To be argued by:
Peter A. Reese, Esq.

Time requested:
Ten minutes

Supreme Court of the State of New York

Appellate Division, Fourth Department

Matter of PETER A. REESE,

Petitioner-Appellant,

Erie Co. Index No. 2019-0071

-against-

ERIE COUNTY BOARD OF ELECTIONS,
JEREMY ZELLNER, As Commissioner of the Erie County Board of Elections,
RALPH MOHR, as Commissioner of the Erie County Board of Elections,
and
LYNN M. DEARMYER-LEE, Objector,

Respondents-Respondents.

BRIEF OF APPELLANT

PETER A. REESE, ESQ.
Attorney for Appellant, Pro se,
49 Starin Avenue
Buffalo, New York 14214
(716) 870-5450
PReese270@aol.com

TABLE OF CONTENTS

CITATIONS

CONSTITUTIONS

STATUTES

CASES

REGULATIONS

ARTICLES AND REPORTS

QUESTIONS PRESENTED

1. Did the trial court err in failing to grant a default judgment against the Board of Elections due to a defective verification?

   Answer of the court below: No.

2. Did the trial court err in failing to grant summary judgment to the petitioner?

   Answer of the court below: No.

3. Did the defective specific objections overcome the statutory presumption of validity?

   Answer of the court below: Yes.

4. Did the trial court err in failing to hold an evidentiary hearing to resolve critical issues of fact?

   Answer of the court below: No.

PROCEDURAL HISTORY

The Erie County Board of Elections invalidated the designating petition of Peter A. Reese for Erie County Executive on April 24, 2019.

Mr. Reese filed a petition to validate on April 26, 2019.

The respondents filed answers on May 1, 2019.

Oral argument was held before Justice Christopher J. Burns on May 2, 2019 but no testimony was taken.

The court denied the petition on May 9, 2019.

The petitioner filed a notice of appeal on May 21, 2019.

STATEMENT OF FACTS

This appeal arises out of a special proceeding pursuant to Election Law Section 16-102, seeking an order compelling respondents to validate the Democratic Party designating petition of the petitioner for election to the public office of Erie County Executive. PETER A. REESE is a candidate for the Democratic nomination for Erie County Executive and filed a designating petition with the Erie County Board of Elections by mail on April 4, 2019. See Reese Petition, ¶ 7. Respondent LYNNE M. DEARMYER-LEE filed objections to the petition. See Dearmyer-Lee Petition, Exhibit "C", Specific Objections from Petition to Invalidate at Index No. 2019-0060.

The Board of Elections ruled the petition invalid on April 24, 2019. See Reese Petition, Exhibit "A". The Election Law requires 1500 valid signatures for the public office at issue. The petitioner filed designating petitions containing 2164 presumptively valid signatures. Reese Petition, ¶12. The Objector challenged a net total of 1465 signatures; however, the gross total of objections (including multiple objections to the same signature) was at least 5398. The Board of

Elections staff found a total of 1286 valid signatures. *Id.* at 13-14. The Board of Elections Commissioners validated a total of 1333 signatures after hearing the Petitioner argue for the validity of numerous signatures rejected by the staff. Thus, the Board of Elections rejected challenges to 664 signatures made by the Objector. *Id.* at 15-16.

The Board's determination is erroneous and invalid because the petition substantially complies with the Election Law, is presumed valid and should be validated. The sole basis of the Board's decision was alleged specific objections filed by the Objector. Those objections are defective for the following reasons:

1. They are not in fact specific objections within the meaning of the Election Law Section 6-154 but scatter-gun objections which list multiple inconsistent grounds for objections for numerous signatures. For example, there were five or more objections to 711 signatures.
2. They are not in fact specific objections because the Objector's associates admitted at the Board hearing that in preparing the objections, they did not consult or rely upon actual Board of Elections records showing the actual signatures and ways of writing and/or printing of the voters who signed the designating petition; rather they are "shot in the dark" objections based allegedly and only on a digital list of voters.
3. Finally, on information and belief and by implied admission of Objector LYNN M. DEARMYER-LEE at paragraph 34 of her verified petition in Dearmyer-Lee v. Reese, Erie Co. Index No. 2019-0060, the specific objections were prepared with at least some assistance of the Board itself, in

violation of the letter and spirit of Election Law Section 6-154, as explained more fully below.

