

At a Special Term of the Supreme Court of the State of New York held in and for the County of Onondaga on November 23, 2022.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
ONONDAGA COUNTY

JOHN W. MANNION,

Petitioner,

Index No. 009195/2022

v.

REBECCA SHIROFF; THE ONONDAGA COUNTY BOARD OF ELECTIONS; THE OSWEGO COUNTY BOARD OF ELECTIONS; and THE NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

REBECCA SHIROFF,

Petitioner,

Index No. 009200/2022

v.

THE NEW YORK STATE BOARD OF ELECTIONS; THE OSWEGO COUNTY BOARD OF ELECTIONS; THE ONONDAGA COUNTY BOARD OF ELECTIONS; and JOHN MANNION,

Respondents.

DECISION AND ORDER ON REVIEW OF BALLOT OBJECTIONS

These are two special proceedings pursuant to Article 16 of the Election Law brought by John Mannion and Rebecca Shiroff, candidates for State Senate in New York's 50th Senate District, to preserve ballots for judicial review and subsequently validate the tallies of those ballots (Index Nos. 009195/2022 and 009200/2022). At the initial November 22, 2022 return of the Petitions, the Candidates raised objections to 24 determinations of invalidity made by Respondent Onondaga County Board of Elections at its final post-election review, seeking judicial review of the Board's unanimous rulings that the respective affidavit, absentee and special ballots were invalid (Election Law § 9-209[7][j], [8][e]). There were no objections to Respondent Oswego County Board of Elections' determinations of ballot invalidity. For each of the objections before the Court (eight from Petitioner Mannion and 16 from Petitioner Shiroff), the unopened paper ballot envelopes and the Board's corresponding Voter Registration Information Report, along with any cure affirmations, were stapled together and admitted into evidence (ON – 1 through ON – 24). For the reasons set forth below and summarized in the Appendix, this Court directs the opening and canvassing of seven ballot envelopes, and remands two ballot envelopes to the Board.

I.

1. Withdrawn Objections (five ballots).

At the return, Mannion formally withdrew his objections to the Board's determinations on the four ballots marked as ON – 2 (Dwyer absentee), ON – 3 (McTernan absentee), ON – 4 (Wisniewski absentee), and ON – 6 (Shipley Gozalo special military). Similarly, Shiroff formally withdrew her objection to the Board's determination on the ballot marked as ON – 18 (Herman-Davis absentee). Accordingly, the Board's determinations on those ballots (ON – 2, ON – 3, ON – 4, ON – 6 and ON – 18) stand.

2. Signature Mismatches (nine ballots).

Mannion objects to the Board's ruling that the signature on one absentee ballot affirmation envelope does not match the signature on file at the Board of Elections (ON – 1 [Thayer absentee]), and Shiroff similarly objects to the Board's ruling that the signatures on eight absentee ballot affirmation envelopes do not match the voters' signatures on file (ON – 11 [Cahalan absentee], ON – 13 [Davis absentee], ON – 15 [Wosley absentee], ON – 16 [Smeader absentee], ON – 17 [Tartaglia absentee], ON – 20 [MacCollum absentee], ON – 21 [Strelec absentee], and ON – 22 [Rabe absentee]). Challenges to Board rulings on signatures are reviewed *de novo* and, because voters' signatures often vary over time and for a variety of reasons, the Board rulings will only be sustained where the signatures are "substantially different" from those in the Board's records (*Kolb v Casella*, 270 AD2d 964, 964 [4th Dept 2000]). As part of their review, the Courts must be mindful of the effects that aging has on signatures, both for elderly and for younger voters – including the effects that the tendency of younger voters to not use, or even receive formal instruction on, traditional cursive handwriting – and should review each component of the signatures to determine whether there are any parts that are not substantially different.

