SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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In the Matter of the Application of

MICHAEL G. GRIMM,

Petitioner/Candidate,

-against-

BOARD OF ELECTIONS IN THE CITY OF NEW YORK, and the NEW YORK STATE BOARD OF ELECTIONS And CHARLES D. FALL,

Respondents.

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DECISION and ORDER

Index No. 80132/12
Motion No. 001

The following papers numbered 1 to 7 were marked fully submitted on the 17th day of May, 2012:

Order to Show Cause by Petitioner Michael G. Grimm with supporting papers (May 4, 2012)	1
Letter of Respondent New York State Board of Elections with Affidavit (May 11, 2010)	2
Verified Answer of Respondent Board of Elections in the City of New York (May 14, 2010)	3
Motion to Dismiss, Affidavit and Verified Answer by Respondent Charles D. Fall (May 14, 2010)	4
Memorandum of Law by Petitioner Michael G. Grimm	5
Memorandum of Law and Closing Argument by Respondent Board of Elections in the City of New York	6
Summation and Memorandum of Law by Respondent Charles D. Fall	7

Upon the foregoing papers, and the credible testimony and documentary evidence, the application to reverse the decision of the Board of Elections of the City of New York (hereinafter

"the Board"), rendered May 1, 2012, that invalidated the designating petition of the Independence Party naming petitioner as the party candidate for the office of Member of the House of Representatives in the 11th Congressional District of New York is denied and the petition is dismissed.

A hearing was held before the Court on May 15, 2012, at which petitioner presented the testimony of Mario Bruno, who prepared the candidate's so-called "walking lists" of eligible voters, and of Robert McFeeley, who prepared an analysis of the voter registration rolls promulgated by the Board of Elections. On its direct case, the respondent Board presented the testimony of Steven Ferguson, its Director of Management Information Services.

In the course of the proceedings, the parties stipulated to the following:

- the petition in a companion case to invalidate the designating petition of the respondent-candidate, Michael G. Grimm, and the candidate's cross motion to validate therein, (*Fall v. Grimm*, Index No. 80126/12) were withdrawn.
- the Decision and Order of the United States District Court that, *inter alia*, created a new redistricting plan affecting the 11th Congressional District was issued on March 19, 2012 (*Favors v. Cuomo*, 2012 WL 928223 [EDNY]).
- the first day for signing designating petitions was March 20, 2012.
- the Board made its determination invalidating the subject petition on May 1, 2012
- respondent-candidate's designating petition contained a total of 367 valid signatures.

Pursuant to the Decision and Order of the District Court in *Favors v. Cuomo, supra*, the last day upon which to file a designating petition was fixed as April 16, 2012.

It is undisputed that respondent-candidate Grimm timely submitted a designating petition and that, in invalidating that designating petition, the Board determined that the number of valid signatures, 367, was less that the minimum number of valid signatures required to designate a

candidate of the Independence Party for the 11th Congressional District.

In determining the number of valid signatures required, the Board complied with the direction of the United States District Court in *United States of America v. State of New York*, 10-cv-1214, [NDNY], that the number of signatures for designating petitions for the June 26, 2012 Congressional primary be reduced from 5% to 3.75% of the active enrolled members of the respective parties in each district (*cf.,* Election Law §6-136). In promulgating the voter rolls in the 11th Congressional District, the Board determined that there were 11,166 active enrolled members of the Independence Party in the district, and that, therefore, 419 valid signatures were required.

Petitioner disagrees with this determination**.**

JURISDICTION

Section 16-102(2) of the Election Law provides in pertinent part:

> A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later . . . .

To satisfy the statute all necessary parties must be timely served with the Order To Show Cause and supporting papers (Elec Law § 16-102; *Matter of Macros v. D'Apice*, 122 AD2d 905, 906 [2nd Dept.], *aff'd,* 68 NY2d 764 [1986]; *Klamner v. Rockland County Bd. of Elec.*, 133 AD2d 186, 187 [2nd Dept. 1987]).