At the Board hearing on April 24, 2019, Commissioner Zellner, who doubles as Chair of the Erie County Democratic Party, in response to inquiries, denied that any Board resources were used in the preparation of the specific objections. He further stated that the Democratic Party purchased a digital copy of the Reese designating petition and implied that a computer list of voters was used to prepare objections. *Id.* at 34-35. Even if true, this fact shows that the objections were not "specific" within the meaning of the statute as stated above. However, Mr. Zellner's statement is not consistent with results of a Freedom of Information request made by petitioner's agent as to which parties examined or reviewed the Reese petition. See, Reese Petition, Exhibit "B" 37.

The Board responded by supplying six pages of requests to purchase petitions or other documents (Exhibit "C") and five pages of requests to examine petitions. See, Exhibit "D" 38. As seen in Exhibits "C" and "D", the documents provided by the Board are cryptic and call for an evidentiary hearing on the matter. Exhibit "C" contains a request by Samantha Nephew of the Democratic Party to purchase petitions for a total of $275.00; however, it predates the U.S. Mail filing of the Reese petition on April 4, 2019, by a week at least. Nor does the document specify which petitions were requested and in what format. Exhibit "C", which contains a request which is dated the same day the Reese petitions were allegedly received by the Board, likewise fails to specify which petitions were requested and in what format but indicates a payment of $58 for petitions. That figure at 25 cents per page, the Board rate, would have paid for 232 pages of petitions, more than the 144-page Reese petition. Exhibit "C" also includes a request by Kelly

Sullivan for unspecified "petition review signatures" and indicates, on information and belief, a payment for $7.75 worth of paper copies of 31 signature cards.

Thus, the Board's own records do not show that the Democratic Party or the Objector lawfully acquired a copy of the Reese petition or acquired copies of the hundreds of signature cards they apparently reviewed. Also, the documents at Exhibit "D" indicate that no one associated with the Objector or the Democratic Party examined such records at the Board. However, paragraph 34 of the verified petition filed in Dearmyer-Lee v. Reese, Erie Co. Index No. 2019-60, proves conclusively that the Objector did in fact examine said records or that someone did so on her behalf: "At least 487 signatures, appearing on the Reese Petition, are invalid because they do not correspond to the signatures on file at the ECBOE for the persons who allegedly signed. This includes circumstances in which a person "hand-printed" his or her name, as opposed to signing it in script, as s/he did when s/he signed his or her voter registration application on file at the ECBOE."

This admission shows that the Objector did in fact, contrary to the statement of respondent Zellner, have direct access to Board records without having to file a FOIL request. On information and belief, such access would have been at times and days when the public itself would not have had access to such records and such access would necessarily have involved the improper expenditure of public funds and/or use of public resources for a private use, that being the wages and benefits of Board employees and the expenditure of funds for computer resources after public hours. Moreover, the quoted paragraph also indicates that the Objector had access to records not available to the public at all and which were most definitely not made available to the petitioner's volunteers when they attempted to respond to the objections, to wit, the "application on file at the ECBOE." The petitioner's staff could only access the signature of the voter, not

their full application. On information and belief, only computer terminals accessible by Board staff allow access to voter registration applications. Reese Petition at ¶ 48.

The case law clearly holds that the Board may not, out in the open and sua sponte, make specific objections to petition signatures or witness statements. Here, it appears that the Board, through subterfuge, accomplished the very same result and violated the statutory presumption of validity that encourages citizen participation in democracy. The frivolous and general nature of the objections is shown by the sheer number of objections that were ultimately overruled by the Board. Thus, even if the Objector had lawful access to all Board records and received no improper assistance from the Board itself--in spite of the evidence to the contrary stated herein--her objections were nevertheless defective and not "specific" in nature as they purported to reject many hundreds of valid signatures whose validity could easily have been determined by reasonable diligence. The Objector initially asserted that there were only 670 valid signatures out of 2164 that were filed. See Specific Objections. Thus they challenged 1495 signatures and since they made numerous objections to many signatures, the gross total of objections made to line by line voter signatures was 5398. However, after many hours of work that should have been completely unnecessary, Board staff workers restored 616 signatures. Reese Petition, ¶¶ 50-55.

