Wright v New York City Council
2017 NY Slip Op 32629(U)
December 19, 2017
Supreme Court, New York County
Docket Number: 160701/17
Judge: Alexander M. Tisch

A SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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KEITH WRIGHT, as COUNTY LEADER OF THE MANHATTAN DEMOCRATIC PARTY, *et al.*,

Petitioners,

-against-

NEW YORK CITY COUNCIL, *et al.*,

Respondents.

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DECISION & ORDER

Index No. 160701/17

Motion Seq. No. 001

ALEXANDER M. TISCH, J.

In the instant matter, Petitioners, of whom are various New York County Democratic Party officials and Manhattan Democratic Party clubs, seek injunctive relief in furtherance of their Article 78 petition regarding the appointment of the next New York County Democratic Commissioner of the Board of Elections of the City of New York ("Commissioner").

As will be explained in further detail below, Petitioners' motion for a preliminary injunction is granted. Petitioners have demonstrated a likelihood that the process that has been used to date by the New York City Council ("City Council") to appoint a Commissioner violated the New York State Public Officers Law ("Public Officers Law"). Although unnecessary given the City Council's failure to consider and vote on this position in open meetings as statutorily required, the Court also finds a likelihood that the City Council failed to comply with the New York State Election Law ("Election Law") when construed in conjunction with the New York State Constitution ("Constitution").

To obtain a preliminary injunction, Petitioners were required to demonstrate a likelihood of success on the merits, irreparable harm in the absence of granting the injunctive relief requested, and a balancing of the equities in their favor. *City of New York v. Untitled LLC*, 51 A.D.3d 509, 511 (1st Dep't 2008). Petitioners have met its obligation to demonstrate all necessary factors in support of its application. First, Petitioners have demonstrated a likelihood of success on the merits that they will

succeed in the prosecution of this action. Whether the Democratic Members of the City Council constitute an unincorporated association, as asserted by Petitioners, or a subset of the City Council, as asserted by Respondents, the deliberation and selection of a Commissioner is subject to the statutory open meetings and public notice requirements contained in the Public Officers Law; however, the City Council has failed to either provide public notice of such meetings or produce minutes of the proceedings thereof. Moreover, it would appear that the City Council is not adhering to the tradition, spirit, and the letter of the process for designating a Commissioner as contemplated by the Constitution and the Election Law.

At the outset, it is beneficial to the discussion contained herein to set forth the applicable constitutional and statutory provisions relevant to the instant decision. Article II, § 8 of the Constitution regarding appointments of Commissioners states the following:

> All laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct. Existing laws on this subject shall continue until the legislature shall otherwise provide.

(emphasis added).[1]

The New York State Legislature enacted Election Law § 3-204 to implement this constitutional provision and sets forth a process for appointment of election commissioners as follows:

> 1. At least thirty days before the first day of January of any year in which a commissioner of elections is to be appointed, the chairman or secretary of the appropriate party county committee shall file a certificate of party recommendation with the clerk of the appropriate local legislative body.

[1] The Constitution indicates that local election commissioners will be subject to the "nomination" of political parties, while the Election Law refers to this process as a "recommendation." The distinction is relevant solely to interpret the Election Law in manner that does not run afoul of constitutional entanglements.

2. Party recommendations for election commissioner shall be made by the county committee or by such other committee as the rules of the party may provide, by a majority of the votes cast at a meeting of the members of such committee at which a quorum is present. If at any time a vacancy occurs in the office of any election commissioner other than by expiration of term of office, party recommendations to fill such vacancy shall be made by the county committee or by such other committee as the rules of the party may provide, by a majority of the votes cast at a meeting of the members of such committee at which a quorum is present.

3. The certificate filed shall be in such form and contain such information as shall be prescribed by the state board of elections.