Here, the Court specifically tailored the service provisions of the Order to Show Cause to petitioner's allegation at paragraph 18 of the Verified Petition dated May3, 2012 and relied upon by the Court, that the Board's determination invalidating his designating petition was rendered on May

2, 2012. As noted, and now stipulated by the parties, the Board's determination actually was rendered on May 1, 2012.

Therefore, notwithstanding the provisions of the Order to Show Cause regarding service, the last date to commence the instant proceeding was May 4th, the third business day following May 1st. Petitioner initially having provided the Court with an erroneous date, cannot now be heard to argue that he relied on the Court's otherwise correct computation of the time within which to serve respondents. It is well-established that the time within which to serve all necessary parties cannot be modified by the Court (*Matter of Loucky v. Buchanan*, 49 AD2d 797 [4th Dept. 1975]). Thus, personal service upon respondent Charles D. Fall, the objector herein, on May 7, 2012, was untimely as a matter of law and thus, fatally defective (*see, Matter of Hennessey v. DeCarlo*, 21 AD3d 505 [2nd Dept.], *lv denied*, 5 NY3d 706 [2005].

Nor was the purported substituted service upon respondent Fall which petitioner attempted on May 4, 2012, sufficient to secure jurisdiction. It is undisputed that, upon being informed by an adolescent who answered the door at the Fall residence that respondent was not there, the process server secured a copy of the pleadings to the door of the residence and subsequently sent a copy of the pleading by overnight delivery via FedEx, a private courier service. At a minimum, a prerequisite to substituted delivery pursuant to CPLR 308(4), the alternative method relied upon here, requires a showing of due diligence on the part of the process server to serve the party pursuant to the alternative service provisions of CPLR 308 *(see e.g., Matter of Hennessey v. DeCarlo, supra*; *Matter of Zambelli v. Dillon*, 242 AD2d 353 [2nd Dept. 1997]).

In any event, even if the Court found that the due diligence requirement had been met, due to the requirement that service must be complete on all necessary parties within the period prescribed

by Election Law 16-102(2), the overnight delivery attempted here -- placement of another copy of the papers in a FedEx overnight delivery envelope on May 4 marked for Saturday (May 5, 2012) delivery -- was untimely (*Matter of Bruno v. Peyser*, 40 NY2d 827, 828 [1976]).

Petitioner having failed to comply with the strictly-construed service provisions of Election Law Section 16-106(2), the Court is without discretion to entertain this matter, and accordingly is constrained to dismiss this proceeding *(see, Matter of Wilson v. Garfinkle*, 5 AD3d 409 [2nd Dept. 2004]).

PETITIONER'S REMAINING CONTENTIONS

Notwithstanding petitioner's jurisdictional error, were the Court to consider petitioner's remaining contentions, it would find them without merit.

In essence, petitioner raises two substantive challenges to the Board's invalidation of his designating petition: (1) that in computing the number of enrolled active members of the Independence Party for purposes of calculating the percentage of valid signature required, the Board improperly included enrolled members who had not participated in an election since at least the 2004 general election; and (2) that the Board failed in its statutory duty to promulgate a map of the new 11th Congressional District (encompassing all of Staten Island and a portion of Brooklyn) and/or a list of all active voters enrolled in the Independence Party within that District in a timely manner sufficient to allow him an adequate opportunity to identify, locate and secure their signatures.

As noted, the Board determined that 419 valid signatures were required in order to validate petitioner's designating petition. That calculation was based on the application of the Court-mandated percentage–3.75%– to the number of active enrolled member of the Independence Party, which the Board determined to be 11,166.

Despite the wide latitude given to the petitioner by the Court at the hearing to present evidence challenging that computation, petitioner has failed to meet his burden to establish either that the Board miscalculated the number of active enrolled voters, or that, due to the purportedly late date that the Board promulgated the voter rolls and map of the newly-redrawn 11th Congressional District, there was insufficient time within which petitioner could gather a sufficient number of valid signatures.