Within a very limited time frame, Petitioner Reese's campaign workers and legal staff, after spending many hours poring over Board records, were able to convince the Commissioners to restore yet another 47 signatures, leaving a final total of 1333 valid signatures. However, on information and belief, many dozens more signatures could have been restored through additional efforts of the Reese campaign, for example, by obtaining affidavits from voters, if Reese campaign efforts had not been derailed by the filing of approximately 600 frivolous objections that do not in any way constitute specific objections within the meaning of the

Election Law. Thus, there is a real possibility that in this case, had properly formulated and well documented specific objections been filed, the Reese campaign might have been able to target its scarce resources in a more efficient manner and sooner, and may have been able to validate his petition.

Even though the petitioner had filed Freedom of Information requests for any records related to his designating petition and had received responses as noted in his verified petition, on the day of oral argument, the Board of Elections did a document dump of every FOIL request made during the relevant period. See, Court Exhibit "1". Significantly, the Objector was silent as the Sphinx about said documents at oral argument. Nevertheless, a review of the documents reveals only one with any clear connection to the Reese candidacy. An otherwise unidentified individual named Monica Boutin requested information about a list of thirty-two voters who appear to be witnesses who carried the Reese designating petition. Whatever the reason for this request, it cannot account for the allegation by the Objector that she or her allies review the Board records of 487 signatories to the Reese petition. Dearmyer-Lee Petition, ¶ 34..

Petitioner came to the April 23, 2019 meeting at the Erie County Board of Elections fully prepared to video-record the proceedings. In the past the antics of Commissioner Zellner have been so biased, unprofessional, and unfair that Petitioner wished to document any such behavior. At the beginning of the meeting, while Petitioner and his staff were about to set up the video equipment, the commissioners stated that they did not allow video recording of the meeting. When asked whether it was an Open Meeting the reply was "Yes." Petitioner further inquired as to whether they were forbidding him from video recording an Open Meeting. The answer was again, "Yes." Reese Petition, ¶¶ 60-64. Under the Open Meetings Law, public meetings can be freely photographed and video recorded. By prohibiting the Petitioner from video-recording the

meeting, the Commissioners violated the Open Meetings Law. During the meeting George Richert of station WIVB attended briefly and had a camera man video record a portion of the meeting which was later aired on Channel 4. By allowing Richert to video, but preventing Petitioner from doing so, the Commissioners violated Petitioner's rights to equal treatment under the laws of New York and the United States. *Id.* at 65-68.

ARGUMENT

I. THE COURT ERRED IN FAILING TO GRANT A DEFAULT JUDGMENT AGAINST THE BOARD OF ELECTIONS.

The petitioner moved for a default judgment against the Board of Elections due to an obviously defective verification by their counsel, Jeremy Toth, Esq. [Transcript of Proceedings, 8:2, et seq.] Specifically:

1. Mr. Toth failed to state why the verification is not being done by a party. CPLR 3021;
2. Mr. Toth made the verification without being "acquainted with the facts." CPLR 3020(d)(2); and,
3. Mr. Toth purported to verify on information and belief based on review of Board records that are not specified, however, he did not in fact make any allegations on information and belief so his verification in that regard is gibberish.

In response, Mr. Toth offered no cogent explanation of these failures:

> "MR. TOTH: Your Honor, I did receive Mr. Reese's letter. 3020(d)2 allows verification by anybody who's acquainted with the facts if the respondent is a government official. In this case, obviously where a government official is standard practice in Article 78s for attorneys representing the various agency to sign the verification. I don't think Mr. Reese's argument has any merit, but if Your Honor would, you know, would prefer a verification from someone else, I can spend the day trying to figure out who's most appropriate. I think the reason the CPLR allows attorneys to verify on behalf of government agencies is because often times the allegations are so far afield and so widespread that it's difficult to find one particular person who has all of the necessary facts. I think that's why it says a person acquainted with. And I am acquainted with it, because I have all of the original documents right here. My answer is based on these documents and then the other parts of my answer are based on the law." [9:1-20]

Verification is critical in summary proceedings as there is little time for verification of facts through discovery as prompt decisions have to be made. That being the case, the trial court should have granted the default judgment.