4. Commissioners of election shall be appointed by the county legislative body, or in the city of New York, by the city council. Provided, however, that if a legislative body shall fail to appoint any person recommended by a party for appointment as a commissioner pursuant to this section, within thirty days after the filing of a certificate of recommendation with such legislative body, then the members of such legislative body who are members of the political party which filed such certificate may appoint such person. And further provided, if there are no members of the legislative body who are members of the political party which filed such certificate, the appointment shall take effect upon the expiration of thirty days from the date that the certificate was filed. If none of the persons named in any of the certificates filed by a party are so appointed within sixty days after the filing of any such certificate, then such party may file another certificate within thirty days after the expiration of any such sixty day period recommending a different person for such appointment. If a party fails to file a certificate within the time prescribed by this section, the members of the legislative body who are members of such party may appoint any eligible person to such office.

5. If at any time a vacancy occurs in the office of any election commissioner other than by expiration of term of office, such vacancy shall be filled as herein provided for the regular appointment of a commissioner except that a person who fills a vacancy shall hold such office during the remainder of the term of the commissioner in whose place he shall serve. Certificates of party recommendation to fill such vacancy shall be filed not later than forty-five days after the creation of the vacancy.

Currently, the Commissioner is Alan Schulkin, whose term expired on December 31, 2016.[2]

On November 21, 2016, pursuant to Election Law § 3-204, the New York County Democratic

[2] Petitioners assert that their concerns have immediacy as Shulkin was appointed in a process that allegedly failed to comply with the same open meetings and public notice provisions of the Public Officers Law that form the basis of the instant application. *See* Schwartz Reply Aff., ¶ 24. While the City Council's records apparently indicate that a hearing on Schulkin's appointment took place, the minutes from said meeting do not indicate that a vote took place. *Id.* Petitioners

Party("Party"),[3] by vote of its Executive Committee, recommended Jeanine Johnson to be appointed as the new Commissioner. A certificate of recommendation was filed with the City Clerk on that same date as set forth by § 3-204. Neither the City Council, nor any subset thereof,[4] acted upon the recommendation. In a series of emails, it appears that Johnson communicated with a representative of the City Council about her prospective appointment and received no definitive response. On November 29, 2017, the Party, by vote of its Executive Committee, recommended Sylvia DiPietro to be appointed Commissioner. On that same date, a certificate of recommendation was filed with the City Clerk.

In addition to certain concessions made by Respondents at oral argument, according to newspaper reports published on November 21, 2017 in the New York Post and New York Daily News, on or about November 21, 2017, Respondents allegedly scheduled a vote of the New York County delegation of the City Council to consider Andrew Praschak as Commissioner. Carl Campanile, *Dems claim Mark-Viverito is trying to get pal a job in 'November surprise'*, N.Y. Post (Nov. 21, 2017), https://nypost.com/2017/11/21/dems-claim-mark-viverito-is-trying-to-get-pal-a-job-in-november-surprise; Erin Durkin, *City Council resists speaker's push to put pal on Board of Elections*, N.Y. Daily News (Nov. 21, 2017), http://www.nydailynews.com/new-york/city-council-resists-speaker-push-put-pal-elections-board-article-1.3649637. A review of the City Council's calendar, as posted on its website, indicates that such meeting was not publicly noticed. The New York City Council, *Legislative Research Center*, http://legistar.council.nyc.gov/Calendar.aspx (last accessed on Dec. 18, 2017). Apparently, no vote took place at that meeting and a review of the minutes on the City

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assert that "the Democratic Conference held a separate meeting, without public notice or public record at which it approved Schulkin's appointment." *Id.*

[3] The Court notes that the New York County Democratic Party, New York County Democratic Committee, Manhattan Democratic Party are the same entity.

[4] A "subset," for purposes of this decision, includes the Democratic Members of the City Council and the New York County Members of the City Council.

