

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

BARD COLLEGE, ELECTION@BARD, LEON
BOTSTEIN, ERIN CANNAN, CYNTHIA DEANN
AUSTIN CUNNINGHAM, MARIA ALEJANDRA
RODRIGUEZ ORTIZ, SARINA JAQUELINE CULAJ,
and TOMAS S. FORMAN,

Index No. 2021/52777

Petitioners,

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIK J. HAIGHT, in his official capacity,
HANNAH BLACK, in her official capacity.

Respondents,

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

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**SUPPLEMENTAL AFFIRMATION OF MICHAEL DONOFRIO, ESQ.
IN OPPOSITION TO RESPONDENT ERIK J. HAIGHT’S MOTION TO DISMISS**

MICHAEL DONOFRIO, an attorney being duly licensed to practice before the Courts of
the State of New York, hereby affirms the following under the penalties of perjury:

1. Together with co-counsel Yael Bromberg, Esq., I represent the Petitioners in this Article
78 Proceeding. I submit this affirmation in further opposition to Respondent Election
Commissioner Erik J. Haight’s August 2, 2021 Motion to Dismiss.

2. On August 10, 2021—the same day that Petitioners submitted their opposition to
Commissioner Haight’s motion—Respondent Commissioner Hannah Black submitted her own
opposition to Commissioner Haight’s motion. The opposition—comprising Commissioner
Black’s Affidavit (with exhibits) and an affirmation by her attorney, Michael Treybich—contains facts
not previously available to Petitioners.

3. I submit this brief Supplemental Affirmation to assist the Court in its consideration of Commissioner Haight's pending motion by highlighting a handful of critical facts in Commissioner Black's opposition that were not previously available to Petitioners.

4. First, Petitioners described the November 30, 2020 BOE resolution (the "Prior Resolution") as "procedurally irregular." Doc. No. 46, ¶ 3. Commissioner Black confirms the irregularity in her affidavit: "The Prior Resolution appeared to be a secret from the public, as it was adopted in violation of the open meetings law, and I did not discover its existence until I began my term as Commissioner of Elections." Doc. No. 36, ¶ 8. Commissioner Black also confirms that Commissioner Haight refused her demand to rescind the Prior Resolution, *id.* ¶ 9, until she filed *Black v. Haight* (Docket No. 2021-50401). *Id.* ¶¶ 10-11.

5. Second, Petitioners addressed the document that Commissioner Haight characterizes as the "approved" minutes of the February 25, 2021 BOE meeting. Doc. No. 36, ¶¶ 26, 35-38. Commissioner Haight attests that "Commissioner Black reviewed the minutes and requested a couple revisions, and then both she and I approved them." Doc. No. 30, ¶ 7 (emphasis added). Commissioner Black conclusively refutes that she approved them:

- a. "One of Commissioner Haight's staff members prepared minutes following the February 25, 2021 public meeting and sent them to me, and I did request that certain changes be made, but I never approved those minutes. (Email exchange annexed hereto as 'Exhibit D')." Doc. No. 36, ¶ 13.
- b. "Similarly, I did not approve the minutes from the February 25, 2021 meeting, for the reason that I did not agree with the conclusion that 'Both motions failed so the pollsite reverts back to the 2019 pollsite location at St. John's Episcopal Church.' (see, Exhibit E, page 2)." *Id.* ¶ 15; see also *id.* ¶ 14 (providing example of approved minutes from April 16, 2021 BOE meeting).

6. Third, in explaining that the BOE has not designated a 2021 polling location for Red Hook District 5, Petitioners noted that the BOE, in contrast to its recent practice, has not issued any written resolution announcing any such designation. Doc. No. 46, ¶¶ 14-17. Petitioners now have learned from Commissioner Black's Affidavit that Commissioner Haight proffered a draft resolution to Commissioner Black, which she refused to sign because there was no agreement as to a District 5 polling site:

- a. "Further, the new proposed 'Resolution Number 01-2021: Designating Poll Sites for 2021' was circulated on or about February 27, 2021, and it included 'St John's Episcopal Church' as the polling place for the 5th district in the Town of Red Hook. (Copy of the new Resolution 01-2021 is attached hereto as 'Exhibit F')." Doc. No. 36, ¶ 18.
- b. "For that reason, I declined to approve or signify my approval by signing the resolution, only Commissioner Haight's signature appears on the proposed resolution, and it looks like he signed it on April 27, 2021, though it purports to be effective 'March 1, 2021 to February 29, 2022'. (*see*, Exhibit F, pages 1 and 2)." Id. ¶ 17.

