

SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART XXXII, SUFFOLK COUNTY

ORIGINAL MOTION DATE:2/18/05

PRESENT: HON. MARY M. WERNER
JUSTICE OF THE SUPREME COURT

SUBMIT DATE: 2/24/05

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DOROTHY KLEIN, BRIAN SCHNECK,
MICHELE LYNCH ERNEST K. WESSBERG,
SHARIN THOMSON, HERBERT D. BIBLO,

MOTION NO.: 001, MD

Petitioner(s),

DANIEL L. PAGANO, ESQ.
Attorney for Petitioners
2649 Strang Boulevard, Suite 104
Yorktown Heights, New York 10598

- against -

ROBERT L. GARFINKLE, ANITA S. KATZ
COMMISSIONERS, constituting the Suffolk
County Board of Elections, and

VINCENT J. MESSINA, JR., ESQ.
Attorney for Respondents
Working Families Party County
Committee of Suffolk County and
Charles J. Pohanka, III, Chairman
320 Carleton Avenue, Suite 3200
Central Islip, New York 11722

the purported;

WORKING FAMILIES PARTY COUNTY
COMMITTEE OF SUFFOLK COUNTY and
THE EXECUTIVE COMMITTEE OF THE
SUFFOLK COUNTY WORKING FAMILIES PARTY
COUNTY COMMITTEE, CHARLES J. POHANKA, III,
CHAIRMAN, DONNA LENT, SECRETARY, and
DOROTHY WEISSGERBER, TREASURER OF
SAID COUNTY COMMITTEE,

CHRISTINE MALAFI, ESQ.
Suffolk County Attorney
Attorneys for Respondents
Robert L. Garfinkle, Anita S. Katz
Commissioners, constituting the
Suffolk County Board of Elections
By: Andrew G. Tarantino, Jr., Esq.
400 Carleton Avenue
Post Office Box 9062
Central Islip, New York 11722

Respondent(s).

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NEIL H. TIGER, ESQ.
Attorney for Respondent
Donna Lent
33 McGregor Drive
Southampton, New York 11968

JOHN J. LEO, ESQ.
Attorney for Respondent
191 New York Avenue
Huntington, New York 11746

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Upon the following papers read on this motion; Notice of Motion and Supporting Papers 1-14 and Exhibits A-H; Answering Affidavits and Supporting Papers 15-35 and Exhibit A; Replying Affidavit 36-44 and Exhibits A-B; and prior decisions of the Court; it is

ORDERED that the motion (seq #001) by petitioners for an order granting summary judgment on their petition pursuant to Election Law § 16-102 on the grounds that the purported Organizational Meeting of the Suffolk County Working Families Party Committee held September 27, 2004 is null and void and that the filing with the Suffolk County Board of Elections on September 27, 2004 of the election of officers and Rules and Regulations generated from the meeting are null and void is denied.

By Verified Petition pursuant to Election Law § 16-102 dated October 6, 2004 petitioners challenged the validity of the purported Organizational Meeting of the Suffolk County Working Families Party Committee held September 27, 2004 on the grounds that the meeting was not properly noticed, called and/or convened; that no quorum was present; that fraudulent/non-existent proxies were used by respondents; that no roll call was conducted or taken as required; that there was a failure to conduct voice voting fairly; and that there was a failure to follow Roberts Rules of Order. Following appeal of the Court's dismissal of the petition on October 15, 2004, the matter was remitted to this Court for further proceedings including an evidentiary hearing on the merits of the petition. Matter of Klein v. Garfinkle, 12 A.D.3d 604, 786 N.Y.S.2d 77 (2nd Dep't, 2004). Following an appearance before the Court on January 5, 2005 regarding discovery applications, the parties agreed upon February 18, 2005 for the hearing. Petitioners submitted the present motion for summary judgment. The hearing on the petition was adjourned to commence on May 11, 2005.

In support of this motion for summary judgment, petitioners submit: a copy of the Working Families Party Rules and Regulations; the sign-in sheet from the meeting containing 37 names ¹(which respondents have maintained both at the initial hearing on this matter and in opposition to this motion is not necessarily complete); copies of 56 proxies held by Donna Lent and or Charles J. Pohanka, III (provided to petitioner pursuant to this Court's direction); proxies held by petitioners and others that were submitted to the credentials committee at the September 27, 2004 meeting (held to be invalid and ineffective based upon the absence of the Election District on the individual proxy); a copy of the minutes of the meeting; and the affidavit of petitioner Brian Schneck dated January 17, 2005. In opposition, respondents Executive Committee of the Suffolk County Working Families Party Committee and Charles J. Pohanka, III submit: the affidavits of counsel for these respondents; the affidavit of the attorney for

¹One person is marked as having left before the meeting began.