Council's website, while comprehensive, does not indicate that said meeting or any vote occurred.[5]

The New York Daily News reported on November 29, 2017 that the New York County delegation of the City Council "signed off on the pick of Andrew Praschak . . . for a commissioner seat on the board during a closed door session Wednesday [November 29, 2017], sources said." Erin Durkin, *Speaker Melissa Mark-Viverito's friend gets Board of Election gig*, N.Y. Daily News (Nov. 29, 2017), http://www.nydailynews.com/new-york/speaker-melissa-mark-viverito-friend-board-election-gig-article-1.3666225. The article went on to say that "[t]he Council's full Democratic conference is slated to vote on the pick Thursday [November 30, 2017]." *Id.* A review of the City Council's posted calendar indicated that, as with the first meeting, neither meeting was publicly noticed. According to a New York Daily News article dated December 6, 2017, all Democratic City Council members of the City of New York did not approve Praschak's appointment because not enough members showed up for the November 30, 2017 meeting. Erin Durkin, *Judge shuts down City Council speaker's plot to put pal on elections board*, N.Y. Daily News (Dec. 6, 2017), http://www.nydailynews.com/new-york/judge-nixes-council-speaker-plot-put-pal-elections-board-

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[5] Public Officers Law § 106 regarding minutes of meetings states the following:

> 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
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> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law is added by article six of this chapter.

The Legislative Research Center of the New York City Council's website lists every meeting of the City Council and includes the agenda and minutes of those meetings. The nomination of Praschak is nowhere to be found on the website on November 21st, 29th, and 30th, 2017, despite multiple reports that meetings transpired.

article-1.3682092. Astonishingly, the only public record of these meetings having occurred and what transpired therein are after-the-fact newspaper articles.[6]

Public Officers Law § 102(1) defines "meeting" as "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Additionally, § 102(2) defines a "public body" as:

> any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.

Further, Public Officers Law § 103(a) sets forth that "[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article." (footnote omitted). Public Officers Law § 104 sets forth public notice requirements for public meetings, in relevant part, as follows:

> 1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given or electronically transmitted to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.
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> 2. Public notice of the time and place of every other meeting shall be given or electronically transmitted, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.

The Court finds that the meetings held on November 21st, 29th, and 30th, 2017 are likely to have been held in violation of the open meetings and public notice provisions of §§ 103 and 104 of the Public Officers Law. The vote that allegedly took place at the November 29th, 2017 meeting of the

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[6] While newspaper articles constitute hearsay, the Court can consider hearsay on a motion for a preliminary injunction. *See La Magica LLC v. 145 Atlantic LLC*, 154 A.D.3d 515, 515 (1st Dep't 2017); *Green v. Lakeside Manor Home for Adults, Inc.*, 19 Misc. 3d 1110(A) (Sup. Ct. Richmond County 2008). In any event, the articles are referred to for a limited purpose as long as a hearing is conducted. *Cf. Peckman v. Mutual Life Ins. Co. of N.Y.*, 125 A.D.2d 244, 246-47 (1st Dep't 1986).

New York County Democratic delegation, which Respondents contended at oral argument was only advisory, is also likely to be deemed as having been conducted in violation of §§ 103 and 104 of the Public Officers Law, and, if so, would then be declared void pursuant to Public Officers Law § 107.[7]

Respondents admit that "the power of appointment always lies with the legislative body as a whole or a subset of its members." Therefore, such meetings are not exempt pursuant to Public Officers Law § 108(2)(a) on the basis that they are deliberations of a political committee, conference, or caucus.[8] Election Law § 3-204(4) permits the members of the legislative body who are members of such party to appoint a Commissioner under certain circumstances. The law does not specify the method for doing this, but it is evident to this Court, and the Respondents admitted at oral argument, that such appointment of a public officer constitutes an official legislative act pursuant to Article II, § 8

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[7] Public Officers Law § 107(1) states the following:

> Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief. In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice for reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government.

The Court finds that Petitioners are aggrieved persons that have standing pursuant to this section.

