

# **RIGHTS AND RESPONSIBILITIES OF AN ELECTION COMMISSIONER**

**January 12, 2016**

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**1) Composition of Board of Elections. See EL§3-200.**

- a) Two Commissioners for each county constitute the BOE, except if >120,000 population, the local legislature may increase to 4, keeping parity of Dem and Rep.
- b) NYC may have maximum of 10, two from each county, appointed by the city council.

**2) Prohibited to hold other offices simultaneously.**

- a) A commissioner cannot run for or hold any public office except notary, village officer, local justice, school board member outside NYC, or member of community board within NYC. If becomes a designated candidate, the designation is “null and void.” See EL§3-200
- b) List can be further restricted by local law and trumps EL. *Castine v Zurlo*, 46 Misc3d 995 (Sup Ct., Clinton County 2014)

**3) Removal of Commissioner from Office**

- a) Investigation - Governor may conduct an investigation into the charges and generally a superior court judge in commissioner’s venue or by a commissioner appointed by the governor (hereinafter the “fact-finder”). Governor may direct the attorney-general or the local district attorney to assist in the investigation. See §POL 34.
- b) Hearing -hearing requires minimum 8 day written notice to commissioner. The selected fact finder has subpoena powers. Right to counsel exists at the hearing, but not for investigation. See §POL 34.
- c) Report to Governor - the governor may request a report from the fact finder, but only evidence admitted at the hearing may be included in the report. See §POL 34.
- d) Expense – the fact finder may hire or request others to assist in the investigation, such as attorney-general or local district attorney, or even

hire private counsel as necessary for fact finder to perform her duties. The cost of the investigation and proceedings is borne by the local governing body and requisition is made from time to time to pay these expenses which must be reasonable. See §POL 34.

- 4) **Term** – two year term, commencing on January 1 of odd years. The county may change that to four years and reduce it back to two years. It may also provide for staggered terms.
- 5) **Salary** – set by the county (outside NYC which is by meeting attendance not to exceed \$30,000 per year).
- 6) **Organization/proceedings of BOE.** See EL §3-212.
  - a) Organizational meeting - each January at the organizational (first meeting), a President and Secretary are elected, but must be from differing party.
  - b) Majority vote - All actions as a board require a majority vote.
  - c) Minutes of meetings – recording of all votes on resolutions, of its proceedings.
  - d) Reporting functions – annually to the county by last day in January which must include program description of voter registration action plans and school and college education programs regarding registration. In addition, keep a record of registered voters and how enrolled. The SBOE shall review the voter registration plan and assist in outreach services/activities.

## 7) Investigations conducted by the BOE.

- a) As a *board*, can decide to conduct an investigation into “any matter in relation to which the board is charged with a duty...or violations of the elective franchise....” after which time, subpoenas may issue to assist the investigation which may be issued by a single commissioner. If no agreement by the BOE is reached to conduct an investigation, there can be no unilateral issuance of subpoenas. But in that instance, a commissioner can directly become a complainant or direct the complainant to the SBOE, which may then conduct an investigation or direct the local BOE to do so, and subpoenas used. EL §3-104; EL §3-212(2), EL §3-218; see *Mohr v Schroeder*, 162 Misc2d 584, *rev'd* by 216 AD2d 926 (4<sup>th</sup> Dept. 1995), *rev'd* by 86 N.Y.2d 786 1995) reinstating the trial court decision.
- b) Assistance from other agencies/offices - BOE can request, to carry out its duties, assistance from “any law enforcement agency” upon written request and it must be provided (the investigation of registration is a stated purpose, not a limitation). Documents and information from other “public officers<sup>1</sup>” must also be provided free of charge. Assume that the person is a public officer unless s/he objects that is not.

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<sup>1</sup> Who is a “public officer?” For the purpose of this section, attention is called to §POL 2 defines local officers and state officers. However, distinguish this use from EL Article 17 definitions as to who may be criminally liable for illegal acts under the Election Law, dealt with later in this outline. With regard to this section of the outline, the application of this term sometimes must be determined by factors to be considered to label one a public officer. Some *examples* when this issue is determined are consideration of the following, though in such argued cases, various factors:

- a) Required to take a constitutional oath;
- b) The employment is public and person is required to discharge duties to the public; receives compensation for discharging a public duty;
- c) It is a legislatively created office, though not necessarily those hired to assist in those duties.

