STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In re Eileen E. Buholtz on behalf of
ROCHESTER PHILHARMONIC ORCHESTRA, INC.,

Petitioner, DECISION AND ORDER

v.

Index #2013/01909

ROCHESTER PHILHARMONIC ORCHESTRA, INC.,
William E. Cherry, Patrick Fullford,
Marie Kenton, Dawn F. Lipson,
Katherine T. Schumacher, Mark Siwiec,
Ingrid A. Stanlis, and Dr. Eugene Toy,

Respondents.

Petitioner, a member of the RPO as of December 19, 2012, brings this proceeding pursuant to Not for Profit Law ("N-PCL") §618 seeking to overturn the January 23, 2013 election of directors at the annual meeting of members of the Rochester Philharmonic Orchestra, Inc. ("RPO"). Petitioner also asserts as a second cause of action that the RPO failed to provide her with a list of members entitled to vote at the annual meeting and refused to provide members' contact information which petitioner asserts she is entitled to pursuant to N-PCL §621.

Not for Profit Corporation Law §618 provides:

> Upon the petition of any member aggrieved by an election and upon notice to the persons declared elected thereat, the corporation and such other persons as the court may direct, the supreme court at a special term held within the judicial district where the office of the corporation is located shall forthwith hear the proofs and allegations of the

> parties, and confirm the election, order a new election, or take such other action as justice may require.

As well stated in an earlier Supreme Court decision applying this statute, "[t]he court has broad equitable powers and may direct a new election where the election under review is 'so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require the court to order a new, clear and adequate expression.'" In re F. I. G. H. T., Inc., 79 Misc.2d 655, 659 (Sup. Ct. Monroe Co., 1974). However, the court "should not interfere in the internal affairs of a corporation of this character unless a clear showing is made to warrant such action." Id., citing Matter of Wyatt v. Armstrong, 186 Misc. 216, 220 (Sup. Ct., N.Y. Co., 1945), quoted in Scipioni v. YMCA of Rochester and Monroe Co., 105 A.D.2d 1113 (4th Dept. 1984). "[I]n the absence of any appearance of fraud or intentional wrongdoing, courts usually direct new elections only when correction of an alleged grievance would affect the result of the election." Blanksteen v. New York Mercantile Exch., 879 F. Supp. 363, 367 (S.D.N.Y. 1995)(citing In re Election Officers and Directors of F.I.G.H.T., Inc., 79 Misc.2d 655, supra; Burke v. Wiswall, 193 Misc. 14 (Sup. Ct. Ulster County 1948). "Furthermore, election procedures for not-for-profit corporations are not to be disturbed without a showing that an election was tainted by fraud or wrongdoing." Parisi v. N.Y. Co. Med.

Society, 177 A.D.2d 369, 370 (1st Dept. 1991)(emphasis supplied).

Initially, although respondents assert in their answer that petitioner lacks standing to raise the issues asserted in her petition, respondents admit that §618 allows an aggrieved member to seek relief [Resp. Mem. Law., n. 1] and present no arguments that petitioner is not aggrieved within the meaning of the statute. "[E]very member has a presumptive interest in the legality of members' meetings." 6 White, New York Business Entities, ¶618.01 (citing In re Lake Placid Co., 274 App. Div. 205, 208 (3d Dept. 1948)("any stockholder has a presumptive interest in the legality of votes cast at a stockholder's meeting," construing N-PCL §618's predecessor statute, section 25 of the General Corporation Law). "A defeated candidate for election is, of course, an aggrieved person." 6 White, New York Business Entities ¶618.01 (citing Cuva v. United States Tennis Ass'n, 13 Misc.3d 1221(A), 2006 WL 2918215 (West. Co. 2006)(Lippman, J.)(candidates defeated by the election in controversy had standing to bring Section 618 proceeding). At this point, the court considers petitioner a "candidate" only for the purpose of standing in the sense that she complains that she was not elected to a directorship position. The legality of her candidacy under the by-laws is considered separately below.