Donna Lent; the affidavit of Charles J. Pohanka, III; the check for use of the Riverhead Polish Hall on September 27, 2004, the affidavit of Dorothy Weissgerber; copies of the 71 proxies respondents claim to have held on September 27, 2004.

It is well settled that "except where expressly governed by legislation, the internal organization and authority of a political party is governed by the party rules" Matter of Bachmann v. DeFronzo, 164 A.D.2d 926; 559 N.Y.S.2d 586 (2nd Dep't, 1990); see, Election Law § § 2-114. Where a meeting is held in contravention of the subject party rules any action taken thereat is invalid. *Id.*; see also, Matter of Firestone v. MacKay 306 A.D.2d 346, 760 N.Y.S.2d 548 (2nd Dep't, 2003). A Court "is bound to give effect to applicable rules of a political party, both as a matter of federal constitutional law and as a matter of clear statutory intent". Lugo v. Board of Elections, 123 Misc. 2d 764, 474 N.Y.S.2d 910 (Sup. Ct., N.Y. Co., 1984).

The Suffolk County Working Families Party Rules and Regulations (hereinafter "SCWFP rules") specifically require that "at any meeting of the County Committee or of a Town Committee, a "quorum" shall be twenty percent (20%) of the County Committeemen entitled to vote at such meeting and present in person or by proxy, said 20% to be determined by and based upon the "vote" of such committeemen as herein defined." (Article 1 § 5). "Vote" "as it applies to a County Committeeman, whether he or she be voting in a meeting of the County Committee or of the Town Committee" is defined as "one -half of the party vote in his or her election district for governor at the last preceding gubernatorial election".(Article 1 § 5). Under the SCWFP rules, an organizational meeting is a County Committee meeting at which "the Chairman of the outgoing County Committee shall preside until a Chairman of the new County Committee is elected." (Article III § 4). The SCWFP rules provide that ""The following order of business shall be maintained unless changed by unanimous consent. 1. Pledge of Allegiance and Invocation (Star Bangle Banner, were (practical) (sic); 2 Roll call (by collective proxies); 3. Filling of vacancies; 4. Adoption of rules or amendments, if any; 5. Election of officers." (Article III § 6).

The submitted "Minutes of the Working Families Party Re-Organizational Convention September 27, 2004" recite that immediately following the calling of the Convention to order, Charles J. Pohanka, III, "designated as Convener by the Suffolk County Working Families Party Executive Committee", "entertained a motion to dispense with the reading of the roll of delegates and motion carried. A majority of delegates sufficient to make up a majority by substitution being present, the Convener entertained a motion to elect a Chairperson. Nominations were accepted, and after there being no further nominations and after a motion duly made and seconded, and adopted, nominations were closed, and a vote was called on to vote for a Chairperson. A resolution was made, seconded and adopted and the roll was dispensed with a vote taken viva voce by majority vote. Charles J. Pohanka, III was hereby elected Chairperson by majority vote."

The requirement for a "quorum" as set forth in the SCWFP rules for "any other Committee described herein shall be a majority thereof present in person or by proxy." To be a validly constituted organizational meeting, as a designated County Committee meeting, a "quorum" (20% of the County Committeemen entitled to vote and present in person or by proxy, said 20% to be determined by and based upon the "vote" of such committeemen as herein defined.) is required to be present.(Article I § 5; Article III § 4). Thus, there were required to be present "in person or by proxy", elected County Committeemen with a weighted vote of 20% of the total weighted vote of 1097 votes at the subject meeting. For purposes of determining the total weighted and proportional vote the court accepts petitioners' uncontested figures: the number of County Committeemen elected on September 12, 2004 as 586; the total weighted vote represented by them as 1,097 votes; a quorum of 20% of this number as 219.4 votes. Therefore, in order for both the September 27, 2004 organization meeting and the actions taken at this meeting to have been valid, the County Committeemen present at the meeting were required to be present either in person or by proxy² with the ability to cast 219.4 weighted votes.

