SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 4, 2019

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

IMPORTANT

If you are considering seeking further review of an Election Term decision, you must IMMEDIATELY contact the Clerk's Office at the Court of Appeals, which can be reached by calling (518) 455-7700.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

811.1

CAE 19-01228

PRESENT: SMITH, J.P., NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF MICHAEL J. HENNESSY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF ELECTIONS OF COUNTY OF ONEIDA,
CAROLANN N. CARDONE, ROSE MARIE GRIMALDI,
COMMISSIONERS CONSTITUTING THE BOARD,
RESPONDENTS,
AND JAMES GENOVESE, OBJECTOR, RESPONDENT-APPELLANT.

BEE READY FISHBEIN HATTER & DONOVAN, LLP, MINEOLA (ANDREW K. PRESTON OF COUNSEL), FOR RESPONDENT-APPELLANT.

KEVIN P. RYAN, SYRACUSE, FOR PETITIONER-RESPONDENT.

PETER M. RAYHILL, COUNTY ATTORNEY, UTICA (ROBERT E. PRONTEAU OF COUNSEL), FOR RESPONDENTS BOARD OF ELECTIONS OF COUNTY OF ONEIDA, CAROLANN N. CARDONE AND ROSE MARIE GRIMALDI, COMMISSIONERS CONSTITUTING THE BOARD.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered May 28, 2019 in a proceeding pursuant to Election Law article 16. The order granted the petition, validated 25 signatures on the designating petitions filed on behalf of petitioner and ordered that the designating petitions be deemed qualified and accepted by respondent Board of Elections of County of Oneida and that petitioner be declared a duly qualified candidate of the Democratic Party for the office of Oneida County Executive in an election to be held in 2019.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to Election Law article 16 seeking to validate his designating petition as a Democratic Party candidate for the office of Oneida County Executive. The designating petition had been invalidated by respondent Board of Elections of County of Oneida (Board), which determined in response to objections filed by James Genovese (respondent) that the designating petition contained 22 fewer valid signatures than required. After a hearing, Supreme Court validated 25 signatures that had been invalidated by the Board and thus ordered that petitioner be declared a duly qualified candidate of the

Democratic Party for County Executive. Respondent appeals.

Initially, we note that this proceeding is not moot. Although the primary election date has passed, petitioner was the sole candidate to seek the subject designation, and thus he will be the Democratic Party candidate in the general election if his designating petition is valid (*see* Election Law § 6-160 [2]; *Matter of Lord v New York State Bd. of Elections*, 98 AD3d 622, 623 [2d Dept 2012]). We further note that the requests for affirmative relief made by the Board in its respondent's brief are not properly before us because the Board did not file a notice of appeal from the order (*see Cleere v Frost Ridge Campground, LLC*, 155 AD3d 1645, 1647 [4th Dept 2017]; *see also Matter of Overbaugh v Benoit*, 172 AD3d 1874, 1875 n 2 [3d Dept 2019]).

With respect to the merits, we reject respondent's contention that the court erred in validating the signatures at lines 2 through 4 and lines 6 and 7 of page 28 of the designating petition. Each of those signatures had listed by them the same street address, but no apartment numbers were included even though testimony at the hearing established that there are "maybe 60 [to] 70" apartments at that address. We nonetheless conclude that the designating petition adequately set forth the "residence address" of those signers within the meaning of Election Law § 6-130 "by indicating each signer's respective street address" (*Matter of Hayon v Greenfield*, 109 AD3d 920, 922 [2d Dept 2013]; *cf. Matter of Salka v Magee*, 164 AD3d 1084, 1086 [3d Dept 2018], *lv denied* 31 NY3d 914 [2018]; *see also Matter of Tully v Ketover*, 10 AD3d 436, 437 [2d Dept 2004]), and that an apartment number is not a required component of a residence address for purposes of section 6-130 (*see generally Tully*, 10 AD3d at 437). Respondent's contention that the court should have deferred to the Board's interpretation of the term "residence address" is improperly raised for the first time on appeal (*see Matter of Buttenschon v Salatino*, 164 AD3d 1588, 1589 [4th Dept 2018]) and, in any event, it is without merit inasmuch as the definition of that term presents a question of "pure legal interpretation" for which deference to an administrative agency is not warranted (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]; *see New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 80-81 [1st Dept 2006]).