At the January 23, 2013 annual meeting of members of the RPO, eight candidates nominated by the RPO Governance Committee

pursuant to By-Law article III(3)(a) were elected by at least 369 votes each. This total constituted a plurality for each candidate of the 455 valid ballots received as determined by the Inspector of Election (the "Inspector"). See Affidavit of Jules L. Smith, March 15, 2013, Ex. 5. The Inspector also noted that 55 ballots were received casting votes for candidates that were not nominated by the Governance Committee or were not otherwise nominated pursuant to By-Law article III(3)(b). These ballots included 53 votes for petitioner and between 51 and 54 votes each for the other five write in candidates aligned with petitioner ("Petitioner candidates").

Central to this case is the question of whether so called "write-in" candidates or votes for such candidates were permitted. Respondents argue that the question is academic because, even if the write in candidate ballots were not ruled invalid, no write in candidate received near enough votes to achieve the required plurality of total votes cast by members attending the meeting of members. In any event, respondent contends, the by-laws do not permit write-in candidates.

The court agrees. Assuming that the Inspector should have determined that the ballots casting votes for Petitioner candidates were valid, counting those votes would not have changed the outcome of the election. That those votes were determined to be invalid is not sufficient reason to order a new

election unless "the outcome . . . 'could have' been affected" by the challenged action, a standard not met prima facie in petitioner's papers. Jackson v. First District Dental Society, 240 A.D.2d 265, 266 (1st Dept. 1997). See Burke v. Wiswall, 193 Misc. at 18 ("[A] new election should not be directed to correct an alleged grievance which if sustained would not change the result").

Moreover, the court does not find that the RPO by-laws permit the write in candidacy attempted by the Petitioner Candidates. Not for Profit Corporation Law §703 provides that "[d]irectors shall be elected or appointed in the manner and for the term of office provided in the certificate of incorporation or the by-laws."

The RPO By-Laws provide two methods for nominating director candidates. The first is by nomination of the Governance Committee pursuant to article III(3)(a). Under this method, the Goverance Committee nominated eight candidates to stand for election at the January 2013 annual meeting. The second method provides for "Other Nominations" by petition pursuant to article III(3)(b). Under this method, a petition must be submitted to the Secretary of the Board, signed by at least 25 members qualified to vote in the election of directors, by October 31 preceding the next election.

> On receipt of any such other nominations the Secretary shall cause such nominations to be

> listed on the bulletin board of the offices of the Corporation, printed on ballots distributed to members, published or announced in one or more newspapers, and, if practical, included in the next issue of the RPO News or such other newsletter or written communication then being regularly sent to members.

This section goes on to state that "[n]ominations from the floor at such annual meeting shall not be in order except as otherwise provided by law." No candidates were nominated by petition to stand for election at the January 2013 meeting.

Petitioner contends that her candidacy was not by "floor nomination" as prohibited in the By-Laws, but was rather by "write in." Petitioner submits three affidavits of certified professional parliamentarians, Anne L. Homer, Mark Schiansky and Michael E. Malamut. These parliamentarians point out that the by-laws provide that meetings of members shall be conducted in accordance with Robert's Rules of Order - Revised, "[e]xcept as provided in the Certificate of Incorporation or these By-Laws." By-Laws, article XII(2). Petitioner's parliamentarians opine that the By-Laws are silent on the issue of write-ins and do not otherwise prohibit write-in votes because write-in votes are not nominations. Further, Roberts Rules of Order - Revised provides that a member may vote for any eligible person whether nominated or not.

Respondents submit the affidavit of their own expert parliamentarian who opines that the by-laws provide explicitly

how candidates are determined and only candidates as set forth therein are eligible for election.

