

MEETING OF THE
COMMISSIONERS OF ELECTIONS
HELD ON TUESDAY, MARCH 5, 2013
AT 1:30 P.M.

42 BROADWAY, 6TH FLOOR COMMISSIONER'S HEARING ROOM
NEW YORK, NY 10004

PRESENT: President Frederic M. Umane
Secretary Gregory C. Soumas

Commissioners Araujo, Guastella, Barrera, Dent, Shamoun, Michel,
Sipp

Dawn Sandow, Deputy Executive Director
Pamela Perkins, Administrative Manager
Steven H. Richman, General Counsel
Raphael Savino, Deputy General Counsel
Valerie Vazquez-Rivera, Director, Communications & Public Affairs
Troy Johnson, Coordinator, Candidate Records Unit
John Luisi, ACCO
Dorothy Delayo, Director, Personnel
John Naudus, Manager, EVS
John O'Grady, Chief Voting Machine Technician
Stephen Thompson, HAVA Training Specialist, EDO
Steve Ferguson, Director, MIS
Ryan Deahn, Candidate Records Unit
Daniel Lavelle, Associate Staff Analyst
Thomas Sattie, Associate Staff Analyst, Ballot Management
Giacomo Kmet, Temporary Contract Attorney, OGC
Anibal Luque, Temporary Contract Attorney, OGC
Stephen Denkberg, Counsel to the Commissioners
Kenneth M. Moltner, Counsel to the Commissioners

GUEST: Douglas Kellner, Co Chair, NYS Board of Elections
Kimberly Galvin, General Counsel, NYS BOE
David Seltzer, representing NYC Council
Katharine Lavey, Campaign Finance Board
Eric Freisman, Campaign Finance Board
Courtney Gross, NY 1 News
Bridget Bergis, WNYC

Rachel Fauss, Citizens' Union
Monica Bartley, CIDNY
Kate Doran, LWV
Jerry Goldfeder
Alan Flacks

President Umane called the meeting to order at 1:40 PM.

President Umane announced that pursuant to the provisions of Title 2 of Article 9 of the New York State Election Law, specifically Section 9-204, the Commissioners would conduct the meeting of the Board of Canvassers in the City of New York for the purposes of certifying the results of the February 19, 2013 Special Election in the 31st City Council District, Queens.

President Umane designated Commissioner Shamoun as the second Republican Commissioner for the respective county.

Secretary Soumas designated Commissioner Araujo as the second Democratic Commissioner for the respective county.

The General Counsel reported that pursuant to the provision of the New York City Charter, the Mayor issued a Proclamation on January 3, 2013 calling for a Special Election on February 19, 2013 to fill a vacancy in the Office of Member of the New York City Council from the 31st Council District in Queens. The Board conducted the Special Election and then fulfilled its statutory responsibilities under Title 2 of Article 9 of the New York State Election Law. In accordance with the provisions of Article 9, the Board conducted a recanvass of all the votes cast at the poll sites using the Ballot Scanner and a canvass of all the Absentee, Affidavit, Military, and Special Ballots. These activities were conducted in accordance with the Board's Canvass Procedures and its Post-Election Activity Procedures adopted in 2010, both of which have been pre-cleared by the Attorney General of the United States pursuant to the Voting Rights Act of 1965. He recommended that the Commissioners call upon the Queens Deputy Chief Clerk and staff to present their report and the Statement and Return for the Special Election held on February 19, 2013.

Deputy Chief Clerks Marie Lynch and Mr. Pataky presented the Board of Canvassers with the Statement and Return of Canvass for the Special Election conducted in Queens County on February 19, 2013.

President Umane asked a series of questions with respect to the Return of Canvass that was presented by the Queens staff:

- a) Does the Queens staff confirm that the results presented are accurate and correct? Yes.
- b) Are there any discrepancies to report to the Board?
No.
- c) Do you confirm that the audit of voter verifiable audit records required by Section 9-211 of the New York State Election Law has been successfully conducted? Yes.
- d) Do you have any other comments for the record?
No.

President Umane thanked the Queens staff for conducting a successful Election on behalf of all the Commissioners.

Commissioner Araujo moved to approve and adopt the Statement and Return of Canvass for the February 19, 2013 Special Election for Member of the New York City Council in the 31st Council District, Queens. Commissioner Michel seconded the motion, which was adopted unanimously.

