient to compensate the victim for the actual damages caused, plus costs and attorney's fees. In addition, if the violation is ongoing, the contemnor may be fined for each day the violation continues and/or jailed until he/she

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complies. Thus, persons found guilty of civil contempt may spend many months or even years in jail (see People ex rel. Feldman v. Warden, 46 AD2d 256 [1st Dep't 1974], aff'd 36 NY2d 846 [1975]).

The guarantee of due process requires a hearing "appropriate to the nature of the case", (U.S. v. Raddatz, 447 US 667 [1980]), but a full evidentiary hearing is not mandated in every instance where contempt is sought. If no factual disputes exist, and the matter may be resolved upon the parties' submissions, no evidentiary hearing is necessary (Brown v. Mudry, 55 AD3d 828 [2d Dep't 2008]).

While an individual always has the right to be represented by an attorney of one's choosing, there is no common law right of a public officer to compel the taxpayers to pay for private counsel. Instead, public officers have a qualified statutorily created right to be reimbursed for the fees of their private attorney when certain circumstances and conditions exist (see Public Officers Law § 18; see also Cahn v. Town of Huntington, 29 NY2d 451 [1972]). Thus, Public Officers Law section 18, subdivision 3(a) expressly provides, "[u]pon compliance by the employee with the provisions of subdivision five of this section, the public entity shall provide for the defense of the employee in any civil action or proceeding . . ." Subdivision 5 requires the public officer to deliver to the chief legal officer of the public entity a written request for representation and provide full cooperation to the chief legal officer. The "chief legal officer" in Dutchess County is the County Attorney.

In addition, Public Officers Law section 18, subdivision 2 also sets conditions for a public officer's retention of private counsel.

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“Subject to the conditions set forth in paragraph (a) of this subdivision, the employee shall be entitled to be represented by private counsel of his choice in any civil action or proceeding whenever the chief legal officer of the public entity . . . determines that a conflict of interest exists or . . . a court . . . determines that a conflict of interest exists.”

Thus, the determination as to whether a conflict of interest exists sufficient to warrant retention of outside, private counsel, at additional taxpayer expense, is not left to the unbridled discretion of public employees who have neither the legal training, education, nor experience to make that determination. In instances involving claims made by or against county boards of elections and/or the commissioners of the boards of elections, it is the County Attorney’s responsibility to determine whether he/she can represent the board of elections, or one, or the other, or both, of the commissioners (see, e.g., Williams v. Rensselaer County Bd. of Elections, 118 AD2d 966 [3d Dep’t 1986], appeal dismissed 68 NY2d 809 [1986]; Hill v. County of Sullivan, 14 AD3d 744 [3d Dep’t 2005]). And where, as here, a board of elections cannot act because of a split among two county election commissioners, the County Attorney may properly choose to represent one of the commissioners in a proceeding commenced to resolve the dispute (Elgin v. Smith, 10 AD3d 483 [4th Dep’t 2004]).

In such circumstances, it is incumbent upon the public official seeking to retain outside counsel to provide evidence sufficient to establish that the municipal attorney, “. . . refused to act, or was incapable of, or was disqualified from acting,” before such official is entitled to receive public funds for a private attorney (Hill v. County of Sullivan, 14 AD3d 744 [3d Dep’t 2005]). Neither of the Dutchess County Board of Election

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Commissioners made any effort to satisfy this burden. In fact, there is no evidence to suggest that either of them even notified the County Attorney before retaining private counsel. Without notifying the County Attorney and obtaining his/her permission, neither commissioner was authorized to retain private counsel at taxpayer expense.

ANALYSIS

In the instant matter, one party to a court-ordered stipulation accuses the other of violating that order. The moving party alleges that the contemptuous conduct constitutes both civil and criminal contempt under sections 753 and 750 of the Judiciary Law. The alleged contemnor denies the allegations of contempt and moves to dismiss upon the grounds that he was not prosecuted by indictment as provided in Criminal Procedure Law Article 170. Upon review of the parties' submissions, the Court determines that the relevant facts are not in dispute and therefore a full evidentiary hearing is not required. In addition, the motion to dismiss must be denied since Article 170 of the Criminal Procedure Law is inapplicable to these proceedings.

The only remaining issue is whether Commissioner Haight's unilateral action in failing to comply with the Election Law procedures constitutes either a civil or a criminal contempt. This Court answers in the negative.

While Commissioner Haight clearly and unequivocally violated the spirit of both the statute and the court-ordered Stipulation, the allegedly contemptuous conduct (i.e. failing to file a proper challenge and unilaterally causing a sheriff's investigation prior to any bipartisan internal review by the Board of Elections) was not expressly or explicitly

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prohibited by the court order. Where terms of an order are vague or indefinite, or may be susceptible to different interpretations, a finding of contempt will not lie (Holtzman v. Beatty, 97 AD2d 79 [2d Dep't 1983]; Muwwakkil v. Metropolitan Suburban Bus Auth., 289 AD2d 309 [2d Dep't 2001]; Hoglund v. Hoglund, 234 AD2d 794 [3d Dep't 1996]; Korn v. Gulotta, 186 AD2d 195 [2d Dep't 1992], leave to appeal denied 81 NY2d 759, reargument denied 81 NY2d 835 [1993]). Since the Stipulation and Order did not contain an unequivocal mandate regulating the precise activities complained of, neither civil nor criminal contempt will lie. In view of the foregoing, the Court need not address Commissioner Haight's additional claim that he only undertook these actions upon advice of counsel.

However, a finding that his conduct does not meet the technical definitions of contempt should in no way serve to exonerate Commissioner Haight from his bad behavior. In his short tenure as election commissioner, he has demonstrated a lack of professional judgment. His wasteful reliance on private counsel, the county sheriff's office, the county attorney and the district attorney further strains already scarce financial resources and constitutes a waste of taxpayer money. In addition, Commissioner Haight's seeming ignorance of the applicable provisions of the Election Law, which govern the function and administration of county boards of election, raises serious doubts as to his ability to serve in this high public office. Finally, his refusal to allow the petitioner an opportunity to review the documents before he caused them to be removed is simply inexcusable.

The court respectfully reminds both Commissioners that the Election Law applies to each of them and it is their responsibility to become familiar with all applicable

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provisions. The legislative purpose in creating county boards of elections was "to create a bipartisan board to have charge of elections" (In Re Kane, 144 AD 196 [2d Dep't 1911], aff'd 202 NY 615) (emphasis added). Continued failure to know and abide by these laws should not be tolerated. This Court respectfully suggests that the Dutchess County Board of Legislators and the State Board of Elections more closely monitor the conduct of the Dutchess County Board of Elections Commissioners, and require a higher level of performance and professionalism before any future reappointment.

This is the Decision and Order of the Court.

The court has read and considered the following papers:

- 1) Notice of Motion for Contempt; Affirmation in Support of Kathleen O'Keefe, Esq.; Exhibits A–B; Affidavit in Support of Kelly Hetrick; Memorandum of Law;
- 2) Affidavit of Erik J. Haight; Exhibits A–F;
- 3) Reply Affirmation of Kathleen O'Keefe, Esq.;
- 4) Notice of Motion to Dismiss; Affirmation of James E. Walsh, Esq.; Attachment A; and
- 5) Affirmation in Opposition of Kathleen O'Keefe, Esq.

Dated: May 22, 2013
 White Plains, New York


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