

SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT; DUTCHESS COUNTY

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In the Matter of the Application of  
Joseph Mondello, Chairman of the New York State  
Committee of the Republican Party, and  
Patricia Killian, Chairman of the Dutchess County  
Conservative Committee,

Petitioners,

-against-

**DECISION AND ORDER**

Index No: 2254/09

The New York State Board of Elections,  
Gregory Peterson, Douglas Kellner, Evelyn  
Aquila, James Walsh, Commissioners, and The  
Dutchess County Board of Elections, David  
Gamache and Fran Knapp, Commissioners, and  
The Columbia County Board of Elections, Donald  
Kline and Virginia Martin, Commissioners, and  
The Rensselaer County Board of Elections, Larry  
Bugbee and Edward McDonough, Commissioners,  
and The Essex County Board of Elections, Lew  
Sanders and David Mace, Commissioners, and  
The Greene County Board of Elections, Thomas  
Burke and Frank DeBenidictus, Commissioners,  
and The Saratoga County Board of Elections,  
William Fruci and Diane Wade, Commissioners,  
and The Warren County Board of Elections,  
Mary Beth Casey and William Monfort, Commissioners,  
and The Washington County Board of Elections,  
Jeffrey Curtis and Donna English, Commissioners,  
and The Delaware County Board of Elections,  
Janice Brudick and William Campbell, Commissioners,  
and The Otsego County Board of Elections, Henry  
Nicols and Sheila Ross, Commissioners, and

James Tedisco and Scott Murphy,  
Candidates for Member of the U.S. House of Representatives  
for the 20<sup>th</sup> Congressional District,

Respondents.

The parties and counsel appeared before this court on April 15, 2009 at which time direction was requested from this court regarding certain issues which have arisen during the counting process to determine the next member of the United States House of Representatives in the 20<sup>th</sup> Congressional District in New York.

The background of the application to this court has been more fully set forth in an order of this court dated April 6, 2009 and need not be reiterated in the context of this order.

It would appear as though the counting of absentee ballots together with the counting of overseas ballots which commenced on April 14, 2009 has been taking place and although certain concerns had been raised by one party or the other regarding the progress of the counting, on an overall basis it has been proceeding to the point that apparently four of the ten counties have completed their count and one county has only the overseas and/or military ballots to finalize.

It was further represented to this court that there are approximately 1,200 ballots which have been set aside due to objections raised by representatives of one or the other of the candidates.

It is apparent that for the most part members of the boards of elections throughout this district and/or their representatives need not be present in court on any additional dates unless an issue should arise that specifically addresses a particular county board of elections. This court is cognizant of the fact that of the 10 counties involved, many of those are a great distance from this courthouse which requires hours of traveling each way. The time of the members of the boards of elections in those counties and/or their representatives is better spent attending to the duties of their jobs.

Three issues were raised before this court on April 15, 2009. The first concerns a procedure to be in place in the event that both members of a board of election believe a particular absentee ballot should be counted while a representative of one of the parties objects to it being opened, cast and canvassed. The second issue addresses the authority of the candidates and indeed this court to review applications for absentee ballots in order to question the legitimacy of a decision by a particular board of elections when granting a request for an absentee ballot. In other words, once a board of elections makes a determination that the absentee ballot will be forwarded, does that preclude any inquiry as to the propriety of the application in the first instance. The last issue is one of residency and to what degree a person can live in one jurisdiction and yet claim to be a resident for voting purposes in another jurisdiction. So far as this last issue, the court has given counsel for James Tedisco until Monday, April 20, 2009 to submit any legal authority opposing the cases cited by counsel for Scott Murphy as it relates to this issue.

Turning first to the question as to what should happen in the instance where both commissioners of a particular board of elections have determined an absentee ballot should be opened and where one of the candidate's representatives objects to it, the concern is that if the

ballot is opened, that ballot is thereafter separated and counted, any judicial review pursuant to Election Law 16-112 would be ineffective as any defects claimed by the objector would not appear on the face of the ballot itself and a re-canvass would be futile. Counsel for candidate Murphy indicates that pursuant to recent case law, Matter of People for Ferrer v. Board of Elections of City of New York, 286 AD2d 783 [2001], this court lacks the authority to vary the statutory scheme set forth in Articles 8 and 9 of the Election Law and in effect the court is limited to its authority as set forth under the Election Law of the State of New York.

As a matter of fundamental fairness, it would seem that there is an easy answer to this dilemma which permits the voting process to go forward as anticipated but nevertheless preserves the envelope and ballot for future review. This precise issue was addressed in Matter of O'Keefe v. Gentile, (1 Misc3d 151). A simple procedure was put into place whereby the envelope would be opened, a photocopy of the ballot made prior to canvassing of it, and then the photocopy returned to the envelope and sealed with a notation that an objection had been made but not sustained. This court agrees with that concept and procedure as it truly protects everyone's rights and will cause minimal invasion of process at the board of elections.

In relation to the request to review applications for an absentee ballot, Section 8-402 (7) of the Election Law directs that a board of elections shall keep a record of all such applications for absentee ballots showing certain pedigree information on such applications. The list of applicants is available to the persons identified in that section of law. In a recent decision of this department where an application had been made seeking a copy of the underlying application, it was held that "... there is no express provision in the Election Law providing for the relief they seek..." (See Jacobs v. Biamonte, 38 AD3d 777). In other words, the Appellate Division, Second Department declined to extend the rights of inquiry absent legislation granting to the Supreme Court such power. This court concurs and it is therefore

ORDERED that absent specific directive by this court, it is unnecessary for any commissioners of the boards of election and/or their representatives in the 20<sup>th</sup> Congressional District to be present for any further court proceedings. It is further

ORDERED that in the event there is a unanimity of the commissioners of a board of elections in any county within the 20<sup>th</sup> Congressional District which would allow a ballot to be opened and an objection is made by a representative of either candidate or the petitioner, the envelope shall be opened, a photocopy of the ballot made before canvassing and then the photocopy of the ballot placed back in the envelope where it shall be sealed and an endorsement made concerning the objection and who made it. It is further


ORDERED that either candidate or petitioner shall be entitled to a list of applicants for absentee ballot for the March 31, 2009 special election but shall not be entitled to the underlying application form itself. It is further

ORDERED that counsel shall appear before this court on Monday, April 20, 2009 at 10:00 a.m. for further proceedings and to establish a means to continue counting of the votes in an orderly fashion.

The foregoing constitutes the decision and order of this court.

Dated: April 15, 2009  
Poughkeepsie, New York

ENTER:



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SUPREME COURT JUSTICE

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.