Rothbart v Otsego County Bd. of Elections

2025 NY Slip Op 33115(U)

August 19, 2025

Supreme Court, Otsego County

Docket Number: Index No. EF2025-484

Judge: Brian D. Burns

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At a term of the Supreme Court of the State of New York held in and for the County of Otsego, at Cooperstown, New York, on July 18, 2025.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF OTSEGO

MICHAEL FORSTER ROTHBART,

Petitioner,

v.

OTSEGO COUNTY BOARD OF ELECTIONS,

Respondent.

DECISION AND ORDER

Ind. No. EF2025-484

BEFORE: HON. BRIAN D. BURNS
SUPREME COURT JUSTICE

APPEARANCES: For Petitioner
Steven Z. Feuer, Esq.

For Respondent
Monica V. Carrascoso, Esq.

This Election Law proceeding, brought pursuant to Election Law § 16-102, comes before the court on the verified petition of Michael Forster Rothbart, an independent candidate for the public office of City of Oneonta Council Member, Ward 7. Petitioner challenges the June 5, 2025 determination of the Otsego County Board of Elections disqualifying his independent nominating petition on the ground that his proposed party emblem violated Election Law § 2-124. He seeks judicial review of that determination and reinstatement of his candidacy for the general election to be held on November 4, 2025.

On or about May 23, 2025, petitioner Michael Forster Rothbart filed an independent nominating petition with the Otsego County Board of Elections ("BOE"), seeking to appear on the general election ballot for Oneonta Council Member, Ward 7. The petition listed the independent body name "Better Oneonta" with a logo incorporating the words "Better Oneonta" as the proposed party emblem.

Objections to the petition were filed on May 27. The BOE held a hearing to determine the objections on June 5, 2025. At the conclusion of that hearing, the BOE issued a determination rejecting the petition on the grounds that the proposed party logo was impermissibly similar to official logo of the City of Oneonta and constituted a prohibited symbol under Election Law § 2-124. Although no written notice of the determination was mailed to petitioner, an email conveying the outcome was sent to Michael Huttner, a member of petitioner's campaign team. The petitioner never expressly authorized the BOE to provide a notice of its determination by email.

The BOE alleges that the petitioner had communicated with it by email regularly in the months leading up to the filing of the present petition and that the petitioner often initiated the email exchanges. The respondent recites a litany of such email exchanges dating from November of 2024 and continuing through the end of May 2025. Petitioner does not contest these allegations

Petitioner commenced this special proceeding under Election Law § 16-102 on June 10, 2025, and filed an amended verified petition on June 11, 2025. Petitioner served respondents with the petition on or about June 20, 2025. The court signed an Order to Show Cause June 17, 2025, making the matter returnable on June 30, 2025. On that date, the court heard oral argument from the parties in person. The court then provided the parties the opportunity to submit

supplemental briefs no later than July 18, 2025. Each party submitted a supplemental brief and the court has considered the same in reaching its determination of the issues before it.

The BOE contends that the petitioner's legal challenge is untimely and should be dismissed on these grounds. Election Law § 16-102(2) requires that a petition challenging a board's determination be filed and served within fourteen days after the last day to file the petition or within three days of receiving notice of the adverse determination, by mail, whichever is later. Notification by electronic correspondence in lieu of mail and/or to a candidate's designee must have the candidate's affirmative consent (Election Law § 6-154[7]).

The parties agree that the last day to file petitions was May 28, 2025. Thus, the last day to file and serve a legal challenge to any determination of an objection to the petitions was June 10, 2025 – or three days after the date the BOE provided the petitioner notice by mail of its determination – whichever date is later in time. Here, the legal challenge was filed on June 10 but not served until June 20, 2025. The BOE contends that the petitioner's legal challenge is therefore untimely. Petitioner contends, and respondent concedes, that respondent never served the petitioner notice of its determination by mail, and as a result the three-day extension of the time period to file has not even begun to run, much less expire.

Under Election Law § 6-154(5), when a board of elections makes a determination that a designating petition is invalid, the board must "give notice of the determination forthwith by mail." The failure to provide timely notice to the candidate by mail delays the start of the petitioner's three-day window to file a judicial challenge (see, *Matter of Richardson v. Britt*, 242 A.D.2d 857, 858, 662 N.Y.S.2d 332 [4th Dept. 1997]).