Contrary to respondent's further contention, the court properly validated the signature at line 8 of page 17 of the designating petition, which the Board had invalidated as illegible, and the signatures at line 8 of page 6, line 5 of page 29, line 8 of page 90, and line 11 of page 91, which the Board had invalidated because the signatures were printed rather than in script and did not match the signatures on file with the Board. The signatures at line 8 of page 17 and line 8 of page 6 were properly validated based on the testimony of the signers identifying their signatures (*see Matter of Romaine v Suffolk County Bd. of Elections*, 65 AD3d 993, 995 [2d Dept 2009]; *see generally Matter of Jaffee v Kelly*, 32 AD3d 485, 485-486 [2d Dept 2006], *lv denied* 7 NY3d 707 [2006]). The court validated the other three signatures by crediting the testimony of "subscribing witnesses

attesting to the identity of [the signers]" (*Matter of Henry v Trotto*, 54 AD3d 424, 426 [2d Dept 2008]; *see generally Jaffee*, 32 AD3d at 485-486), i.e., testimony that the subscribing witnesses either personally knew the signer or required the signer to present identification before signing, and that credibility determination is entitled to deference (*see Matter of Pidot v Macedo*, 141 AD3d 680, 681 [2d Dept 2016]; *Matter of Kraham v Rabbitt*, 11 AD3d 808, 809-810 [3d Dept 2004]; *Matter of Farrell v Cayuga County Bd. of Elections*, 288 AD2d 844, 844 [4th Dept 2001]).

Respondent also contends that the subscribing witness for page 90 of the designating petition engaged in fraud by attesting in his subscribing witness statement that the signer listed at line 8 signed her name in his presence, when in fact her son signed for her pursuant to a power of attorney. In view of the court's determination to credit the testimony of the subscribing witness, however, we conclude that the record fails to establish that the subscribing witness statement was false, i.e., that the listed signer did not sign the designating petition herself (*see generally Romaine*, 65 AD3d at 995). Furthermore, even if the listed signer's son did sign for her, that would merely require invalidation of her signature and would not establish fraud in the subscribing witness statement entitling respondent to any greater relief (*see Matter of Van Der Water v Czarny*, 153 AD3d 1555, 1556 [4th Dept 2017]; *Matter of Fatata v Phillips*, 140 AD3d 1295, 1296-1297 [3d Dept 2016]; *cf. Matter of Burman v Subedi*, 172 AD3d 1882, 1883-1884 [3d Dept 2019], *lv denied* 33 NY3d 906 [2019]; *see generally Matter of Rodriguez v Harris*, 51 NY2d 737, 738 [1980]). As a result, the invalidity of that signature would not affect the overall validity of the designating petition, which contained three more than the required number of signatures.

In view of our determination, we do not reach respondent's remaining contention.

Entered: September 4, 2019

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

789.1

CAE 19-01477

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, AND DEJOSEPH, JJ.

IN THE MATTER OF ROCHESTER CITY SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE ROCHESTER CITY SCHOOL DISTRICT, VAN HENRI WHITE, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF EDUCATION OF THE ROCHESTER CITY SCHOOL DISTRICT, AND CYNTHIA ELLIOTT, INDIVIDUALLY AND AS VICE PRESIDENT OF THE BOARD OF EDUCATION OF THE ROCHESTER CITY SCHOOL DISTRICT, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, LOVELY A. WARREN, AS MAYOR OF THE CITY OF ROCHESTER, COUNCIL OF THE CITY OF ROCHESTER, RESPONDENTS-DEFENDANTS-APPELLANTS, AND MONROE COUNTY BOARD OF ELECTIONS, RESPONDENT-DEFENDANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (PATRICK BEATH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

