

NEW YORK STATE SUPREME COURT
ORANGE COUNTY

IN THE MATTER OF

DOREY HOULE,

Index No: EF006424-2022

-Petitioner,

-against-

NEW YORK STATE BOARD OF ELECTIONS, et al.,

-Respondents.

MEMORANDUM OF LAW IN SUPPORT

Respondents PETER S. KOSINSKI and ANTHONY J. CASALE, in their official capacities as Commissioners of the New York State Board of Elections, submit this Memorandum of Law in support of the Petitioner's application before this court.

Dated: Albany, New York
November 15, 2022

By: /s/ Kevin G. Murphy

Kevin G. Murphy, Esq.
Deputy Counsel
NEW YORK STATE BOARD OF ELECTIONS
40 North Pearl Street, Suite 5
Albany, NY 12207
(518) 474-6236
kevin.murphy@elections.ny.gov

I. THE ONONDAGA COUNTY SUPREME COURT ERRED BY DENYING THE REQUESTED RELIEF IN ANALOGOUS MATTERS

Other Respondents have cited to the jointly decided Decision and Order, dated November 15, 2022, in the matters of Shiroff v. NYSBOE et al. (Onondaga Co. Supreme No. 009200/2022) and Mannion v. NYSBOE et al. (Onondaga Co. Supreme No. 009195/2022) (the “Decision”) as persuasive authority for the instant application for injunctive relief. Respondents Kosinski and Casale respectfully allege that had two points, central to their arguments in that matter, been addressed in the Decision, Petitioners’ applications for injunctive relief would not have been denied in its entirety. Therefore, with respect to the below-described points, the Decision should not be considered by this Court as persuasive authority.

In the Decision, the Court cites to Election Law (“EL”) 9-209(5) in describing the process for canvass and review of absentee, military, and special ballot envelopes, noting that this review process is undertaken “without objection.” (Decision, Page 3). The next sentence reads: “The process is essentially the same for affidavit ballots, except that it is carried out in a single post-election day review (Election Law 9-209(7)).” This statement conflates both subdivisions and assumes similar treatment of all ballots apart from the time frame in which the review occurs. However, EL 9-209(5) explicitly states that no objections are permitted to absentee, military, and special ballots, while EL 9-209(7) contains no such language for affidavit ballots, a critical distinction that goes unaddressed in the Decision.

Likewise, the Decision states: “It is only when a voting machine is unable to process a ballot that it must then be canvassed and cast manually in accordance with the procedure under Election Law 9-102(3)(b) and 9-110.” (Decision, Page 5). In both their papers and in oral argument before the Onondaga Supreme Court, Respondents Kosinski and Casale argued that affidavit ballots fit firmly within the statutory description of “election day paper ballots that have not been scanned,”

as set forth in EL 9-102(3)(b), an argument unaddressed in the Decision. Indeed, should this argument have been answered in the affirmative, the Court's own logic would require permitting objections by candidates to affidavit ballots, as it states that ballots described in EL 9-102(3)(b) are canvassed under the provisions of EL 9-114: "[c]andidates have the right during that manual canvassing to object to the clerks' determination." (Decision, Page 5).

Respondents Kosinski and Casale posit that as these central points were unaddressed in the Decision, such authority should be disregarded as persuasive.

II. THE PROVISIONS OF SUBDIVISIONS 7 AND 8 OF ELECTION LAW SECTION 9-209 ALLOW FOR CANDIDATES OR THEIR REPRESENTATIVES TO RAISE OBJECTIONS TO REVIEW AND CANVASSING OF AFFIDAVIT BALLOTS.

The Election Law amendments enacted in 2021 (Chapter 763) do not limit the ability of candidates or their representatives to raise objections to the review and canvassing of affidavit ballots. The Election Law was specifically amended to limit the candidates or their representatives from raising objections to the review and canvassing of *absentee ballots*:

"Nothing in this section prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board's jurisdiction from observing, without objection, the review of ballot envelopes required by subdivisions two, three and four of this section." EL § 9-209(5).

The explicit language of this subdivision 5 bars only the raising of objections to the review and canvassing of *absentee ballots*, as objections to affidavit ballots are conducted pursuant to subdivision 7 of this section.

EL 9-102(3)(b) provides: "Election day paper ballots that have not been scanned shall be canvassed and tallied pursuant to this section and sections 9-108 and 9-110 of this title."

Affidavit ballots meet this definition and are clearly contemplated by this provision. Pursuant to

the method of review and canvassing such ballots, EL 9-114 explicitly provides for the method for such objections to be raised.

EL 9-209(7)(b) does limit the reasons by which an affidavit ballot may be invalidated by listing what is considered valid: “Affidavit ballots are valid when cast at a polling site permitted by law by qualified voters: (i) who moved within the state after registering; (ii) who are in inactive status; (iii) whose registration was incorrectly transferred to another address even though they did not move; (iv) whose registration poll records were missing on the day of such election; (v) who have not had their identity previously verified; (vi) whose registration poll records did not show them to be enrolled in the party in which they are enrolled; and (vii) who are incorrectly identified as having already voted.”

Thus, objections are only permitted to be raised on these factors prior to ruling an affidavit ballot valid. And once an affidavit ballot has been ruled invalid, EL 9-20(7)(j) sets forth the subsequent procedure to be followed:

“At the meeting required pursuant to paragraph (a) of subdivision eight of this section, each candidate, political party, and independent body shall be entitled to object to the board of elections’ determination that an affidavit ballot is invalid. Such ballots shall not be counted absent an order of the court. In no event may a court order a ballot that has been counted to be uncounted.”

This ability to object is further supported by EL 16-106(1)(d), which allows a court to review preserved challenges related to “ballots voted in affidavit envelopes.”

While the Legislature specifically limited the ability to raise objections with regards to absentee ballots, it did not restrain candidates or the representatives’ making objections with respect to affidavit ballots, only limiting the scope of such objections.