7. Commissioner Black's affidavit and the draft resolution confirm that the BOE did not agree on or designate a District 5 polling location on February 25 (or ever), and, critically, that Commissioner Haight was aware of those facts:

- a. "At the February 25, 2021 public meeting, Commissioner Haight and I clearly did not agree on the location of a poll site for Red Hook District 5. (The video of the February 25, 2021 public meeting is Exhibit G [footnote omitted])." Id. ¶ 21.
- b. "Second, following the circulation of minutes of that meeting, I did not approve those

minutes.” Id. ¶ 22.

- c. “Third, a hard copy of the new Resolution 01-2021, which was clearly intended to set poll sites, was circulated sometime during March or early April, and it begs the question: why did Commissioner Haight’s staff circulate a resolution to designate polling places, which he signed, if the polling places were in fact (as he argues) designated at the February 25, 2021 meeting or by the unapproved minutes of that meeting?” Id. ¶ 23.
- d. Commissioner Black refused to sign the proffered Resolution. See supra ¶ 6(b).

8. Fourth, Petitioners explained that in the absence of an agreement between the Commissioners, designation of the 2021 polling location for District 5 would revert back to the designation of the Bertelsmann Campus Center *and* the St. John’s Church (not the Church alone) as a result of this Court’s October 30, 2020 Order (which Commissioner Haight and then-Commissioner Soto both assented to). Doc. No. 46, ¶¶ 10, 11, 13, 19. Commissioner Black confirms that, when the Commissioners cannot agree on a pollsite, under the BOE’s “longstanding tradition and course of dealing” that pollsite “falls back to the prior location.” Doc. No. 36, ¶ 24. Commissioner Haight agrees that “the practice in Dutchess County when the Commissioners have not agreed on the designation of a new polling place has been to use the last designated polling place.” Doc. No. 30, ¶ 10.

9. Commissioner Black also confirms that “[t]he prior location for the Red Hook District 5 poll site during the 2020 General Election was set by prior order of this Court on October 30, 2020, for the Bertelsmann Campus Center at Bard College, upon consent of the Board of Elections (which consent would have required the approval of both Commissioner Haight, and

then-Commissioner Soto).” Doc. No. 36, ¶ 26.¹ Applying the BOE’s tradition and practice to the undisputed facts, Commissioner Black reaches the same conclusion as Petitioners: “because we failed to set a new polling site for Red Hook District 5, the polling site reverted to the prior polling site, which was both the Bertelsmann Campus Center at Bard College and St. John’s Episcopal Church.” Id. ¶ 29.

10. Finally, Commissioner Black confirms that she “had several telephone conversations with Jonathan Becker from Bard College during February and March, 2021 due to his interest in the location of the poll site for Red Hook District 5, which contains the Bard College campus” in which she “conveyed [her] understanding to Mr. Becker, including following the February 25, 2021 meeting, that no poll site had been designated this year for Red Hook District 5.” Id. ¶¶ 27-28.

11. In its October 23, 2020 Order in the 2020 litigation, this Court found that “the primary factor identified by Commissioner Haight and relied upon by this court [that there was insufficient time to move a polling location] was simply untrue.” Doc. No. 5 at 3. Similarly in this case, the “primary factor identified by Commissioner Haight” in support of his motion to dismiss—that the Commissioners reached an agreement on February 25, 2021—has been shown to be “simply untrue.”

12. On August 11, 2021, Commissioner Black filed a Verified Answer With Cross-Claim. Doc. No. 52. The cross-claim relies on the facts noted above and requests, among other things, that “the Petitioners’ request for an order requiring that the Bertelsmann Campus Center at Bard


¹ Commissioner Black notes specific pandemic-specific exceptions that the BOE made in 2020 by agreement of Commissioner Haight and then-Commissioner Soto based upon recommendations of the New York State Board of Elections where the poll sites defaulted to the 2019 locations. Doc. No. 36, ¶ 25. Those exceptions are inapplicable here, because the Red Hook District 5 designation of the Bertelsmann Center and the St. John’s Church was made by agreement of the two Commissioners in resolving the 2020 litigation and then directed by this Court’s October 30, 2020 Order.

College be designated as a Poll Site for the Town of Red Hook, District 5, in addition to the St. John's Episcopal Church." Id. at 6, Prayer for Relief ¶ I. Petitioners agree that this is an appropriate disposition of the Petition, especially in light of Commissioner's Black's filings.


CONCLUSION

For all of the foregoing reasons, in addition to those set forth in Petitioners' August 10 filings, Petitioners respectfully request that the Court deny Commissioner Haight's motion in its entirety and grant the relief sought in the Petition.

Date: Montpelier, Vermont
August 13, 2021

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