On this motion, petitioners have recognized that the credentials committee ruled that all the proxies submitted by petitioners "were not going to be counted as they lacked Election Districts on them". In opposition to the motion, respondent Charles J. Pohanka, III avers that " the proxies submitted by the petitioners are fatally defective and were held so by the credentials committee of the organizational meeting". Dorothy Weissgerber avers she was a member of the credentials committee on September 27, 2004 that ruled that the proxies submitted by petitioners were "fatally defective" as they "failed to include the Election District of the person giving the proxy".³ Therefore, for purposes of determining whether in fact a quorum was present, the Court will not consider the proxies submitted by petitioners inasmuch as petitioners have not demonstrated that the ruling of the credentials committee requiring that the election district of the individual signing the proxy was made in error (as weighted voting requires that the use of this number for computation of the individual's vote).

²The rules governing the use of proxies are contained in Article VIII Section 1 and provide that: "The members of the County Committee...may be represented and vote by proxy at any meeting of such committees. Such proxy must designate another member and may designate an alternate member of the County Committee.....as a proxy member authorizing the proxy.... Aside from the Officers and the members of the Executive Committee, including the out-going Officers and members thereof, the maximum number of proxies that one member may hold is (4) proxies. All prior proxies are revoked by the member's signature on a new proxy. All persons designated as proxies shall be subject to the approval or disapproval of the credentials committee at any time during the course of any meeting."

³In her affidavit respondent Dorothy Weissgerber further states "In fact, the total number of proxies submitted on behalf of respondents is seventy-one (71). The total number of proxies submitted on behalf of petitioners is sixty-three (63)".

Petitioners rely upon the sign-in sheet reflecting 36 attendees and the respondents 71 proxies (notwithstanding their challenges to the authenticity and validity of these proxies) to demonstrate that no quorum was present at the September 27, 2004 meeting.

The Court has reviewed the sign-in sheet and the 71 proxies submitted by respondents to determine whether as defined in the party rules a quorum was present on September 27, 2004 .

While the Court has credited the 71 proxies⁴ respondents have submitted on the motion⁵, the Court has independently reviewed each of these documents and observes that the respondents proxies originally submitted to the Court totaling 56⁶ are the same

⁴The 71 Proxies included in Respondents' Exhibit A are purportedly those given to Charles J. Pohanka, III or Donna Lent by the following individuals: Deborah Cuniglio dated 9/20/04; Michael Cuniglio dated 9/27/04; Betty D. Pohanka dated 9/23/04; Charles J. Pohanka, Jr. dated 9/23/04; Patricia Serrano dated 9/23/04; Peter Vaccaro dated 9/27/04; Sheila Monteleone dated 9/27/04; John C. Mareinka dated 9/19/04; Kenneth E. Grich dated 9/19/04; David Crimi dated 9/19/04; James C. Pendrell dated 9/27/04; James D. Pendrell dated 9/27/04; Patricia M. Chatterton dated 9/27/04; Robert Willsey dated 9/27/04; Veronica Boeckmann dated 9/10/02 ED. 4 crossed out 69vb; Robert Boeckmann dated 9/10/02 ED 4 crossed out 199rb; Carolyn La Morte dated 9/22/04; Nadine La Morte dated 9/22/04; Gregory Lent dated 9/9/02; Sharon Ward dated 1/1/04; John Eddington dated 9/10/02; Patricia Eddington dated 9/10/02; Leonardo A. Servedio dated **October 4, 2002**; Grace Hardy dated **10/3/02**; Edward Stackhouse dated 9/27/04; Richard Caccavano dated 9/27/04; Veronica Sagginario dated 9/27/04; Jason Rodriguez dated 9/27/04; Laura Becker dated 9/27/04; Ellen Muroz dated 9/27/04; Meta Hausser dated 9/27/04; Maureen Fetterly dated 9/27/04; Dawn Cone dated 9/27/04; Tina Andrews dated 9/27/04; Tanya Greene dated 9/27/04; Sarah Battaglia dated 9/27/04; Enrique Davis UNDATED; John Schmidt UNDATED; Joshua Mylett UNDATED; Brain Lind UNDATED; George Bazules UNDATED; Anna Mackey UNDATED; Frederick Bucaria UNDATED; Stephen Dzedziech UNDATED; Rick Boucicaut UNDATED; Heidi Venticinque UNDATED; Anthony Chiaramonte UNDATED; Jennifer Collins UNDATED; Karen Mancuso UNDATED; Edward Willis dated Sept 24, 2004; Joseph Lavore dated 9/27/04; Kristen D' Albora dated 9/23/04; Candace Flack dated 9/22/04; Eugenia Lawrence dated 9/27/04; Michael Mauro dated 9/23/04; Ronda De Jong dated 9/24/04; Erick Santiago dated 9/24/04; Michelle Vega dated 9/25/04; Tincy Jones dated 9/27/04; Carl Maxwell dated 9/27/04; James Ingoglia dated 9/27/04; Keith Mc Kelvay dated 9/23/04; Brendan Mc Cave dated 9/19/04; Stephen Flaherty, Jr. dated 9/22/04; Pedro Velez dated 9/24/04; Randna Adams dated 9/26/04; Mark Gebhart dated 9/24/04; Lynda Scott dated 9/22/04; Gregory Durham dated 9/27/04; Stefania Verteletska dated 9/24/04; Adam Lanes dated 9/23/04.