II. THE COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT TO THE PETITIONER.

A. THE OBJECTOR ADMITTED THAT SHE DID NOT EXAMINE THE RECORDS OF THE BOARD OF ELECTIONS IN PREPARING HER OBJECTIONS.

The petitioner moved for summary judgment against the Objector and the Board based on the implied admission that the so-called specific objections were made without examining the actual records of the Board in violation of the intent of the Election Law. [Transcript of Proceedings, 9:23, et seq.] For example, the respondents failed to specifically deny following paragraphs: 28, 29, and 30:

> 28. Specific objections made without access to Board records are intrinsically defective generalized objections since they lead to the filing of many hundreds of objections that would be obviated by doing what the Legislature contemplates, *actually examining the polling records*.
> 29. Thus, by making objections without such records, objectors turn the statutory scheme upside down and impose burdens on the Board, the taxpayers, candidates and our democracy itself.
> 30. Specifically, the following categories of objections cannot properly be made without access to Board records:
>
> a. 5A of persons whose signatures are not identifiable
> b. 6A. of persons with unidentifiable or missing given name
> c. 7A. of persons with initials not identifiable with register
> d. 8A. of persons whose names are hand printed
> e. 10A. of persons not registered at address set forth in petition
> f. 12A. of persons who do not reside in political unit"

At oral argument, Objector's counsel was coy about how their objections were prepared but eventually made a reference to a "VAN" system as the basis for the objections. However,

they never explained what that system is even though petitioner's counsel stated that we were uncertain of the nature of such system and that no mention of such system had been made in Objector's pleadings. The trial court did not express any interest in what it meant. However, it appears that this is a purely digital database lacking any signature exemplars of voters or any information from the voter's application such as how they print their name. See, Transcript of Proceedings, 37:17-38:6; wikipedia.org/wiki/NGP_VAN#Products

Thus, it is evident that the objections were not prepared with Board records but merely with a digital database. The question is whether that level of laxity meets the statutory definition of "specifications of the grounds for the objections." It is difficult to imagine how it could since there were no computers widely available in 1935 when this language was first inserted into the law.

A statute must be read as a whole, taking account of all relevant provisions. The Election Law spells out in detail how voters are registered; what records of said registration need to be maintained; and how voters can be removed from the rolls. It is not conceivable that the Legislature intended specific objections to be filed without consulting such records. In fact, since there were no computerized records when the current legislative scheme was complete, circa 1935, the only way to prepare objections at that time was by resort to Board records. Respondents bear a heavy burden of proving that the invention of the electronic computer changed the meaning of legislation passed in 1935.

Specifically, the following sections are relevant to preparation of objections:

> § 3–220. Records and photostats; preservation and sale 1. All registration records, certificates, lists, and inventories referred to in, or required by, this chapter shall be public records and *open to public inspection* under the immediate supervision of the board of elections or its employees and subject to such reasonable regulations as such board may impose . . . No such records shall be handled at any time by any person other than a member of a registration board or board of

> inspectors of elections or board of elections except as provided by rules imposed by the board of elections. 2. The central file registration records shall be kept in locked filing cabinets in the office of the board of elections or, in the appropriate branch offices of the board of elections. Such photostatic records *shall be open to public inspection*, in lieu of the original registration records. . . . 5. Any such photostatic, microphotographic or photographic film copy made pursuant to this section or any such computer readable record shall be deemed to be an original record for all purposes and, when satisfactorily identified, may be introduced in evidence in any judicial or administrative proceeding. An enlargement, facsimile or certified copy thereof shall, for all purposes, be deemed to be an enlargement, facsimile or certified copy of the original record and may likewise be introduced in evidence if the film copy or the computer readable record is in existence and available for inspection under direction of the court or administrative agency. The introduction in evidence of a film copy or a copy of a computer readable record, or an enlargement, facsimile or certified copy thereof, shall not preclude introduction of the original record. (Emphasis added)
>
> §5-204
> g. After completing the registration forms the inspectors of election shall require the applicant *to sign* the two registration records in the spaces provided for his signature at the time of registration.
> h. After securing the voter's signatures, the two inspectors by whom the registration is taken *shall sign the records in the spaces provided.* (Emphasis added)

Since a statute's meaning must be discerned by reading it as a whole, the statute clearly contemplates that in preparing objections, the objector would need to review the meticulously maintained and secured original records of the voter, containing at least two original signatures.