Based upon a review of the challenged signatures, the Court affirms the Board's rulings on the two ballot affirmation envelopes marked as ON – 11 (Cahalan absentee) and ON – 16 (Smeader absentee), and overrules the Boards' rulings that the signatures were substantially different on seven ballot affirmation envelopes and directs opening of the envelopes and canvassing of ballots marked as ON – 1 (Thayer absentee), ON – 13 (Davis absentee), ON – 15 (Wosley absentee), ON – 17 (Tartaglia absentee), ON – 20 (MacCollum absentee), ON – 21 (Strelec absentee), and ON – 22 (Rabe absentee).

3. Power of Attorney Signatures (two ballots).

Mannion objects to the Board's determination that an affidavit ballot affirmation envelope signed only by an agent purportedly holding a power of attorney on behalf of the voter was invalid (ON – 5 [Andersen affidavit]), and Shiroff similarly objects to the Board's determination that an absentee ballot affirmation envelope signed only by an unverified power of attorney on behalf of the voter was invalid (ON – 23 [Giancola absentee]). Absentee and affidavit ballot affirmation envelopes must be signed or marked by the voter to be valid (Election Law §§ 8-306, 8-410). An individual holding an effective power of attorney does not have the authority to sign a ballot affirmation on behalf of the voter (General Obligations Law §§ 5-1502A – 5-1502M). If a voter is physically unable to sign or mark an affidavit or absentee ballot, there are specific provisions under the Election Law to ensure proper assistance (New York Election Law § 8-306, 8-400[7]), but those provisions do not permit the use of an unverified attorney-in-fact to simply sign in lieu of the voter's actual signature or mark. Accordingly, the Board's determinations that the ballots marked as ON – 5 and ON – 23 are invalid are affirmed.

4. No Postmarked Envelopes for Cure Affirmations (two ballots).

Mannion objects to the Board's determinations that two absentee ballots that required a cure were invalid because the exterior envelopes containing the cure affirmations were inadvertently discarded by the Board, purportedly precluding the Board from being able to determine whether they were timely submitted (ON – 7 [Huslander] and ON – 8 [Byrnes]). Cure affirmations must be filed (postmarked or delivered) to a Board of Elections either on the day before the election, or within seven days of a Board of Elections' mailing of a rejection notice

letter, whichever is later (Election Law § 9-209[3][e]), and the Courts have no authority to excuse a late filing (*Seawright v Bd. of Elections in the City of New York*, 35 NY3d 227, 233 [2020]).

Where it is impossible for a Board to make a reasonable determination that a ballot or cure affirmation was timely filed based upon all of the records and information available to it, then the Board must rule that ballot or cure affirmation invalid (*Coviello v Knapp*, 91 AD3d 868, 869 [2d Dept 2012]; *cf. Gallagher v. N.Y. State Bd. of Elections*, 477 FSupp3d 19, 51 [SDNY 2020]). The record before this Court fails to address this issue. Accordingly, the Court must remand the ballots marked as ON – 7 and ON – 8 to the Board, along with their cure affirmations, so that the Board may review them in accordance with Election Law § 9-209[8] and issue a ruling as to whether it is possible to make a reasonable determination – based upon all of the records available to it – that the cure affirmations were timely filed and therefore the ballots valid; or whether it is impossible to do so, and the ballots are therefore invalid (*see Tenney v Oswego County Board of Elections*, 70 Misc3d 680, 693-94 [Sup Ct Oswego Cty 2020]).

5. Unsealed Ballot Affirmation Envelope (three ballots).

Shiroff objects to the Board's determinations that three absentee ballots contained within unsealed affirmation envelopes were invalid (ON – 12 [Giegold absentee], ON - 14 [Richards], and ON – 19 [Gettino]). While some of the stricter requirements of the Election Law have been modified by recent legislation, the failure to at least partially seal an absentee affirmation envelope was explicitly identified by the Legislature as a fatal defect (Election Law § 9-209[3][i]). Accordingly, the Board's determinations that the ballots marked as ON – 12, ON – 14, and ON – 19 are invalid are affirmed.