- c) Door-to-door check of registered voters – any one member of the board may required a special door-to-door check in any election district(s), even if checked the previous year. Bipartisan team conducts it and signs a report under penalty of perjury. The board is required to employ a sufficient number of employees to conduct the checks. EL §5-710.

8) **Record access and retention.**

a) Security. EL §3-220

- i) All records, certificates, lists, and inventories reference in, or required by, the Election Law are open to public inspection, but not specifically not the driver's license number nor social security number.
- ii) The original record cannot be handled by anyone other than staff even when for public inspection. So photostatic copies may be made and kept and these used for public inspection.
- iii) Central file registration records must be kept in locked filing cabinets and only handled as necessary.

b) **Record retention.** EL §3-220

- i) Mutilated/void registration records – 2 years, though must keep a file of serial numbers of the destroyed records.
- ii) Deaths – 2 years
- iii) Cancellations – 2 years, destroyed in January of each year.

- iv) After 10 years, may destroy original records and keep photostatic copies.
- v) Registration and poll records – if entire voter’s registration and poll record is in computer, and with permission of SBOE, 2 years. If computer record does not include the backs of the registration poll record, then when poll record read in, 2 years after that, but not necessary in any event beyond 4 years after read into computer.
- vi) Nomination and designation papers, except ballots, unless in litigation, 2 years
- vii) Poll books – at the end of the 2<sup>nd</sup> calendar year of the year of election.
- viii) Petitions – cannot leave the BOE office unless in custody of staff or per court order.
- ix) Electronic media cards – must follow the SBOE procedure in force. EL §3-222.
- x) Ballots – voted ballots and other ballots, 2 years after election. EL §3-222.
- xi) Sealed, unused ballots, 4 months, provided a certificate with data/numbers of the ballots is kept for 2 years. EL §3-222.
- xii) Label programming data for ballots – 2 years. EL §3-222.

9) **Campaign finance filing.** EL §16-114.

- a) A local board may institute a supreme court proceeding to compel an overdue filing or to correct a defective or false filing, and the court order will require filing within 5 days thereafter.
- b) A proceeding may also be brought for any other failure to comply with “any provisions of this chapter...”
- c) Undertaking must be filed with the court in an amount it determines for anyone proceeding for a purpose other than in a) above.

#### 10) **Criminal Liabilities.**

- a) EL Article 17 lists numerous acts constituting a crime, many of them felonies. Everyone working for a BOE an “election officer.” §17-100(3). This would include poll workers.
- b) Distinction between a misdemeanor and felony - A misdemeanor carries up to one year in the county jail. A felony (E felony) carries up to a 4 year state prison incarceration.
- c) Felonies include:
  - i) Abetting a false registration. §17-104(5)
  - ii) Misconduct by an election officer. §17-106
  - iii) Alteration/removal of registration records or of challenge or affidavit records. §17-108(3)
  - iv) Owner of premises falsely reporting tenancies. §17-114(3)
  - v) With regard to a certificate of nomination or official ballot, actively or passively allows illegal alteration or a falsehood to be stated. §17-120(1),(4)(5).
  - vi) Knowingly and willfully fails to act or impedes or attempts to delay the performance of an act authorized by the EL. §17-128
  - vii) Assisting or engaging in illegal voting. §17-132

- viii) Using a “paster” on an official ballot. §17-134
- ix) Attempting or making a false canvass of ballots cast. §17-136
- x) Buying or selling votes, even with promises. §17-142, §17-144
- xi) Procuring or presenting false documents to vote. §17-160
- xii) Destroying or delaying election results. §17-170.

d) Any violation of the “elective franchise,” even if not specifically covered in Article 17, is a misdemeanor.