As convincingly demonstrated by the respondent Board, the sole basis for placing a voter on inactive status is provided by Sections 5-213 and 5-712 of the Election Law, *i.e.,* when a voter fails to respond to the confirmation notice required by Article 5, the voter "shall forthwith be placed in inactive status" (Elec. Law § 5-712[5]). There is no statutory basis for designating a registered, enrolled voter "inactive' within the meaning of the Election Law based upon that voter's having not participated in prior elections for any period of time. To the extent, then, that petitioner purports to assert that registered, enrolled voters of the Independence Party who have not voted in an election since 2004 must be declared "inactive" for purposes of determining the number of voters whose valid signatures are required to validate a designating petition, his argument is without support in fact or law. Merely not voting for a period of time–no matter how extended a period– is not a valid basis under the Election Law for the Board to render a voter's status inactive.

Similarly unavailing is the assertion that the Board failed to provide in a timely manner the information necessary to allow petitioner to gather sufficient signatures during the signature-gathering period that ran from March 20, 2012 to April 16, 2012.

Title VI of the Election Law establishes the requirements for the filing and custody of voter registration records. Section 5-604 of that Title requires that by the first day of April each year the

local board (here the City Board) "shall cause to be published for each *election* district a complete list of the registered voters of each *election* district," which shall include the information required for registration lists and the party enrollment of each voter (emphasis supplied). It is undisputed that the Board promulgated those lists prior to April 1, 2012. There is no requirement that the voter lists be promulgated by Congressional District. As the Board fully complied with its statutory mandate in timely promulgating the voter registration records by election district, petitioner has not established that he was harmed by any inaction on the part of the Board.

Moreover, it is undisputed that the congressional redistricting data files were received by the Board in late March of 2012, and that the preliminary enrollment list of voters was posted on the Board's website on April 6, 2012. All voter information was available on-line no later than April 9, 2012, seven days before the end of the signature-gathering process. Petitioner concedes that, other than a phone call and an exchange of emails with workers at the Board requesting information, he made no other attempt to secure the information, either from the federal court's website or from the City Board's and State Board's own websites, where it was readily and timely available. In this regard, it appears that for the most part there were no significant changes in the makeup of the 11th Congressional District based on the Court-drawn redistricting. The new 11th Congressional District was largely founded on the existing 13th Congressional District that encompassed all of Staten Island and most of what is now the Brooklyn portion of the 11th Congressional District. Given the promulgation of the Congressional District map by the federal court in March; the April first availability of the voter information by election district for all of Staten Island and the Brooklyn portion of the Congressional District that remained unchanged; and the publication of the electronic version of the voter enrollment data by April 9, 2012, it cannot be said that petitioner was prejudiced

in any significant way in his attempt to garner sufficient signatures by the close of the signature-gathering process on April 16, 2012.

It is indeed unfortunate that, under these circumstances, the voters of the Independence Party are without a candidate on their party line. However, given the failure to take the necessary and proper steps to secure the Independence Party designation, the Court is without both jurisdictional and statutory authority to direct the Board to place him on the ballot.

For the above reasons, there is no factual or legal basis to reverse the decision of the Board of Elections in the City of New York invalidating the designating petition, nor to either reduce the number of valid signatures required for the designating petition or extend the time within which to gather such signatures (*see generally*, Election Law Sections 6-136; 1-106[2]; *Carr v. New York State Board of Elec*, 40 NY2d 556 [1976]; *Matter of Stoppenbach v. Sweeney*, 297 AD2d 456 [3rd Dept.], *aff'd*, 98 NY3d 431 [2002]).

Accordingly, it is

ORDERED that the application is denied in all respects; and it is further

ORDERED that the petition is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

ENTER

Dated: May 23, 2012

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ANTHONY I. GIACOBBE
JUSTICE OF THE SUPREME COURT

[* 9]