The contrary interpretation of the statute is absurd. If objections can be filed without reviewing Board records, this means that any objector's purely subjective impression of what a signature on a petition signifies is valid under the law. Also, if some sort of unknown computer system was relied upon here, there is no indication in the record of whether such a system is current or accurate. Another reason to insist on the use of Board records is that voters are continuously being added to and deleted from the records for a variety of reasons. Using outdated private computer records simply increases the burden on candidates and on boards of elections, all contrary to the intent of the Legislature.

Although the respondents scoffed at this argument at oral argument and the trial court essentially ignored it, the largest board of elections in the State has explicitly endorsed the argument in a formal rule:

> "Objectors are warned not to include in the specifications broad, non-specific or generic claims or claims which are not supported by documents filed with the Board. The Board may dismiss the entire objections as frivolous if specifications include such claims." New York City Board of Elections, Rule H8 pursuant to Election Law 6-154.

We submit that this rule is merely an interpretation of the statute by an agency with special expertise in the area:

> "Where the interpretation of a statute involves specialized 'knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom,' the courts should defer to the administrative agency's interpretation unless irrational or unreasonable." *KSLM-Columbus Apartments, Inc. v. New York State Division of Housing*, 5 N.Y.3d 303, 312 (N.Y. 2005)

Indeed, it is the only reasonable interpretation of the law since an objection made without looking at the records the Election Law has mandated be maintained cannot be considered to be specific within the meaning of the Election Law. One cannot "specify" the "grounds" for objection without examining poll records. One can only engage in wild speculation. This would be contrary to the purposes which motivated the passage of two significant changes in the law that were clearly designed to favor candidates and make objections more difficult to sustain.

Prior to 1922, the law spoke merely of "a written objection" to a petition. However, a new Election Law in 1922 for the first time created a presumption of validity of designating petitions. Laws of 1922, c. 588, §103. Frivolous and baseless objections effectively destroy that statutory presumption and force the candidates to prove their signatures are valid. Worse yet, since the process of doing so is arcane and time-consuming, it improperly forces many candidates off the ballot. Finally, by greatly increasing the burden on boards of elections to

review frivolous objections, it violates the legislative purpose repeatedly stated as a prime goal of the re-codified Election Law in 1922 (adding the presumption of validity). The Joint Legislative Committee on Election Law stated:

> "Many valuable suggestions toward economy and simplification of the procedure in matters relating to elections and primaries were offered and many of them were adopted and are included in the proposed bill. . . The committee . . . favored a simple revision of existing provisions of the Election Law, to correct inaccuracies, reduce expenses in operating the election machinery, reduce the labors of election officers, and generally to simplify the procedure. The bill which accompanies this report is intended to effect those objects." Legislative Document (1921), No. 60, pp. 3-5.

It is hard to imagine a clearer statement of the purposes of new provisions such as the newly-added presumption of validity than to save costs and simplify procedure. Allowing objectors to systematically make massive numbers of frivolous objections violates both policies.

Another significant change in the law was enacted in 1935 when for the first time, the Legislature imposed the requirement of filing "specifications of the grounds of the objections." Election Law, §142. Thus, in olden days, mere "objections" were allowed (see L. 1909, ch. 22, §55-a); then the Legislature created the presumption of validity in 1922; finally, in 1935, the Legislature required that specific objections be filed. Both major changes in the law were designed to assist candidates in qualifying for the ballot and both made the job of objectors more difficult. It is also worth noting that both were enacted well before the era of computers where bona fide objections could only be propounded by examining actual board records.

Thus, the New York City Board has merely stated the only true meaning of specific objections as necessarily based on review of Board records and not subjective speculations based on digital list of voters. This Court should hold that, where it is proven that objections were not based on examination of Board records, they are not valid specific objections within the meaning of the Election Law and do not serve to reverse the statutory presumption of validity.