Commissioner Araujo moved to authorize the use of the Commissioners' signature stamps as appropriate on the Statement and Return of Canvass. Commissioner Shamoun seconded the motion, which was adopted unanimously.

There being no further business to come before the Board of Canvassers in the City of New York, Commissioner Araujo moved to adjourn the meeting of the Board of Canvassers and convened the weekly stated meeting of the Commissioners of Elections in the City of New York. Commissioner Dent seconded the motion, which was agreed to unanimously.

Commissioner Barrera moved to table the minutes of the February 26, 2013 Commissioners meeting. Commissioner Umame seconded the motion, which was agreed to unanimously.

Mr. Naudus gave an update on the Bengali version of the EMS. He reported that at the last weekly meeting with the State Board, NYC Board staff was informed that the State Board is on schedule with testing and will meet the April 15, 2013 deadline to certify the next version of the EMS and firmware DS200 AutoMark to support Bengali. In addition, he reported that the Commissioners authorized select Board staff to go to Albany to review the system and ensure that it supports Bengali accurately. On Wednesday, March 6th and Thursday, March 7th, Mr. Naudus along with Rachel Knipel and the two Bengali Translators will travel to Albany to review the screens on the DS200 AutoMark and ensure that it is actually correct prior to the system being certified.

Commissioner Araujo inquired whether an update is sent to community groups that have been monitoring this process and if not, can the staff do so.

Mr. Naudus reported that previously they haven't but would. He stated that the staff was going to wait until after the trip to Albany and incorporate their findings. He informed that the State Board has not given advocates an opportunity to review the system before certification in any prior instances.

Commissioner Soumas recognized Douglas Kellner, Co-Chair of the State Board of Elections and asked if he had anything to add.

Mr. Kellner stated that he is not familiar with the details and acknowledged Kimberly Galvin, General Counsel of the State Board. Ms. Galvin reported that she has been monitoring status updates and is not aware of any advocacy groups. Mr. Kellner announced that if anyone wants to have that review, it would not be a problem.

Mr. Naudus provided the Commissioners with a copy of the Revised Draft Run Off Options for review. He reported that the Commissioners suggestions have been incorporated and there are now only four separate options.

- a) Option 1: All paper ballots for the Run Off. The ballots would be printed and sent out to the Poll Sites. Voters' vote on paper ballot and put them in cardboard boxes. At the end of the night Poll Workers would count the ballots by hand, fill out the return of canvass, and report it back to the NYPD and the General Office.
- b) Option 2: Using the Lever Machines for both the Primary and Run Off as we had four years ago.
- c) Option 3: Use the Scanners for the Primary and Run Off but with modifications to critical areas. This would,
 - a. Require us to obtain permission from the State Board of Elections to reduce the number of test decks to five ballots.
 - b. Require us to increase the number of registered voters per scanner thereby lessening the number of scanners we have to roll out. The recommendation is 2500 voters per scanner. That would decrease the number of scanners shipped to 2700.

He reported that the State Board is considering allowing us not to Hash Code the machines to determine that no breach of security

regarding the operating system or software has occurred on the scanners, if the seals are not broken on the machines Election night.

- c. Require the Commissioners to make a determination the day after the Run Off in what the possible combinations would need to be to print and then run it.

It may be less than what we've originally proposed after considering every possible combination. However, if there is a close race and it's not clear who the top two candidates are, there will be some cost involved with doing combinations of the ballots.

- d) Option 4: Voters cast paper ballots, place them into ballot boxes that have counters on them to record the number of ballots cast. The Poll Workers would actually be able to do an accounting of how many ballots were cast but not actually open the ballot box and count them. The sealed ballot boxes would be sent from the Poll Sites to our Central Office locations where high speed scanners count them. Our facilities will then announce the results of the Election. Hopefully, ensuring a more accurate count because we're using systems to do the counting as opposed to Poll Workers to hand count the ballots.

All of these options have some degree of issues as far as any legal changes:

Option 2: To approve the use of the Lever Machine.

Option 4: Changing the Law to allow us not to announce results at the Poll Sites; or

Option 3: Changing the Commissioners adopted requirements for the number of registered voters per scanner and the SBOE giving us permission to us the revised testing plan.

