

# New York Supreme Court

APPELLATE DIVISION -- SECOND DEPARTMENT

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In the Matter of Application of  
ANDREW GOODMAN FOUNDATION,  
ELECTIONS@BARD, SADIA SABA,  
ERIN CANNAN, AND LEON BOTSTEIN,  
*Petitioners-Appellees*  
-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,  
ERIC HAIGHT, in his official capacity

*Respondent -Appellant,*  
ELIZABETH SOTO, in her official capacity,

*Respondent-Respondent,*

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules

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## **RESPONDENT SOTO's BRIEF**

APP DIV NO. #

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JAMES E. LONG ESQ.  
Attorney for Respondent Elizabeth Soto  
668 Central Avenue  
Albany New York 12206  
(518) 458-2444  
*fax* (518) 458-2448  
Email: Longlaw@mac.com

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**PRELIMINARY STATEMENT  
STATEMENT OF FACTS**

This brief is submitted on behalf of Respondent, Elizabeth Soto, one of two appointed Commissioners of the Board of Election for Dutchess County. Soto is the Democratic Party Election Commissioner in Dutchess County.

Appellant Haight is the Republican Election Commissioner for Dutchess County. As often can be the case the Election Commissioners of their respective parties disagree and take an opposite position in this litigation.

By letter dated February 28, 2020 Petitioners, by counsel Venable LLP (Michael J. Volpe *of counsel*) (Appx. 38-39), requested that the polling place of the Red Hook Election District #5 be moved from The Church of St. John the Evangelist Episcopal Church in Barrytown, New York to a suitable on campus location at Bard College in Annandale-on-Hudson, New York.

Respondent Soto responded by letter dated March 3, 2020 advising Mr. Volpe that she was in full agreement with the relocation of the polling site in Red Hook ED #5 to Bard College, but such a decision could not be done by unilaterally and required the consent of the Appellant herein, Eric Haight, the Republican Election Commissioner of Dutchess County. Mr. Haight did not agree in March 2020 to this relocation.

Petitioners-Respondents-Appellees commenced this proceeding to move

the polling place on September 4, 2020. Supreme Court rendered a Decision and Order on October 13, 2020 denying the relief prayed for on the basis of Appellant Haight's opposition to the Article 78 Petition. Part of his opposition was that there was insufficient time to notify voters of the move of their polling site.

Petitioner-Appellees moved two days after the lower courts decision and order on October 15, 2020 to reargue or to renewal their application pointing out the relocation of other polling location in the Town of Red Hook, particularly Election Districts 7 and 8. Thereafter on October 23, 2020 Supreme Court denied the motion to reargue , granted the motion to renewal stating the basis for the original decision ( not enough time to notify voters) relied on false information provided by Appellant.

This appeal ensues.

## **ARGUMENT**

### **POINT ONE**

#### **SUPREME COURT CORECTLY GRANTED THE PETITIONERS MOTION TO RENEW.**

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (*Kugler v. Kugler* 174 AD3d 876 [Second Dept. 2019], *Central Mtge. Co. v. McClelland*, 119 A.D.3d 885, 886,). A motion for leave to reargue must be ‘based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (*id.* at 886, 991 N.Y.S.2d 87, quoting CPLR 2221[d][2]). A motion for leave to renew must “be based upon new facts not offered on the prior motion that would change the prior determination” and must “contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][2], [3]).

Certainly, the information provided to the Court at the original hearing, that it was too late to make changes to polling places 21 days before an election, which Supreme Court thereafter found false or misleading information was provided to the court. The misleading information provided to the lower courts should certainly satisfy its right to invoke its discretion and grant the Motion for Renewal.

Appellant failed to provide a valid basis for keeping the poll site at its

current location, especially a location that is not ADA-compliant and his primary argument was the time crunch it would put on the Board and the voters to acclimate to a new polling place. However two changes in the same town were also made which on its face negates the excuse proffered at trail term.

As the Supreme court stated in her opinion, she had only sided with the Appellant herein in her initial decision because it was her understanding – based on Commissioner Haight’s affidavit -- that it was too late to move the poll site at the time she heard the original case. But, as noted by the court, the Board of Elections moved another poll site in Red Hook *after* Commissioner Haight submitted his affidavit.

## **POINT II**

### **SUPREME COURT CORRECTLY MODIFIED ITS DECISION AND ORDER**

In a CPLR Article 78 proceeding to review a determination of an administrative agency, the standard of judicial review is whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see* CPLR 7803[3]; *RADA Corp v. Gluckman* 171 AD3d 1189).

When the proffered reason (timeliness) offered to justify the refusal to move a polling site, is in fact false, then logic dictates that the underlying decision

of the Board was arbitrary and capricious if based on false or misleading evidence.

As this court states in *RADA*, “In such a proceeding, courts “examine whether the action taken by the agency has a rational basis,” and will overturn that action only “where it is ‘taken without sound basis in reason’ or ‘regard to the facts’ ” (*Matter of Wooley v. New York State Dept. of Correctional Servs.*, 15 N.Y.3d 275, 280, 907 N.Y.S.2d 741, 934 N.E.2d 310, quoting *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431, 883 N.Y.S.2d 751, 911 N.E.2d 813; see *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 232, 356 N.Y.S.2d 833, 313 N.E.2d 321), or where it is “arbitrary and capricious” (*Matter of Deerpark Farms, LLC v. Agricultural & Farmland Protection Bd. of Orange County*, 70 A.D.3d 1037, 1038, 896 N.Y.S.2d 126).

The actions of Commissioner Haight in refusing to move the polling site was based on a disregard of the facts, that there was in fact time to do so and in fact the Dutchess County Board of Election was moving other polling sites at that very moment. The changes to the polling place in Districts 7 and 8 could be accomplished in time for notice to voters pre-election but for Appellant to then say there was not time to move the poll site in District 5 of Red Hook is arbitrary and capricious on its face.

### **POINT III**

#### **SUPREME COURT DID NOT ABUSE ITS DISCRETION**

Respondent Soto in her reply to the Article 78 Petition pointed out to the court that “In ruling on this proceeding, I ask the Court to take notice that under Section 4-104(2) of the Election Law, the Board of Election must inform voters of a change of polling sites by no later than five days prior to the election.”

EL§ 4-104 2. States: “If the board of elections, after designating a polling place, and after sending written notice of such polling place to each registered voter, designates an alternative polling place, it must, at least five days before the next election or day for registration, send by mail a written notice to each registered voter notifying him of the changed location of such polling place. If such notice is not possible the board of elections must provide for an alternative form of notice to be given to voters at the location of the previous polling place.”

If by statute 5 days is directed to provide the notice to voters, and if that is not possible then by some alternative method, certainly 11 days from the court’s decision and order of October 23, 2020 is not an abuse of discretion.

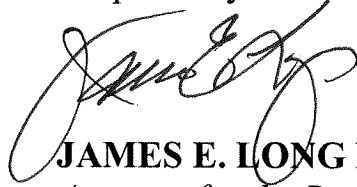


**CONCLUSION**

**SUPREME COURT SHOULD BE AFFIRMED.**

The Decision and Order of Supreme Court should be affirmed.

Respectfully submitted,



**JAMES E. LONG ESQ.**

*Attorney for the Respondent Soto*

668 Central Avenue

Albany New York 12206

(518) 458-2444

*fax* (518) 458-2448

[Longlaw@mac.com](mailto:Longlaw@mac.com)

**CERTIFICATE OF COMPLIANCE PURSUANT TO 22  
NYCRR§670.10.3(F)**

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s/ *James E. Long*

JAMES E. LONG