B. ALTERNATIVELY, THE PRESUMPTION OF VALIDITY OF THE DESIGNATING PETITION WAS VIOLATED BY THE OBJECTOR'S IMPLIED ADMISSION THAT SHE USED BOARD OF ELECTIONS RESOURCES NOT AVAILABLE TO THE GENERAL PUBLIC.

Given the statutory presumption of the validity of designating petitions, boards of elections are barred from preparing their own specific objections to petitions or assisting in any way with the preparation of those objections by outside parties. Here, the Objector admitted using Board records unavailable to the public and the petitioner alleged that the Freedom of Information request he made showed that the Objector did not have lawful access to this records. See Reese Petition at ¶ 36, et seq. In her answer, the objector failed to explain how these records came into their possession and further failed to rebut the following allegations which are thereby deemed admitted:

In this regard, the objector failed to specifically deny the following allegations: 42, 43, 44, 45, 46, 48.

42. Thus, the Board's own records do not prove that the Democratic Party or the Objector lawfully acquired a copy of the Reese petition or acquired copies of the hundreds of signature cards they apparently reviewed.
43. Also, the documents at Exhibit "D" indicate that no one associated with the Objector or the Democratic Party examined such records at the Board.
44. However, paragraph 34 of the verified petition filed in *Dearmyer-Lee v. Reese,* Erie Co. Index No. 2019-60, proves conclusively that the Objector did in fact examine said records or that someone did so on her behalf:
"At least 487 signatures, appearing on the Reese Petition, are invalid because they do not correspond to the signatures *on file at the ECBOE* for the persons who allegedly signed. This includes circumstances in which a person "hand-printed" his or her name, as opposed to signing it in script, as s/he did when s/he signed his or her voter registration application *on file at the ECBOE.*"
45. This admission shows that the Objector did in fact, contrary to the statement of respondent Zellner, have direct access to Board records without having to file a FOIL request.
46. On information and belief, such access would have been at times and days when the public itself would not have had access to such records and such access would

necessarily have involved the improper expenditure of public funds and/or use of public resources for a private use, that being the wages and benefits of Board employees and the expenditure of funds for computer resources after public hours.

48. The petitioner's staff could only access the signature of the voter, not their full application. *On information and belief, only computer terminals accessible by Board staff allow access to voter registration applications.*

If the Board assisted in any way in the preparation of objections, this would violate the statutory presumption of validity which bans any such assistance. Given this prima facie showing that the Board itself improperly made its records available to a private party for the preparation of specific objections and given that the Objector failed to rebut this showing, the court erred in failing to grant summary judgment to the petitioner.

C. THE UNCONTRADICTED PLEADINGS ESTABLISH THAT THE OBJECTIONS FILED WERE NOT SPECIFIC BUT GENERAL IN NATURE.

Whether the Objections were prepared without resort to examination of Board records (Point II-A) or with improper assistance from the Board itself (Point II-B), the objections were not *specific* because 663 of 1495 of their net objections were rejected by the Board, and 4,764 of their 5398 gross objections—88 percent—were rejected, demonstrating that they were frivolous and not specific but scatter-gun and general in nature. The Objector is thus on the horns of a dilemma: either she prepared objections which were necessarily frivolous and general in nature because she failed to use Board records, *or*, she had improper access to such records (without making a proper FOIL request), yet intentionally made a large number of frivolous objections. Either way, the general, frivolous, and scatter-gun objections violated the statutory duty of filing proper specifications and therefore reversed the statutory presumption of validity.

Once again, the Objector's answer fails to deny critical allegations in this regard at paragraphs 26 and 27:

26. By making scatter-gun and shot in the dark objections as noted at paragraph 19 (a) and (b) above, the Objector in this case and the objectors in literally hundreds of other similar cases around the state, effectively reverse the statutory presumption of validity and impose tremendous burdens on the Boards of Elections to sort through overly general objections and on the candidates themselves to pour through voluminous frivolous objections made by persons who have failed to even consult the actual records of the Board.
27. Thus the intent of the Legislature in encouraging competitive elections by presuming petitions to be valid has been reversed and the burden of proof has also been effectively been reversed resulting in legions of potential candidates being deprived of ballot status resulting in an atmosphere of despair, apathy and resignation among the population.