Commissioner Umane stated that in past Elections, the mechanical machines were set up in advance of a Run Off Election with blank columns in the right corner that would be used after votes have been tabulated for the Run Off. He asked if there is not a full ballot this time, would it be possible to program and test the scanners with designated spots set in the system. After the Election and the ballots have been tabulated, if there is a Run Off, use the same testing procedures and only have ballots available with candidates listed in that corner so that without having to do a retest, you might be able to do what was essential done with the Lever Machines.

Mr. Naudus responded that something similar was thought of however it would not be saving any time. Once you reprint the ballot with the names on it, the ballot has to be tested again to ensure that the ballot is functional. The staff would not feel confident printing ballots and not actually testing the things we print. All of our testing to date on all our systems (i.e. Poll Site system, AutoMark system, Central Count System) we've always stood by because the system is tested with the actual ballot. The procedure used is to print the live ballots, take a sampling of the live ballots and test them. We don't want to just test that the system is accurate. The purpose is to ensure that the print run, the system put out for the voters, actually functions. Obviously, what the Commissioner suggests could be performed but the staff is not comfortable with using the system in that manner. Moreover, the mechanical machines did not care about the names of candidates. They could be configured so that the counters worked for each of those six offices and then all we had to do is put a strip in front of those blank columns when we knew the candidate's names.

The General Counsel explained that the ballot given out in the Run Off wouldn't be that ballot. It would be a different ballot with the actual names on it. He agreed with Mr. Naudus and stated that the testing regiment that the State Board mandated and the Commissioners adopted is to use the actual ballot that the voter will see. That's the argument that we've made to the Court; you can't make last minute changes. It's not just substituting a name or adding/removing a name, its actually using that run. For example, if we're printing two million ballots for the Run Off, an "x" number of those ballots are pulled out. Those are the ones that will be marked and run through so that the actual ballot that is given to the voter should be correct and it works.

Secretary Soumas noted that in his conversations with Douglas Kellner, he is convinced of several things. The first is that the existing law requires us to use the scanners, which in my mind negates the possibility of using Options 1 and 4 for the all paper Run Off. The second thing is that the existing Law does not allow us to use the Lever Machines, which negates using Option 2 as a possibility, leaving us with only Option 3. Commissioner Soumas reported that

Mr. Kellner assured him the State Board will work with the New York City Board to do all things necessary to modify their regulations to allow us to implement Option 3. Accordingly, Commissioner Soumas moved to adopt Option 3 as the method and manner for conducting the Run Off. Commissioner Barrera seconded the motion.

Commissioner Sipp inquired about modifications to the State's Regulations.

Mr. Kellner reported that its not actually regulation, it's the Board's Testing Procedures and the staff at the SBOE has been working with the staff from the NYC Board to go over abbreviated testing procedures that are being presented today in the Revised Draft Run Off. Everything that Mr. Naudus reported is in his understanding, why they've worked it out but on an abbreviated basis of just five ballots per machine, and that works. He believes that if this is approved by the City Board then the staff at the State Board will present it to the State Commissioners and they will approve it.

Commissioner Sipp inquired whether the Revised Draft Run Off proposal includes the modifications that the State was working on.

Dawn Sandow confirmed that the State Board has been working with the NYC Board and the State Board sent down a copy of the reduced testing procedures.

Mr. Kellner stated that based on what he's read, he believes that Commissioner Soumas has accurately summarized his position, which is just his position cause he's only just received the document and does not believe that the other Commissioners of the State Board have seen it yet. However, certainly the four Commissioners agreed to make it a priority within the State Board to work with the City and do whatever modifications are necessary to conduct the Primary as best as could be done under very difficult circumstances that the Statute imposes.

Commissioner Sipp inquired whether the modifications take into account the NYC Board's staffing issues that might arise if we can't

determine in a short time frame which candidates are going to actually be on the ballot.

Mr. Naudus reiterated the plan from their proposal. The Commissioners will meet on Wednesday morning, September 11th to make a determination based on the numbers from Election night and the number of absentees and affidavit ballots they have what the possible combinations are. If it's not clear who the top two in each contest is, your decision is made on what the combinations would be and we print those ballots. Each of those combinations would have a five ballot test to it. If there are two different possibilities, we'd be testing ten ballots.