KARL W. KRISTOFF, GENERAL COUNSEL, ROCHESTER CITY SCHOOL DISTRICT, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered August 2, 2019 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, declared that Local Law No. 4 is invalid and that the ensuing referendum is a void advisory referendum, and issued a permanent injunction barring the advisory referendum from being included on the ballot for the November general election.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Respondent-defendant Council of the City of Rochester (City Council) adopted Local Law No. 4 of 2019 (Local Law) to amend the City Charter with regard to the Commissioners of Schools (Commissioners), who constitute petitioner-plaintiff Board of Education of the Rochester City School District (Board). Section 1 of the Local Law amended City Charter § 2-1 by removing the Commissioners from a list of "Elective officers"; section 2 removed the Commissioners' term of office from City Charter § 2-8; and section 3 deleted City Charter § 2-13, "Salaries of School Board members," in

its entirety. Section 4 provided that the amendments shall remain in effect for not less than five years. Section 5 scheduled a referendum for the November 2019 general election and provided that the Local Law would take effect only after both approval by the affirmative vote of a majority of qualified electors in that referendum "and the enactment of appropriate enabling amendments to the Education Law."

In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioners-plaintiffs filed an amended petition-complaint seeking, inter alia, a declaration that the Local Law is invalid and that the referendum is void as advisory, as well as a permanent injunction barring the referendum from being placed on the ballot. Supreme Court granted that relief, determining that the State unequivocally occupies the entire field of public education, thus preempting the Local Law and rendering the referendum impermissibly advisory. Respondents-defendants City of Rochester (City), Lovely A. Warren, as Mayor of the City of Rochester (Mayor), and City Council (collectively, respondents) appeal. We affirm.

Any local law that "[a]bolishes an elective office" or "reduces the salary of an elective officer during his [or her] term of office" is subject to mandatory referendum (Municipal Home Rule Law § 23 [2] [e]), but an "advisory" referendum—i.e., one that lacks legal effect or consequence—is not permitted in the absence of express constitutional or statutory authority for it (*Mills v Sweeney*, 219 NY 213, 217 [1916]; *see Matter of Brucia v County of Suffolk*, 90 AD2d 762, 762-763 [2d Dept 1982]).

Contrary to respondents' contention, we conclude, for two independent reasons, that the referendum on the Local Law is impermissibly advisory and, thus, that the court properly declared the Local Law invalid and the referendum void. First, the language of section 5 of the Local Law, which conditions its effectiveness on subsequent action by the New York State Legislature, strips the referendum of any binding legal effect (*see Matter of Astwood v Cohen*, 291 NY 484, 489-491 [1944], *rearg denied* 292 NY 621 [1944]; *Matter of Silberman v Katz*, 54 Misc 2d 956, 959-963 [Sup Ct, NY County 1967], *affd* 28 AD2d 992 [1st Dept 1967]; *Meredith v Monahan*, 60 Misc 2d 1081, 1083 [Sup Ct, Rensselaer County 1969]; *see also* Municipal Home Rule Law § 23 [1]). Second, as the court correctly noted, a local government may not legislate in areas "where the State has evidenced its intent to occupy the field" (*Albany Area Bldrs. Assn. v Town of Guilderland*, 74 NY2d 372, 377 [1989]), and it is well established that the State has preempted local action in the field of public education (*see* NY Const, art IX, § 3 [a] [1]; art XI, § 1; Education Law §§ 2552, 2553; *Lanza v Wagner*, 11 NY2d 317, 326-327 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]; *Matter of Divisich v Marshall*, 281 NY 170, 173-174 [1939]; *see also Board of Educ., Union Free School Dist. No. 4, Town of Greece v Board of Educ. of City of Rochester*, 23 AD2d 805, 805-806 [4th Dept 1965], *lv denied* 15 NY2d 487 [1965]).

Finally, we conclude that respondents' further contention that the court erred in its ruling concerning a letter sent to City

residents by the Mayor is not properly before us. No actual determination was made concerning the letter, notwithstanding the discussion of the matter in the court's decision, and respondents are therefore not aggrieved with respect to that issue (*see Matter of Toles v Radle*, 172 AD3d 1945, 1946 [4th Dept 2019]; *see also Matter of Sedita v Sacha*, 99 AD3d 1259, 1260 [4th Dept 2012]).

Entered: September 4, 2019

Mark W. Bennett
Clerk of the Court