[8] Public Officers Law § 108(2) states the following:

> 2. a. deliberations of political committees, conferences and caucuses.
>
> b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations.

of the Constitution and Election Law § 3-204, even if only by a vote of the Democratic City Council members. In such instances, the Appellate Division has held the following:

> Courts are empowered, in their discretion, and upon good cause shown, to declare any act taken by a public body in violation of the Open Meetings Law void in whole or in part (*see,* Public Officers Law § 107; *Matter of Roberts v Town Bd.,* 207 AD2d 404). Fixing the appropriate remedy for the Board's actions is expressly a matter of judicial discretion (*see, Matter of Sanna v Lindenhurst Bd. of Educ.,* 85 AD2d 157, *affd* 58 NY2d 626). The uncontroverted record reveals that the Board engaged in a persistent pattern of deliberate violations of the Open Meetings Law through insufficient notice, unreasonable starting times, improper convening of executive sessions, and improper exclusion of members of the public.

Goetschius v. Bd. of Educ. of the Greenburgh Eleven Union Free Sch. Dist., 244 A.D.2d 552, 553-54 (2d Dep't 1997). As noted above, it appears that Respondents have engaged in "persistent violations" of the Public Officers Law surrounding this appointment. Indeed, at oral argument, Respondents were unable to say whether a meeting of the Democratic Members of the City Council was scheduled today, and if so, whether the appointment of a Commissioner would be voted upon. Accordingly, any appointment for the office of Commissioner must be made in accordance with the Public Officers Law in an open and transparent manner and not in a secret, private meeting of which the public lacks knowledge.

Respondents contend that the Democratic City Council members have the right to appoint a Commissioner of their choosing because the Party failed to recommend a different person for the position thirty days after the City Council did not act on Johnson's recommendation within sixty days of the filing of her certificate of recommendation. Johnson's certificate was filed on November 21, 2016. The sixty days for the City Council to appoint Johnson would have expired on or about January 21, 2017. Respondents further contend that the November 29, 2017 recommendation of Sylvia DiPietro is more than thirty days after the time period that the Party had to recommend a different person as a candidate after the expiration of the sixty days of Johnson's recommendation and is essentially void. However, as late as April 17, 2017, Johnson was still communicating with a

representative of the City Council about the progress of her appointment. During this time, Schulkin continued in a "hold-over" capacity as Commissioner.[9] The City Council waited until on or about November 21, 2017, exactly a year after Johnson's original recommendation, to attempt to appoint a Commissioner of their own choosing. Based upon the above discussion, it is evident that Petitioners have demonstrated a likelihood of success on the merits based upon the fact that Respondents, including the City Council, and any subset thereof, attempted to appoint a Commissioner in a closed-door meeting in violation of the Constitution, the Public Officers Law, and the Election Law.

Second, the Court finds that Petitioners would suffer from irreparable harm in the absence of injunctive relief. A failure to comply with statutorily required open meetings and public notice requirements of the Public Officers Law constitutes irreparable harm. Further, the Constitution dictates that the designation of election commissions must be done "upon the nomination of such representatives of said parties respectively." Art. II, § 8. The language following immediately thereafter: "as the legislature may direct," is, as interpreted by this Court, a directive that the legislature is to establish a statutory framework for the appointment of individuals to fill such positions, which resulted in the adoption of the Election Law and Public Officers Law. Interpreting these laws consistently with the constitutional prerogative expressly granted to political parties should recommend or, as set forth in the Constitution, nominate the individual that will eventually serve in the position. There is something of an escape hatch provision in the Election Law that permits the legislature to nominate and appoint an individual in the event that a political party fails to make a timely recommendation or some other *sui generis* situation. Thus, for instance, a local legislature was able to directly nominate and appoint an election commissioner when a party chairperson attempted to nominate himself. *Matthews v. Zwirn*, 170 A.D.2d 708 (2d Dep't 1991). Nonetheless, when a

[9] *See People ex rel. Woods v. Flynn*, 81 Misc. 279 (Sup. Ct. Cayuga County 1913) (holding that until a successor is appointed and qualified, the election commissioner "would undoubtedly hold over and be entitled to discharge the duties of his office . . . and receive the emoluments thereof").

legislative body attempts to impinge on the prerogative of a political party, courts have been sure to prohibit such behavior. *Martin v. Reuning*, 194 Misc. 2d 701, 707 (Sup. Ct. Allegany County 2003). Hence, one particular legislative body, which consisted entirely of members of one political party, sought to avoid having an election commissioner from the other party by not acting on that party's recommendation was subject to a court order permitting the election commission to be seated without a legislative vote at all. 194 Misc. 2d 701. Of course, such cases are infrequent as it seems to be a rarity for a legislative body to attempt to seize the nomination process of a political party's designee for election commissioner for itself.