⁵The following are the additional 15 proxies which were provided by respondents for the first time in opposition to this motion: Erick Santiago dated 9/24/04; Michelle Vega dated 9/25/04; Tincy Jones dated 9/27/04; Carl Maxwell dated 9/27/04; James Ingoglia dated 9/27/04; Keith Mc Kelvay dated 9/23/04; Brendan Mc Cave dated 9/19/04; Stephen Flaherty Jr. dated 9/22/04; Pedro Velez dated 9/24/04; Randna Adams dated 9/26/04; Mark Gebhart dated 9/24/04; Lynda Scott dated 9/22/04; Gregory Durham dated 9/27/04; Stefania Verteletska dated 9/24/04; Adam Lanes dated 9/23/04.

⁶The respondent's 56 proxies copies originally submitted to Court and which are identical to those copies submitted by Petitioners on motion: Deborah Cuniglio dated 9/20/04; Michael Cuniglio dated 9/27/04; Betty D. Pohanka dated 9/23/04; Charles J. Pohanka, Jr. dated 9/23/04; Patricia Serrano dated 9/23/04; Peter Vaccaro dated 9/27/04 Ed 104 cross out 134; Sheila Monteleone dated 9/27/04; John C. Mareinka dated 9/19/04; Kenneth E. Grich dated 9/19/04; David Crimi dated 9/19/04; James C. Pendrell

56 documents that were attached to petitioner's motion. Review of the 71 proxy documents attached to respondents opposition to this motion reveals that not only are there discrepancies between the documents originally submitted and these copies but that a comparison of the signature on the proxy with the voter registration of the individual who purportedly signed the proxy reveals that the majority of the signatures do not match. Additionally, several proxies were submitted from individuals who are also reflected as present by the sign in sheet. (Gregory Lent, Sharon Ward). Indeed, the Court has found that at least 29 signatures do not match registration cards and at least three have wrong election districts. The Court is troubled by these findings and has been made aware (from letters submitted by petitioner's counsel regarding scheduling of witnesses at the hearing on the petition scheduled to commence May 11, 2005) that testimony is expected from a number of persons denying that they signed the proxy claimed by respondents to have been executed by them.

Accepting petitioners' unchallenged mathematical computations of the weighted vote to be accorded the 71 proxies as 121.50 and the weighted vote of all 36 persons present as 60.50, the total weighted vote present at the meeting was 182.00. This is 37.4 less than the weighted vote of 219.40 required for a quorum of the County Committee.

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Significantly, Article III § 8 of the SCWFP rules provide that “the Committee shall be governed by the rules as laid down in Robert’s Rules of Order, except as otherwise provided herein.” It is abundantly clear that in the absence of a quorum as defined in the SCWFP rules under Roberts Rules of Order, all acts of the assembly must be annulled. Here, as in Leirer v. Suffolk County Committee of Conservative Party, 124 Misc. 2d 291, 298-299, 475 N.Y.S.2d 718 (Sup. Ct., Suffolk Co., 1984), where Roberts Rules of Order were incorporated by reference into the party rules: “Section 39 of Roberts Rules of Order... requires that in the absence of a quorum those present have limited functions. They can fix the time to which to adjourn, adjourn, recess, or take measures to secure a quorum.”