### 11) Unilateral Action by a Commissioner.

- a) All actions of local boards must be approved by a majority vote of commissioners. EL §3-212(2)
- b) Hiring and Firing.
  - i) Violation of Equal Protection: While a lawsuit that raises concerns affecting the staff of both political parties is an “action” requiring approval of a majority of the commissioners, occasions in which one commissioner and his party are being denied equal protection resulting in an imbalance on the BOE. *Graziano v County of Albany*, 3 NY3d 475 (2004), citing New York Constitution, article II, § 8, EL § 3–300 [a commissioner not only assists his cocommissioner in the administration of the Board but also safeguards the equal representation rights of his party which was suffering an actionable injury].
  - ii) Hiring freezes: County cannot prohibit filling vacancies on the BOE. EL §3–300 provides that the BOE Board of Elections at its pleasure shall appoint or remove employees, fix their number, and prescribe their duties, titles and rank, and establish their salaries within the amounts appropriated in equal representation of the major political parties. The effect of the hiring freeze resolution would be inconsistent with and undermine the BOE’s constitutional and



statutory authority and create intermittent political imbalance in the Board staff . *Mohr v. Greenan*, 10 Misc. 3d 610, 616-17, (Sup. Ct. 2005) *aff'd*, 37 A.D.3d 1094, (2007).

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iii) BOE autonomy:

(1) The BOE may appoint and remove its employees at its pleasure, and have complete and exclusive control of personnel and performance of duties. *County of Chautauqua v. Chautauqua County Employees' Unit 6300 of Local 807, of Civil Service Employees' Ass'n, Inc., Local 1000, AFSCME, AFL-CIO*, 181 A.D.2d 1052 (4 Dept. 1992).

(2) No formal motion or resolution necessary nor minutes of a vote necessary. Where the board dismissed a clerk employed for ten years following their procedure, it was entitled to do so at its pleasure, and there was no necessity for a formal motion or resolutions or for minutes showing how each commissioner voted. *Starr v. Meisser* 39 A.D.2d 712 (2 Dept. 1972) *affirmed* 33 N.Y.2d 748.

iv) Appointment of clerks: If only one commissioner signs and the other acquiesces for long period of time, it is deemed consent [waited 32 months to object, found to be a “sham.”]

v) Vacancy. Where one commissioner of election has resigned, the remaining member has no power to employ a clerk, and clerks and other employees can be appointed only after such vacancy is filled and the commissioners have organized as a board. *Op. Atty.Gen.*, 1933, 48 St. Dept. 241.

c) Commissioner’s right to sue.

i) One commissioner cannot unilaterally file an appeal from a court ruling dismissing a proceeding [one commissioner appealed

dismissal, but the other did not, so was violation of 3-212(2) and appeal dismissed. *County of Nassau v State of New York*, 100 AD3d 1052 (3d Dept. 2012)]

- ii) Commissioner cannot unilaterally start a proceeding in court on behalf of a BOE, as there is no authority to do so [one commissioner sought to invalidate a certificate of nomination, but the other did not, and proceeding dismissed. *Scannapieco v Riley*, 132 AD3d 705 (2d Dept. 2015)].

d) Right to counsel.

- i) County Law § 409 states that no officer paid by the county can employ a lawyer to appear in any civil action or proceeding by him in his official capacity whenever it is the duty of the county attorney or district attorney to do so.

- ii) Conflict of Interest. If the nature of the litigation makes it unethical or impossible for the county attorney or district attorney to proceed, then an election commissioner may recover reasonable fees absent bad faith. *Wilson v Allegany County*, 175 A.D.2d 645 (4<sup>th</sup> Dept. 1991); *Hill v. County of Sullivan* (3 Dept. 2005) 14 A.D.3d 744.

(1) Reasonability of Fees. Failure by attorney to supply sufficient evidence of time expended (e.g. time sheets) or excessive hourly rate could result in rejection of fee application. *Gamache v Steinhaus*, 7 AD3d 525 (2d Dept. 2004). Put escape clause in retainer.

(2) Not in official capacity of office. Election commissioner voluntarily chose to contest vacation of his office which occurred by operation of law, and therefore was not entitled to fees pursuant to this section, since action was not result of an official act done or failure to perform an official act. *Broome County v. Conte*, 1983, 120 Misc.2d 1050, *affirmed* 101 A.D.2d 905.