Commissioner Sipp asked what is being done to reduce the cost or what is being suggested by the State Board to reduce the cost of printing these ballots.

Dawn Sandow reported that they have discussed reducing the number based on turnout from 75% to 65%. They are also

considering working with another vendor for the Run off which would reduce our cost as well.

Commissioner Umare requested the number of ballots that would be printed.

Mr. Naudus reported that it would be just over two million if reduced to 65%. So, the number will dictate some of the cost and if we can negotiate a better price with another vendor, it would further reduce cost.

Commissioner Sipp asked if it's possible to get this done within two weeks as opposed to a potential three week timeframe.

Mr. Richman reported that on Wednesday, following the Primary Election, if it's clear which two candidates are in the Run Off then this process will go fine. However, if candidates are within a point or less of each other, we'll have a situation and have to work through an aggressive schedule to do the machine recanvass, take PMDs out the scanners, and get through all the absentees and

affidavit ballots. In the Democratic Party, normal turn out would be 800 - 100,000,000 ballots; on the Republican side, 200 - 300,000 ballots. Also, we have to consider multiple candidates on those ballots that may be making objections. In Brooklyn, after the judicial proceedings, it took three and a half weeks to go through a manual canvass of 26,000 ballots. So, the more time between the Primary and Run Off, the better.

Commissioner Barrera asked whether they would need an additional week, just to be safe, for Option 3 to work.

Mr. Naudus stated that ideally, yes, they would want an additional week. However, if the law is not changed and we're stuck with the two weeks then the best case scenario is either we clearly know on Wednesday morning who the two candidates are in each of the contests or the number of possible combinations is small enough that we will be able to do it, basically in the window of five to ten different combinations. Anything more than that would be pushing whether or not we'd be able to get the machines tested and turned around, which is one of the reasons for the recommendation to raise

the number of registered voters per scanner to 1 for every 2500. It would reduce the number of machines that needs to be tested and turned around.

Commissioner Guastella reported that in a conversation with Assemblyman Michael Cusick, he informed her that this week he introduced a Bill to provide the additionally week in hopes that it will pass.

Mr. Richman reported that according to the plan, the Commissioners, on Wednesday morning collectively, will review the numbers based on the Unofficial Returns, the gross number of Absentee Ballots filled out and potentially coming in, and we hope, a count of the Affidavits that were cast. The Commissioners will determine what the possible combinations would be in each of the potential contests and Board staff will put those together. So if there were hypothetically, on the Democratic side for Mayor, five candidates and three are close, the staff would make three combinations there. In the Public Advocate's race, if there are two combinations, that would be five different sets of seven

combinations. On the Republican side, similarly, which Republicans, if no one gets close to 40%, would be in that and print those combinations. In respond to a question, Mr. Richman further detailed the plan that the Commissioners would be making a preliminary determination in an effort to comply with the law, which says they have to conduct the election within two weeks or even three weeks. He explained that when there is a close election, large numbers of paper to be reviewed takes longer. The initial recommendation to shift the election to June was an ideal solution though not conceded. You're now trying to come up with your best efforts to work within that timeframe and that requires the Commissioners to make a decision on Wednesday. As Mr. Naudus pointed out, if it's a large number of combinations, the plan may not work. A small number of combinations will be achievable. However, we still have to make sure that by 48 hours before the Run Off, the correct ballots are being sent out to the public.

Commissioner Umane elaborated that what is being contemplated now is the cost for printing these ballots. If a ballot costs between 52 - 53 cents to print and your talking about printing

ten combinations, that's \$10,000,000.00 worth of ballot printing on the Democratic side and probably \$5, \$6 or \$7,000,000.00 on the Republican side, if it comes to that. And so we're spending all that money and we're only going to use 1 or 2 or maybe none of that, which is wasteful. While we are trying to comply with the law and that's what everybody wants to do, he wants it to be clear that they're not completely oblivious to the fact that this plan is going to be potentially very wasteful of tax-payer money but given the law and our constraints in terms of having to comply with it, we may have make that decision. So, those who want to continue to criticize them without having any idea or any clue about what their doing, he wants to give them the omission to do that but the Commissioners have no choice but to uphold the law and hopefully some of the people in the room may understand that. This is not something that was created here and the Commissioners are trying to figure out a way to spend as much money as they can of the City's short dollars but we are talking about is a very expensive potential alternative that he personally is not convinced given our track record in the last Presidential Election as to how fast we are going to be able to count all the votes and make sure who is going to be in the second or third

position in the event that there is a Run Off. We are hopeful that we will be able to do it but its possible because of 3% audits and additional audits that may be required for other races as Mr. Richman pointed out, may throw monkey wrenches into this and that its by no means a done deal that we're going to be able to do this and people need to understand that up front, cause for sure we are going to be criticized.