The BOE argues that consent to notice via electronic mail can be inferred under these circumstances. The petitioner initiated communication with the BOE by email numerous times

and never objected to communicating with the BOE responding by email. The petitioner provided the BOE with his email address. This argument is reasonable, logical, and based on the BOE's good faith efforts to communicate with the petitioner in a method of his choosing. It is, however, unavailing. The Election Law's requirements are clear: absent affirmative, written consent to electronic notice, the BOE must effect service "by mail" (see, Election Law § 6-154[5], [7]). The email sent to petitioner's aide, while providing actual notice, does not substitute for statutory notice in the absence of compliance with § 6-154's procedural safeguards. The three-day window to initiate proceedings under § 16-102(2) does not begin until notice is provided by mail (see, *Matter of Richardson*, 242 A.D.2d at 858).

Nor is the court persuaded by respondent's reliance on *In re Application of Gabler*, which upheld electronic notice where the candidate had previously provided the BOE with his email address. (*In re Application of Gabler v. Cattaraugus Cty. Bd. of Elections*, 63 Misc. 3d 1236(A), 115 N.Y.S.3d 828 [N.Y. Sup. Ct. 2019]. The decision in *Gabler* is thoughtful and well-reasoned and is based on the court's determination that providing notice by email, instead of by regular mail, is consistent with the State's policy of using technology when available and appropriate. This court notes, however, that the decision in *Gabler* has not been followed by any court, nor has its reasoning been affirmed by the Court of Appeals or any Appellate Division of Supreme Court in the State. In short, *Gabler* is not controlling precedent and this court finds its holding to be inconsistent with the principle that requires courts to construe the Election Law, where its provisions are clear and unambiguous, strictly.

The court now turns to the merits of the petition. Although the record reflects that the Board initially reviewed the sufficiency of petition signatures, the Board's final determination of invalidity was based solely on the emblem accompanying the petition. No findings of signature

insufficiency were issued, and the respondent has not defended the rejection on that basis in this proceeding. Accordingly, the court confines its review to the emblem issue.

Election Law § 2-124 requires that a designating petition must comply with the requirements which includes, in relevant part, the specification of a party emblem "may not be the same as or similar to any emblem, insignia, symbol or flag used by any political or governmental body," as such similarity may be "likely to create confusion." Although emblems may not mislead voters or infringe upon official symbols, courts have upheld the validity of petitions where candidates made timely efforts to cure emblem defects and have not barred substitution absent fraud or prejudice. (see, *McNulty v. May,* 54 A.D.2d 780, 780, 387 N.Y.S.2d 489 [3rd Dept. 1976]; *Moncayo v. Withers,* 154 A.D.2d 598, 599, 546 N.Y.S.2d 426 [2nd Dept.1989]).

Respondents argue that petitioner's emblem is invalid because it is "identical" to a City of Oneonta logo. The BOE is clearly correct in this determination. However, respondent specifically requested on May 30, 2025, to cure the emblem issue in accordance with 9 NYCRR § 6215.7(d). The statute does not prohibit emblem substitution in the interest of preserving valid candidacies, particularly where no prejudice results. The record is silent as to any response from the BOE. Under these circumstances, the court finds that petitioner made a timely, good-faith effort to comply with the Election Law. As recognized in *McNulty* (54 A.D.2d at 780), and *Moncayo* (154 A.D.2d at 599), courts may exercise discretion to allow emblem substitution absent fraud, voter confusion, or material misrepresentation. Moreover, petitioner has proposed two alternative emblems—one already approved for use by a candidate running under the same party banner—thus offering a clear and non-prejudicial remedy. No statute bars this substitution, and precedent supports permitting it where no voter confusion or fraud is present.

For the foregoing reasons, the court finds that the proceeding is timely filed and that the BOE's initial determination, while correct at the time it was made, should be modified to allow the petitioner to appear on the ballot under one of the alternate emblems he proposed using after the initial determination was made. The BOE shall have discretion to select which emblem to use, provided it complies with the size and content restrictions of Election Law § 2-124.

NOW, THEREFORE, it is hereby

ORDERED, that the petition is hereby granted; and it is further

ORDERED, that the Otsego County Board of Elections shall place the name of petitioner Michael Forster Rothbart on the November 2025 general election ballot as the candidate for the office sought; and it is further

ORDERED, that the Otsego County Board of Elections shall print the ballot to include either of the alternative emblems submitted by petitioner in his sworn affidavit dated July 17, 2025, at the BOE's discretion, provided such emblem complies with the size and content restrictions of Election Law § 2-124; and it is further

ORDERED, that any other relief not specifically granted herein is denied.

Dated: August 19, 2025
at Cooperstown, New York

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Hon. Brian D. Burns
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Hon. Brian D. Burns
Supreme Court Justice

To: All parties via NYSCEF