SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I. A .S. PART 17

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FRANK MACKAY, et al.,

Petitioners, Index No. 109502/06

-against-

GWEN MANDELL, Et al.,

Respondents.

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EMILY JANE GOODMAN, J.S.C.:

The Independence Party of the State of New York, a political party (Party), moves by its State Chairman, and by members who reside in Queens, to expel or disenroll the Respondents in this proceeding, who are registered to vote as New York County Independent Party members. Also named as Respondents, are the Board of Elections in the City of New York and the New York State Board of Elections and, in each case, the Commissioners thereof. The latter Respondents have not appeared and, accordingly, take no position in what is an intra party, non-governmental dispute, the results of which would nevertheless be binding on the Boards. Petitioners move under the authority of Election Law Sect. 16-110(2), which allows for disenrollment by order of the Supreme Court,[1] following compliance with certain statutory procedures. The Court is mindful of this State's policy of avoiding Court involvement in the internal affairs of political

[1]I have been elected to the judiciary three times and have never sought nor accepted the endorsement of the New Alliance Party (described in this litigation as the predecessor party of the Respondents) or the Independence Party and do not intend to do so in the future.

parties, and a "legislative choice not to involve the courts in determining Party "principles." Rivera v. Espada, 98 NY2d 422 [2002]

The Respondents do not contest the jurisdiction of this Court except that all but five - - Jessica Marta, Barbara Taylor, Omar Ali, Guy Kloppenburg, and Elaine Block - - reserve their right to challenge the personal service of this petition and the standing of Queens members to initiate the proceedings which concern New York County. However, although such proceedings would normally be brought by the New York County Committee Chair, in this case she is one of the Respondents.

Prior to the commencement of this proceeding, Petitioners held a "hearing" at a local hotel, at which it was determined that the Respondents should be removed from the Party for not being in sympathy with the principles of the Party. This was not on the basis of having failed to qualify for lines on the election ballot, failing to file County Committee officers, or other such lapses, but as the result of an investigation into the words and philosophies of the Respondents. Specifically, the purpose was to investigate Respondents as being "disloyal, unsympathetic with party philosophy, racist, anti-Semitic and of practicing hatred policies." The main objects of the investigation and hearing, and of this litigation, are Dr. Lenora Fulani and Dr. Fred Newman; the other individual respondents are said to be "in concert" with the statements and actions of the pair. The

complaint alleged that Respondents support an ideology that "promotes anti-Semitism, denigrates various religious and ethnic groups and people of color," and promotes "the practice of politics of hatred and bigotry," and such members, therefore, are not in sympathy with the principles of the Party.

Following the hearing, in which the Respondents chose not to participate, the complaint was "substantiated." That is, the appointed hearing officer, who is also one of the Petitioners, (see Rivera v. Espada, 3AD3d 398 [1st Dept 2004]) found that "statements by Drs. Newman and Fulani are racist and anti-Semitic... corrupt and disloyal to the principles of the Independence Party of New York," and that their Party membership should therefore be revoked.

It is fundamental that both the Constitution of the United States, and the Constitution of the State of New York, guarantee freedom of speech and association to both Petitioners and Respondents.[2] Just as individuals are free to express their thoughts, ideas, and opinions, it has also been held to be the right of an organization, to determine its participants and associates under certain limited circumstances. Ancient Order of Hibernians v. City of NY and St. Patrick's Day Parade Committee, Inc., USDNY, Southern District of NY, 814 F. Supp. 358 (1993).

[2]There is no allegation of government restrictions on speech or association in this proceeding.

However, unlike Hibernians, supra, in which membership in an organization was limited to persons meeting very specific and clearly communicated Catholic religious requirements, such as the frequency and timing of taking communion, and in which the United States District Court (Southern District, NY), found Hibernians properly excluded from the St. Patrick's Day Parade, ILGO, Irish Lesbian & Gay Organization, as not sharing the values and commitments of the Hibernians.

Here, there are no enunciated standards or requirements for persons registering in the Party. Party enrollment in this State is accomplished by checking the box of one's choice when registering to vote. Election Law Sect. 5-300.

The statements attributed to Fulani and Newman which many would consider odious and offensive were made by them in 1989 and 1985 respectively, and not in their capacity as Independence Party members or officers in the Party which did not even exist at the time. Attaching these to motion papers in another simultaneous proceeding in Kings County, does not reiterate or republish the statements, making them current, and Petitioners' argument that it does is frivolous.

Just as there is no litmus test for joining or registering in the Party, there are no specific standards for removal except whether it is "just." Election Law 16-110(2)

No evidence has been submitted to this Court that Respondents did, in fact, violate the principles, or have taken any action that would establish that these individuals fit the description attributed to them during their membership. While the Court is not going to speculate on the motive for bringing this Petition now, approximately 20 years after the utterance of the offending statements, nor whether it relates to future candidates and endorsements, nor whether it is designed to attract candidates who might otherwise decline, it appears to be more political than philosophical. Yet the Court, is called upon to review subjective beliefs and philosophies. While I am vigilant about anti-Semitism or racism in my own environment, that I, or others, might find the statements uninformed or distasteful is useless to Petitioners' position, when I have not been presented with any statement made, or evidence of conduct acted upon, in the last 20 years, which supports the Petition. Moreover, as to the 134 members said to be acting in concert, there is no evidence whatsoever of their being out of sympathy with the principles of the Party. "... [t]he court's role is to ensure that the ... Chair reaches a decision on the basis of sufficient evidence and does not consider inappropriate factors." Rivera v. Espada, supra. Even in Rivera, where an elected official publicly and repeatedly denounced the Democratic Party to which he belonged and from which disenrollment was sought, the Court of Appeals held that it would have to be clearly established that statements [made outside the legislature] denouncing the Party would be sufficient to support the rare event of disenrollment.

The Petitioners have not met their burden under Election Law Sect. 16-110(2) and therefore, the Petition is DISMISSED.

The application to disqualify Respondents' counsel Harry Kresky and Gary Sinawski is untimely as it is contained in a reply although it could have been raised in the initial moving papers since Petitioners' counsel James E. Long, refers to them in his Order to Show Cause, as the attorneys for the Respondents, and was aware of that role during the entire process is moot.

This constitutes the Decision and Order of the Court.

Dated: August 11, 2006

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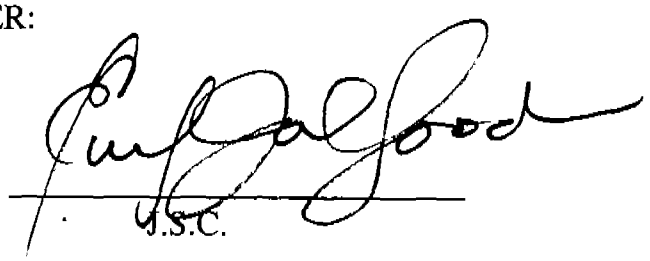

J.S.C.

EMILY JANE GOODMAN