6. Ballot Cast by “Purged” Voter (one ballot).

Shiroff objects to the Board’s determination that a ballot submitted by a “purged” voter was invalid (ON – 10 [Arlukiewicz]). To cast a ballot in New York State, an individual must be both qualified and registered to vote (Election Law § 5-100; NY Const. Art. II, §§ 5, 6). “Purged” status means that an individual was previously registered to vote, but subsequently removed from the registration rolls by an election official who determined that the voter was “no longer eligible to vote in an election” (9 NYCRR 6217.9[a]). Individuals may be purged by election officials for several reasons, including a felony conviction, mental incompetency, moving out of the country, or in the course of federally required voter database maintenance under the National Voter Registration Act (9 NYCRR 6217.9[a][5]). Once purged, an individual must re-register in order to be eligible to vote (9 NYCRR 6217.9[a][3]). Even if a purge was erroneous – the Courts have no authority to restore a voter’s registration status in a proceeding brought by a candidate under Election Law § 16-106 (*Mondello v Nassau County Bd. of Elections*, 6 AD3d 18 [2d Dept 2004]; *Tenney v Oswego County Bd. Of Elections*, 71 Misc3d 400, 406-07 [Sup Ct Oswego Cty 2021]). Accordingly, the Board’s determination that the ballot marked as ON – 10 is invalid is affirmed.

7. Ballot Cast by “Purged Incomplete” Voter (one ballot).

Shiroff objects to the Board’s determination that a ballot submitted by a “purged – incomplete” voter was invalid (ON – 9 [Wood]). To register to vote in New York State, an individual must file a completed voter registration application in the county in which she resides (Election Law Article 5, Title II; 52 USC § 20503). Voters whose registration status is marked as “purged – incomplete” failed to substantially complete their registration application – generally by

not having included a signature with an online application form – and are therefore not registered, or entitled, to vote (Election Law § 5-210[8]; NY Const. Art. II, § 7). An individual who is marked in the voter registration records as “purged – incomplete” is not eligible to vote, and the ballot may not be cast or counted (*Tenney*, 71 Misc3d at 407-08). Accordingly, the Board’s determination that the ballot marked as ON – 9 is invalid is affirmed.

8. Missing Signature (one ballot).

Shiroff objects to the Board’s determination that an absentee ballot submitted without a voter signature on the affirmation envelope, but with a witness signature, was invalid (ON – 24 [Redfield]). Absentee ballot affirmation envelopes must be signed or marked by the voter to be valid (New York Election Law § 8-410). While a missing signature is a curable defect, it is nonetheless fatal. Accordingly, the Board’s determination that the ballot marked as ON – 24 is invalid is affirmed.

II.

Accordingly, upon due deliberation, it is hereby

ORDERED that Respondent Onondaga Board of Elections shall open the seven absentee and affidavit ballot envelopes marked as ON – 1 (Thayer absentee), ON – 13 (Davis absentee), ON – 15 (Wosley absentee), ON – 17 (Tartaglia absentee), ON – 20 (MacCollum absentee), ON – 21 (Strelec absentee), and ON – 22 (Rabe absentee), and canvass and cast the ballots in those envelopes pursuant to Election Law § 9-209, taking all necessary measures in accordance with law to ensure the privacy of the seven voters after opening the envelopes; and it is further

ORDERED that Respondent Onondaga Board of Elections shall review the two absentee ballot envelopes and cure affirmations marked as ON – 7 and ON – 8, along with all of the records available to it, pursuant to Election Law § 9-209(8) and determine whether the cure affirmations were timely filed and therefore the ballots are valid; or whether it is impossible to do so based on the Board's records, and the ballots are therefore invalid; and it is further

ORDERED that this Court shall continue to retain jurisdiction over this matter during the scheduled manual recounts pursuant to Election Law § 9-208(4).

Dated: November 23, 2022


HON. SCOTT J. DELCONTE, J.S.C.

ENTER.