III. THE DEFECTIVE OBJECTIONS FILED AGAINST PETITIONER FAILED TO OVERCOME THE STATUTORY PRESUMPTION OF VALIDITY.

Because the specific objections were defective, the Board erred in failing to presume the validity of the designating petition and in fact to validate the petition. This is a case of first impression on all of the above issues and a matter of grave public importance as it impacts on the state of democracy in this State, which has a well-deserved reputation for a lack of competitive elections, particularly in primary elections. See, e.g., B. Browne, "Voter Turnout In New York - How Low Will We Go?," HuffPost.com (Nov. 9, 2017); L. Autz and S. Khurshid, "Uncontested Democracy: New York ballots offer voters startlingly little choice," GothamGazette.com (Oct. 30,2014).

Incredibly, no case that we know of has defined specific objections or dealt with the other issues raised herein. The most guidance was provided by *McLiverty v. Lefever*, 133 AD2d 720 (2nd Dept. 1989): "Election Law § 6-154 (l) provides that a petition is 'presumptively valid if it is in proper form and appears to bear the requisite number of signatures'. This validity can only be destroyed where a challenge is brought on particularized grounds." A major factor in the lack of competitive elections in New York is the likelihood of having a multitude of frivolous

objections filed against independent candidates with meager resources. Unless the meaning of specific objections is strictly construed and participation of the Board of Elections in any way, shape or form in the preparation of those objections is prohibited, it will be very difficult for independent candidates to challenge political machine candidates who have the benefit of virtually unlimited labor and money supporting their candidacies.

By making scatter-gun and shot-in-the-dark objections, the Objector in this case and the objectors in literally hundreds of other similar cases around the state, effectively reverse the statutory presumption of validity and impose tremendous burdens on the Boards of Elections to sort through overly general objections and on the candidates themselves to pore through voluminous frivolous objections made by persons who have failed to even consult the actual records of the Board. Thus the intent of the Legislature in encouraging competitive elections by presuming petitions to be valid has been reversed and the burden of proof has also been effectively been reversed resulting in legions of potential candidates being deprived of ballot status resulting in an atmosphere of despair, apathy and resignation among the population.

Specific objections made without access to Board records are intrinsically defective generalized objections since they lead, as in this case, to the filing of many hundreds of objections that would be obviated by doing what the Legislature contemplates, actually examining the polling records. Thus, by making objections without such records, objectors turn the statutory scheme upside down and impose burdens on the Board, the taxpayers, candidates and our democracy itself. Specifically, the following categories of objections cannot properly be made without access to Board records:

a. 5A of persons whose signatures are not identifiable

b. 6A. of persons with unidentifiable or missing given name

c. 7A. of persons with initials not identifiable with register

d. 8A. of persons whose names are hand printed

e. 10A. of persons not registered at address set forth in petition

f. 12A. of persons who do not reside in political unit.

Moreover, if Board resources are made available, even to a small extent, to favored objectors, as appears to be the case here, the problem of increasing the burden on candidates and reducing the competiveness of elections is greatly exacerbated. Of course, such assistance would also be unlawful (see e.g., Penal Law § 195.20 Defrauding the government; NY Constitution, Art. VIII, Section 1 gift clause) and a violation of equal protection of the laws and the First Amendment.

IV. THE COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING TO RESOLVE CRITICAL ISSUES OF FACT.

Alternatively, if the Court finds that summary judgment was not warranted because there remained issues of fact on the issues raised herein, we ask the Court to hold that the trial court erred in failing to hold an evidentiary hearing. Specifically, there appears to be a contradiction between the two pleadings filed by the Objector and the statements of both counsel for the respondents regarding the issue of whether Board resources were improperly used to prepare objections. Specifically, the respondents made the following various and contradictory statements and facts about whether board resources were utilized:

1. The Dearmyer-Lee petition in Index No. 2019-60 states at paragraph 34 that 487 signatures were compared with "signatures on file at the" Board of Elections and with "voter registration" applications.