Thus, while Election Law § 3-204(4) does not set forth a time frame for the members of a legislative body who are members of the recommending party to appoint a Commissioner of their own choosing if the party fails to file a certificate within the time prescribed, it cannot be the legislative intent of § 3-204(4) for the City Council to actively thwart the Party from timely recommending an individual for Commissioner by telling Johnson that her appointment was still pending when it had been treated as if it had expired. At the same time, the Party was effectively deprived of the opportunity to make a second recommendation because of the representations made by a representative of the City Council to Johnson. Therefore, it was impossible for the Party to know when Johnson's recommendation expired and the thirty-day clock to recommend a different person as a second candidate began. The Party and Johnson apparently first learned that Johnson's prospective appointment was not going to occur when it was reported on November 21, 2017 that Praschak was proposed for appointment. Pursuant to *Martin*, *supra*, "[t]he rules of statutory interpretation require this Court to interpret in a constitutionally permissible manner and to effectuate the purpose, spirit, and object of the statute under scrutiny." 194 Misc. 2d at 707. The string of cases cited by Respondents refer to different factual situations where it was definitive that the appointing legislative bodies were not going to act on the political party's recommended appointee. Under the circumstances, the Party

may have been correct to recommend DiPietro within thirty days of the time that it acquired knowledge that the City Council was not going to appoint Johnson.

Moreover, while Respondents contend that the time to consider recommendations has expired, the only public announcements on the subject is contrary to this stated position. Item M 0564-2017 of the December 11, 2017 City Council Meeting Minutes indicates a "[c]ommunication from the New York County Democratic Committee recommending the name of Sylvia Di Pietro to the Council regarding her appointment to the office of Commissioner of Elections of the Board of Elections pursuant to § 3-204 of the New York State Election Law." Schwartz Amended Pet. Exh. K. Respondents contended at oral argument that this is just an acceptance of the document, however, the document was referred to the Committee on Rules, Privileges, and Elections. Despite Respondents' contentions, this notation in the December 11, 2017 meeting minutes raises a question as to why the instrument recommending DiPietro was accepted by the City Council if, according to Respondents' contentions, her recommendation is not in accordance with the Election Law and therefore should not be considered. It appears that due to the acceptance of DiPietro's certificate of recommendation, the City Council may now be obligated to consider her recommendation as the process begins anew. *See Matthews*, 170 A.D.2d 708. In this instance, were the Court not to intervene and grant a preliminary injunction, the City Council may ignore the Party's recommendation of DiPietro for the position of Commissioner. A preliminary injunction is thus also required to preserve the status quo, which would permit the City Council to consider DiPietro's recommendation by the Party in accordance with Election Law § 3-204(4).

The Court has considered Respondents remaining arguments, including those regarding jurisdiction,[10] and find them unavailing.

[10] The Court finds no merit to Respondents' argument that service was improper. Service was made in the manner requested by an Assistant Corporation Counsel, thereby allowing Respondents to proceed expeditiously to the Appellate Division, First Department relating to the temporary restraining order in this action. Further, any service arguments have

Accordingly, it is hereby

ORDERED that Petitioners' motion for a preliminary injunction is hereby granted; and it is further,

ORDERED that Respondents, including the City Council, or any subset thereof, are enjoined and restrained, during the pendency of this action, from proceeding with or voting on the appointment of a Commissioner until Respondents comply with the open meetings and public notice provisions set forth in the Public Officers Law and comply with the Election Law.

This constitutes the decision and order of this Court.

Dated: December 19, 2017

Alexander M. Tisch, J.S.C.

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been waived by Respondents having opposed the within Petition and motions on the merits. *See Muslusky v. Lehigh Valley Coal Co.*, 225 N.Y. 584, 588 (1919).