Another monkey wrench might be if there is a difference of only 25%, which is more likely if you have a Run Off because you don't have one candidate running away with it. Are any of these options taken that into consideration?

Mr. Naudus explained that the problem they had with any paper based election is that if its close, within that half percent, all paper election, all of it will have to be hand counted. That is hundreds of thousands of ballots that would have to be hand counted to make the determination. That would then blow it out of the water of having the Run Off two weeks later. The only thing that comes close to it would be the lever machine, Option 2, which basically, when you have the

Lever Machines there is no paper ballot; there is nothing to basically go back to and review so a majority of the votes are on the machine that's why the option is use them in the Primary and Run Off. In the Primary, the votes are all in the voting machines. We look at the machines, the recanvass for the Lever Machines, back when we use them in 2009, took a day. What the machine read, that's what the numbers were. You then only had to hand count, if it was close, the paper ballots (absentees and affidavits) and that's only 20,000 ballots as opposed to hundreds of thousands of ballots that would need to be counted. However, it would still come down to whether we can hand count that amount of ballots in the short amount of time to meet the two week timeframe.

Mr. Richman reported that in the first part of the Revised Draft Run Off proposal, there is a detailed description and best guesstimates of how long the process would take. It also talks about the expedited timeframe to conduct all these processes. Instead of normally waiting a week for the absentees to come in, we would start Thursday on what would be a rolling process. The other concern is how much human resources are needed. In the plan hundreds of

extra positions are going to be needed to do the work. Additionally, it may not be the top race that will slow the process down. It may be a lower race where the review of each of those ballots takes longer. The good news in Queens last week was that we were able to conduct the process in one day. In the Special Election, in Brooklyn, it took three and a half weeks. That is the concern. Another concern is whether this will account in any subsequent court action. In the past, we have been fortunate enough to have a Citywide coordinated part created by the Office of the Court Administration to try and expedite it but it's never taken away the due process rights of any candidate. So, although it's a speedier process, it's a question of volume. As Mr. Naudus indicated, the one advantage, if the legislature would have given us the opportunity, would have been to us the Lever Machines. The amount of paper that would have to be reviewed would be drastically reduced.

Mr. Soumas noted that there are going to be problems but in the absence of a lawful option there is no other way and he does not see a second option.

In response to a question, Mr. Richman reported that there concerns will be conveyed to the City Council as well. However, the Commissioners have their inherent authority to conduct the elections and these are all being talked about as temp positions and as you are aware, the City Council regularly does not fund us with adequate number of temps to run an election.

Commissioner Soumas commented that not only will we do all things necessary to alert the government officials what is needed to implement this, we should also make various statutory recommendations to the legislature.

In a roll call vote to adopted Option 3 as the plan for conducting the Run Off, the motion was ratified by a vote of 8 in favor (Commissioners Araujo, Barrera, Dent, Guastella, Michel, Sipp, Soumas, Umane) 1 opposed (Commissioner Shamoun).

Mr. Naudus stated that in the plan, 75% is spelled out for the number of registered voters used for ballot printing. He asked if their changing that number to 65%.

President Umane did not think this should be decided at this minute because the number of ballots that need to be printed may fall into additional categories that have to be worked out such as how many positions are needed. This all has to be put into a fiscally sensitive proposal that would be submitted to the Mayor and City Council as well as appropriate Elected Officials.

Mr. Richman reported that one of the proposals is to immediately create borough EVS Units. That needs to get created early no matter which option is chosen because there is insufficient staff to do the necessary ethical work. They would need to get the notices out, advertisements within the next 30-60 days so Mr. Naudus can start assembling the people.

