

NEW YORK COURT OF APPEALS ROUNDUP

COMPLIANCE WITH ELECTION LAW REQUIREMENTS STILL IMPORTANT DURING PANDEMIC

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In a May 22, 2020 Notice to the Bar, the Court of Appeals advised that its Albany-based staff will return to the courthouse by May 28, and that oral arguments for the June 2020 session will proceed in-person. While the courtroom will be closed to the public, the arguments will be webcast live.

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The Court of Appeals ruled on an interesting election law issue in *Matter of Ferreyra v. Arroyo*, at the end of last month. The court determined that the designating petition for a State Assembly candidate from the Bronx was invalid because it was fraudulent on its face. The record showed that 512 of 944 signatures on the petition were dated one or two days before the candidate had received the petition forms. In a 4-3 decision issued as a per curiam opinion, the court deemed the petition “so permeated by fraud” that it required invalidation.

The case turns on the designating petition submitted by Carmen Arroyo, who has represented the 84th Assembly District in the South Bronx for the past 26 years. Records showed that Arroyo picked up the blank petition sheets from the printer on Feb. 27, 2020. The signatures on nominating petitions are required by election law to be dated and subscribed by a witness. Arroyo’s campaign submitted 78 pages of signatures. On 41 of these pages, the signatures were all dated Feb. 25 or 26. In total, more than 54% of the signatures were dated prior to the candidate’s receipt of the petition sheets. In addition, 14 of the 28 subscribing witnesses swore that the Feb. 25 and 26 signatures were provided in their presence on the dates noted. In fact, the candidate’s own signature was dated prior to Feb. 27 and was sworn to by her chief of staff.

The Board of Elections disqualified 368 of the 944 signatures on other grounds. Of the remaining 576 signatures, 333 were backdated as described above, leaving potentially 240 properly dated signatures. For a valid petition this year, a candidate must have 150 signatures, which Arroyo exceeded even excluding the backdated signatures.

Arroyo’s challenger in the Democratic primary, Amanda Septimo, (along with others) filed a request for an order declaring invalid Arroyo’s candidacy pursuant to Article 16 of the Election Law. Petitioners argued that Arroyo’s campaign backdated the petition signatures with the improper motive of invalidating signatures that appeared on Septimo’s petition. Election Law §6-134(3) provides that if a person signs two different candidates’ petitions for the same office, the first-dated signature will be counted and the second-dated signature will be deemed invalid. The statutory period for gathering signatures this year started on Feb. 25, 2020. Septimo showed that

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Arroyo's petitions had 35 signatures dated Feb. 25 or 26 that also appeared on Septimo's petitions later in time; these double-signers were thus invalidated for Septimo.

The case proceeded quickly through the courts. At the initial hearing before the Referee, neither the petitioners nor the respondent candidate called live witnesses. The Referee recommended denial of the petition. On May 5, 2020, the Supreme Court accepted this recommendation and rejected the petition. On May 14, 2020, the Appellate Division, First Department affirmed in a 3-1 decision. The majority found that the documentary evidence and affidavit from the printing company were insufficient to establish that the respondent was involved in or intended to commit a fraud. The dissent, authored by Justice Ellen Gesmer, reached the opposite conclusion, finding that the magnitude of the backdating and the involvement of the candidate and her chief of staff compelled the conclusion that there was fraudulent intent.

The court's per curiam opinion dated May 21, 2020, was joined by Judges Rivera, Fahey, Garcia and Wilson. The majority noted that petitioners had to satisfy the high bar of proving fraud by clear and convincing evidence. Based on a review of the record, the court found that the lower courts erred and "should have concluded that this is one of those rare instances in which the designating petition is so 'permeated' by fraud 'as a whole as to call for its invalidation.'" The court relied on the facts that 512 out of the 944 signatures were falsely attributed to dates before the respondent's campaign had possession of the blank petition sheets and that 14 of the 28 subscribing witnesses swore that those signatures were procured on the inaccurate dates.

The dissent was authored by Judge Stein and joined by Chief Judge DiFiore and Judge Feinman. The dissent disagreed with the majority on the basis of the standard of review. The dissent stated that the court's role was to review the record to evaluate whether it contains support for the lower court's findings of fact. The dissent stated that while the documentary evidence may have supported an inference of fraudulent intent, none of the Referee, Supreme Court or First Department were persuaded that petitioners had shown by clear and convincing evidence that the respondent participated in the fraud or that "the irregularities rose to a sufficient level to infect the remainder of the designating petition." The dissent also noted that the petitions contained 240 valid signatures that were not the subject of fraud charges. The dissent concluded that the majority was "impermissibly usurp[ing] the role of the factfinder and exceed[ing] the jurisdiction of the Court."

The Court of Appeals issued another election law decision on May 21, 2020, resolving a split between the First and Third Departments. In *Matter of Seawright v. Board of Elections in the City of New York*, the First Department held that a candidate's late-filed cover sheet and certificate of acceptance did not constitute a fatal defect in light of the unique circumstances created by the COVID-19 pandemic. The Third Department reached the opposite result in *Matter of Hawatmeh v. New York State Board of Elections*. The Court of Appeals sided with the Third Department, holding that strict enforcement of the election law timing requirements is required by the statute and common law, regardless of an individual's extenuating circumstances, in order to ensure fair and consistent application to all candidates.

While the pandemic has resulted in certain changes to election procedures, such as reducing the number of necessary signatures on nominating petitions to 150, the court's recent rulings indicate that it will continue to require strict compliance with election law requirements. False backdating of signatures is impermissible and can jeopardize the entirety of the designating petition, as was the case with respondent Arroyo. Adherence to timing deadlines is required, and late filing will disqualify a candidate from the election. The court observed that if the election rules are to bend for strained circumstances, that is for the legislature to decide. The court's predilections on this subject are perhaps best summarized in the *Seawright* decision: "During the most difficult and trying of times, consistent enforcement and strict adherence to legislative judgments should be reinforced—not undermined."