In addition, petitioners’ have submitted the affidavit of Brian Schneck averring that he objected to the lack of a quorum and called for the calling of the roll. In order for the assembly at the meeting of September 27, 2004 to have dispensed with the order of business set forth in Section 4 of Article III, such must have been done “by unanimous consent”. Respondents have not challenged this factual assertion by petitioner Schneck. Therefore, petitioners have established, on this motion, that there was no unanimous consent to the dispensing of the roll call. The fact that the roll-call was not taken, in contravention of the SCWFP rules prevented petitioners from pursuing their position that a quorum was not present at the meeting. While respondent Pohanka, in his role as outgoing Chairman was permitted to utilize a “voice vote” by the SCWFP rules⁷ for *voting* (See, Matter of Donnelly v. Curcio, 284 A.D.2d 460, 726 N.Y.S.2d 703 [2nd Dep’t, 2001]), the rules do not permit him to dispense with the calling of the roll unless such is “by unanimous consent.” Finally, respondents do not even claim that the rules were suspended at the meeting upon vote of the “County Committee by two-thirds (2/3) of the gubernatorial vote of the Committee members present and voting in person or by proxy.” (Section 1 of Article IX “Amendments”). Moreover, the minutes merely state that the “convenor” chairman “entertained a motion to dispense with the reading of the roll of delegates and motion carried.” When a method of voting such as a “voice vote” or a “show of hands” is used, which is not tallied according to the weighted votes to be applied to the count of hands or sound of voices, the Court cannot determine the arithmetic results of voting. Leirer v. Suffolk County Committee of Conservative Party, *supra*. Further, a failure to comply with the procedural rules of the party incorporating Roberts Rules of Order has been held a deprivation of procedural due process and First Amendment rights. *Id.*

The Court finds that petitioners have met their initial burden of setting forth evidentiary facts with respect to the absence of a quorum sufficient to establish entitlement to judgment as a matter of law (Zuckerman v. City of New York, 49 NY2d

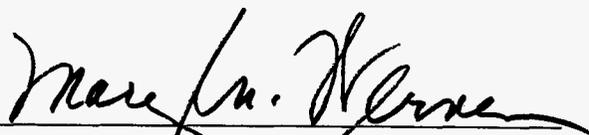
⁷Section 7 of Article III provides that: “Votes at Meeting of the County Committee. At all meetings of the County Committee, all matters requiring a vote of the members shall be decided by voice vote or by a show of hands if the Chairman of the meeting shall so direct. In the event that persons in attendance entitled to cast at least one-half (2) of the votes of the Committee in attendance demand a roll-call vote on any question, the Chairman shall direct the Secretary of the meeting to call the roll.”

557 [1980]; Fabbricatore v. Lindenhurst Union Free Sch. Dist., 259 AD2d 659 [2nd Dep't, 1999]). Therefore, it is respondents burden to refute this with admissible evidence sufficient to create a question of fact (Winegrad v. New York University Medical Center, 64 NY2d 851 [1985]); Piccolo v. DeCarlo, 90 AD2d 609 [3rd Dep't, 1982]).

Respondents have failed to challenge these figures in concrete terms⁸, opposing the motion based in part upon their position that there is an issue of fact as to whether the sign-in sheet is accurate. To defeat this motion, respondents were required to "lay bare [their] proof to show that there was a triable issue of fact". Silberstein, Awad & Miklos, P.C. v. Carson, 10 A.D.3d 450, 780 N.Y.S.2d 910 (2nd Dep't, 2004). Respondents have failed to present the Court with proof of the presence of other individuals at the meeting and thus have failed to contradict the sign-in sheet as proof that only 36 persons were physically present and have not supplied proof otherwise demonstrating the presence of a quorum. The Court is not convinced that respondents failure to provide sworn proof that other individuals were present at the meeting does not warrant summary disposition in petitioners' favor. Reliance upon mere speculation and unsubstantiated allegations is insufficient to create an issue of fact for resolution at a hearing on the petition. See, Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 693 N.Y.S.2d 67, 715 N.E.2d 95 (1999); Zuckerman v. New York, 49 N.Y.2d 557, 404 N.E.2d 718; 427 N.Y.S.2d 595 (1980); Maciarelo v. Empire Comfort Systems, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2005 N.Y. App. Div. LEXIS 3345 (3rd Dep't, 2005). However, in view of the serious nature of the allegations of fraud and irregularity presented in this petition in an Election Law matter and arguable issues of fact concerning the validity of respondents' proxies, the number of persons physically present at the meeting, and whether the taking of a roll-call was improperly dispensed with, the Court denies summary judgment.

The Court will therefore proceed to take testimony at an evidentiary hearing on the petition as previously scheduled.

Dated: 5/11/05


MARY M. WERNER, J.S.C.

FINAL DISPOSITION _____

NON-FINAL DISPOSITION X

SCAN x

DO NOT SCAN _____

⁸Moreover, respondents position that "one person one vote" voting was to be utilized is not only contrary to the party rules in this regard, but such a tally of the proxies and individuals present (71 proxies and 36 individuals) totaling 107 is ten individuals short of 117.20 (20% of the total number of Committeemen [586]).