The Commissioners unanimously agreed to postpone further consideration until the next stated meeting.

Mr. Luisi presented the Commissioners with a copy of the Comparative Expenditures report dated March 5, 2013 in absence of Mr. Ward.

Commissioner Umane expressed disapproval that the Legislative package leads with finance issues. He suggested that the staff revise the proposals and begin with ballot friendly proposals that everyone is going to want to work on.

Ms. Sandow asked for approval to add the word “successfully” in paragraphs 2, 3, and 4 of the letter.

Commissioner Barrera authorized the Deputy Executive Director to add words or make changes in letters without having to seek the approval of the full Board of Commissioners. Commissioner Michel seconded the motion, which was adopted unanimously.

Commissioner Umane stated that the General Counsel should consider revising the Legislative package and authorized legal staff to reverse the order of the proposals. Commissioner Dent seconded the motion, which was adopted unanimously.

President Umane commented that the Commissioner ought to authorize the General Counsel and staff to write a letter to the legislature requesting an extra week between the Primary Election and the potential Run Off Election and he would leave to them in which direction they want to go but feels strongly that we need a three week period in which to prepare for the Run Off. He also suggested adding the words "it's a stretch to do it".

Ms. Sandow also pointed out that Option 4 is all paper with a centralized canvass. She explained that sealed ballot bins would be taken to our Central Office locations by the NYPD. There the ballots would be counted centrally on scanners. That would need a legislative change that should be put in, just in case. The Poll Workers would be required to fill out a reconciliation sheet at the end of the night.

Mr. Richman stated that the reason the statute requires the Board to count or at least scan that night is so there is some evidence of what happened at that site and not have to question afterwards. The concern here is:

- a) The device that Ms. Sandow talks about doesn't exist.
- b) There getting rid of the fundamental process - if you can't scan emergency ballots they are suppose to hand count them at night. You're asking the legislature to go on record saying we're willing to compromise the integrity for the purpose of making it convenient for the Inspectors.

Ms. Sandow responded that they are currently researching to find a ballot box that has two locks on it for a Dem and a Rep key. Ballots would be able to go into the ballot box and there would be a counter on it. That ballot bin box would be taken by the NYPD back to the borough office. A bi-partisan team would be unlocking the ballot box and that bi-partisan team would be scanning them into the system. And, once again, the Poll Workers would be doing a reconciliation sheet. Although we are still researching, we could at least start preparing, if there is approval here, some type of legislation.

Commissioner Shamoun inquired when more information will be given about the Option 4 ballot box design as reported by Ms. Sandow.

Ms. Sandow advised that they are researching it now. The staff has had difficulty communicating with the vendor because the company is not in the United States and there is a time difference.

Commissioner Barrera stated that legislative approval is needed anyway so Option 4 should be included just in case. Commissioner Barrera moved to include a request to the legislature to consider Option 4 in the Legislative proposal. Commissioner Shamoun seconded the motion. The motion did not receive enough affirmative votes. The motion did not pass.

President Umane asked the staff to prepare a draft of the legislative changes for the Commissioners review. Commissioner Shamoun wants all legislative changes for the Run Off Options presented to the Commissioners at the next meeting

Ms. Sandow commented that aside from putting these changes in our legislative package, that they should send a letter to the State Legislature and Elected Officials, separately, with just the legislative changes for the Run Off.

Mr. Richman clarified that the Commissioners wanted a copy of the draft legislation presented to them modify the time between the Primary and Run Off from two to three weeks and include all legislative changes of the Run Off Options.

President Umane moved to convene an Executive Session to discuss litigation and personnel matters. Secretary Soumas seconded the motion, which was agreed to unanimously.

President Umane recognized Alan Flacks, a member of the public.

President Umane reconvened the open public meeting and reported that the following action was taken in the Executive Session:

- a) Natalie Dubovici, an Administrative Assistant in the Candidate Records Unit is reassigned to the Queens Office effective immediately.
- b) Advance Sick leave is granted to Ameriar Feliciano, Clerk in the Brooklyn Office.

President Umane moved to adjourn the meeting. Secretary Soumas seconded the motion, which was adopted unanimously.

The next stated meeting of the Commissioners is scheduled for Tuesday, March 12, 2013 at 1:30 P.M.