2. No FOIL material at Court Exhibit "1" shows that the Objector lawfully accessed such records.
3. The Board of Elections denied allowing any improper access to Board records. Answer, paragraph 2.
4. Objector denies any Board involvement in preparing objections, Answer, paragraph 21, yet, she fails to enlighten the court as to which FOIL requests allowed her to access Board records.
5. The Objector claims attorney-client privilege as to how the objections were prepared even though she stated in her own petition that she consulted Board records.
6. Commissioner Zellner indicated at the Board hearing that the review was done with a digital list of voters. See Reese Petition, ¶ 34.
7. At oral argument, Objector's counsel implies that Board records were not consulted in the preparation of objections. Transcript of Proceedings, 11:15-17.
8. At oral argument, Objector's counsel references an apparent computerized voter system called "VAN." *Id.* at 12:19-23.
9. After being challenged as to the lawfulness of their methods, Objector's counsel refuses to state how they prepared objections. *Id.* at 15:12-15.

Given the numerous internal contradictions among the respondents' many statements on how the objection were prepared and their purposely evasive and absurd claim of attorney-client privilege, the court erred in failing to hold an evidentiary hearing to determine whether the Board illegally assisted the Objector in preparing specific objections.

V. THE BOARD OF ELECTIONS BLATANTLY VIOLATED THE OPEN MEETINGS LAW BY REFUSING TO ALLOW PETITIONER TO VIDEO-RECORD THE MEETING.

The Board of Elections admits to violating the Open Meetings law but merely argues about the remedy. However, the Board offers no explanation whatsoever for the commissioners blatant disregard for the plain language of the law: "Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means." Public Officers Law §103(d)(1); *Csorny v. Shoreham-Wading River Central School Dist.*, 305 A.D.2d 83 (2nd Dept. 2003); *Mitchell v. Board of Education of the Garden City Union Free School District,* 113 A.D.2d 924 (2nd Dept. 1985); *Peloquin v. Arsenault,* 162 Misc. 2d 306 (Sup. Ct. Franklin Co. 1994). Not only is no explanation provided but there is further no explanation of why a local television station was allowed to videotape the meeting while petitioner was denied that right. The action taken at the meeting should be voided if only to punish the rank arrogance and unapologetic abuse of power seen here. The Court has no other viable means to make the Board respect the law in the future; indeed, *not* voiding the result will actually invite more intentional wrongdoing in the future.

Moreover, this litigation itself has been prejudiced by the lack of a recording. This Court has been deprived of the exact wording of Commissioner Zellner on a key issue: how the objections were prepared. Instead, the Court must rely on a paraphrase of his words. See, Reese Petition, ¶¶ 33-34. Thus, palpable prejudice has been proven. Finally, only wild speculation can conclude that the commissioners would have made the same nit-picky rulings against the petitioner on camera that they made without fear of having their decisions posted on the internet.

Had they complied with the law, there would be no need to speculate. This is their fault, not petitioner's. The decision to invalidate should be reversed. The Objector failed to respond to this cause of action so she should not be heard to complain about such a ruling at this point.

At times like these, it is useful to remember why we have an Open Meetings Law in the first place:

> §100. Legislative declaration.
>
> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

CONCLUSION

The order of the trial court should be reversed in all respects and the petitioner's request for an order placing him on the primary election ballot should be granted (see Points I, II and III, above.) In the alternative, the matter should be remanded to the trial court for an evidentiary hearing (see Point IV, above). Alternatively, if necessary, the matter should be remitted to the Board of Elections for a re-hearing. See, Point V, above.

Dated: Buffalo, New York
May 24, 2019

PETER A. REESE, ESQ.
Pro se,
49 Starin Avenue
Buffalo, New York 14214
(716) 870-5450
PReese270@aol.com

PRINTING SPECIFICATIONS STATEMENT Pursuant to 22 NYCRR 1250.8 (j)

The foregoing brief was prepared on a computer as follows:

Typeface: Times New Roman

Point Size: 12

Line Spacing: 2

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to 22 NYCRR 1250.8 (k), is 6726, as calculated by the word processing system used to prepare the brief.

PETER A. REESE, ESQ.