APPEARANCES:

Greenberg Traurig, LLP by *Robert M. Harding, Esq. and Joshua L. Oppenheimer for Petitioner John W. Mannion*

Messina Perillo & Hill, LLP by *John J. Ciampoli, Esq. for Petitioner Rebecca Shiroff*

Onondaga County Department of Law by *Benjamin M. Yaus, Esq. for Respondents Onondaga County Board of Elections*

Oswego County Attorney's Office by *Richard C. Mitchell, Esq., for Respondents Oswego County Board of Elections*

New York State Board of Elections by *Brian L. Quail, Esq. for Commissioners Douglas A. Kellner and Andrew J. Spano*

New York State Board of Elections by *Todd Valentine, Esq. for Commissioners Peter S. Kosinski and Anthony J. Casale*

Mannion v Shiroff (009195/2022) / Shiroff v Board of Elections (009200/2022)
Decision and Order - Appendix

Ballot	Exhibit	Objector	Objection (Legal Issue)	Order
ON-1	Absentee Env/Ballot, Board Records (Thayer)	Mannion	Signature Review	OVERRULED, VALID
ON-2	Absentee Env/Ballot, Board Records (Dwyer)	Mannion	Signature Review	N/A (withdrawn)
ON-3	Absentee Env/Ballot, Board Records (McTernan)	Mannion	Signature Review	N/A (withdrawn)
ON-4	Absentee Env/Ballot, Board Records (Wisniewski)	Mannion	Signature Review	N/A (withdrawn)
ON-5	Affidavit Env/Ballot, Board Records (Andersen)	Mannion	Signed by POA	AFFIRMED, INVALID
ON-6	Military Env/Ballot, Board Records (Shiplez Gozalo)	Mannion	Signature Review	N/A (withdrawn)
ON-7	Absentee Env/Ballot, Board Records, Cure Affirmation (Husland)	Mannion	Timeliness of Cure Unknown (BOE error in discarding env.)	BOE REVIEW
ON-8	Absentee Env/Ballot, Board Records, Cure Affirmation (Byrnes)	Mannion	Timeliness of Cure Unknown (BOE error in discarding env.)	BOE REVIEW
ON-9	Affidavit Env/Ballot, Board Records (Wood)	Shiroff	Purged - Incomplete Voter (allegedly improper)	AFFIRMED, INVALID
ON-10	Affidavit Env/Ballot, Board Records (Arlukiewicz)	Shiroff	Purged Voter (allegedly improper)	AFFIRMED, INVALID
ON-11	Absentee Env/Ballot, Board Records (Cahalan)	Shiroff	Signature Review	AFFIRMED, INVALID
ON-12	Absentee Env/Ballot, Board Records (Giegold)	Shiroff	Unsealed Oath Envelope	AFFIRMED, INVALID
ON-13	Absentee Env/Ballot, Board Records (Davis)	Shiroff	Signature Review	OVERRULED, VALID
ON-14	Absentee Env/Ballot, Board Records (Richards)	Shiroff	Unsealed Oath Envelope	AFFIRMED, INVALID
ON-15	Absentee Env/Ballot, Board Records (Wolsley)	Shiroff	Signature Review	OVERRULED, VALID
ON-16	Absentee Env/Ballot, Board Records (Smeader)	Shiroff	Signature Review	AFFIRMED, INVALID
ON-17	Absentee Env/Ballot, Board Records (Tartaglia)	Shiroff	Signature Review	OVERRULED, VALID
ON-18	Absentee Ballot, Board Records (Herman-Davis)	Shiroff	No Oath Envelope	N/A (withdrawn)
ON-19	Absentee Env/Ballot, Board Records (Gettino)	Shiroff	Unsealed Oath Envelope	AFFIRMED, INVALID
ON-20	Absentee Env/Ballot, Board Records (MacCollum)	Shiroff	Signature Review	OVERRULED, VALID
ON-21	Absentee Env/Ballot, Board Records (Strelec)	Shiroff	Signature Review	OVERRULED, VALID
ON-22	Absentee Env/Ballot, Board Records (Rabe)	Shiroff	Signature Review	OVERRULED, VALID
ON-23	Absentee Env/Ballot, Board Records (Giancola)	Shiroff	Signed by POA	AFFIRMED, INVALID
ON-24	Absentee Env/Ballot, Board Records (Redfield)	Shiroff	No Voter Signature (only witness signed)	AFFIRMED, INVALID