The court is required to adjudicate members and corporation's rights according to unambiguous terms of the corporation's bylaws. ALH Properties Ten v. 306-100th St. Owners Corp., 191 A.D.2d 1, 16 (1st Dept. 1993)("The bylaws of the corporation constitute a contract between the shareholders and the corporation"); Procopio v. Fisher, 83 A.D.2d 757, 758 (4th Dept. 1981)("The parties' rights must be adjudicated according to the unambiguous terms thereof and the words and phrases therein must be given their plain meaning"). "The rules for construing contracts apply equally to a corporation's by-laws. Kralik v. 239 E. 79th St. Owners Corp., 5 N.Y.3d 54, 59 (2005)." Matter of Schapira v. Grunberg, 11 Misc.3d 1063(A)(Sup. Ct., Bronx Co., 2005). "[T]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent, and that the best evidence of what parties to a written agreement intend is what they say in their writing" (Greenfield v Philles Records, 98 NY2d 562, 569 [2002] [citations and internal quotation marks omitted])." Innophos, Inc. v. Rhodia, S.A., 10 N.Y.3d 25, 29 (2008).

The decision in Matter of Bello v. Disabled Am. Veterans, 2010 N.Y. Misc. LEXIS 5989 (Sup. Ct., Nassau Co., Dec. 3, 2010)(hereafter "Bello") is instructive. In that case, the

petitioner challenged an election of officers of a veteran's organization conducted via a special meeting called specifically to elect officers. Bello, at *5. Analyzing the case under N-PCL §618, the court "reject[ed] as unsound the blanket contention, as articulated [by the Inspector General of the National organization] . . . that the language in Article I, Section 1 permits a special meeting to be called for the disputed elections because the by-laws are silent as to a special election of officers." Bello, at *11. Article I, Section 1, as referred to in the Bello case provided that "Robert's Rules of Order, Revised, with [sic] govern *except as hereafter specifically stated*." Bello, at *2 (emphasis in original). The Bello court explained that "[t]he conduct of elections is excepted from the use of Robert's Rules because it is 'hereafter specifically stated' [here, "[e]xcept as provided in . . . these By-Laws"], and thus the use of Robert's Rules should yield to the specific election procedures spelled out in the by-laws as reproduced above." Bello, *11 (bracketed material supplied). As the Bello court reasoned, to do otherwise would render meaningless the exception language found in the reference to Robert's Rules which requires that Robert's Rules yield to the by-laws. Here Article XII(2) provides that Robert's Rules governs except where "as provided in the by-laws."

The court finds that the by-laws unambiguously provide a

process by which director candidates are identified and made known to the membership well in advance of the annual meeting. Moreover, the by-laws also attempt to make this the exclusive nomination process by prohibiting last minute or surprise nominations by excluding floor nominations. Here, as in Bello, Robert's Rules must yield to the specific provisions governing elections and nominations for board positions. Bello, at *11 ("Robert's Rules should yeild to the specific election procedures spelled out in the by-laws"); Pecoraro v. State Comm. Of the Independence Party, 272 A.D.2d 849 (3d Dept. 2000)(rejecting as unreasonable an interpretation of the Party rules based on Robert's Rules of Order Newly Revised [9th ed.] where such construction would render the meeting-by-petition process found in the Party rules "meaningless"). "Parliamentary procedure is vitally important. Properly used, it can result in productive, non-combative meetings that end on time and about which the members feel satisfied that they were given the opportunity to fully participate and contribute." 1-2 The Law of Associations, Matthew Bender and Co., Inc., §2.06 (2012). Petitioner, however, may not use Robert's Rules as a means to avoid the nomination procedure set forth in the by-laws. Consequently, votes cast for persons not nominated as director candidates pursuant to the by-laws were correctly disregarded.

In considering petitioner's other allegations, the court

finds that they are either without merit or do not warrant interference in the internal affairs of the RPO. Scipioni v. YWCA of Rochester, 105 A.D.2d 1113 (4th Dept. 1984) ("A court acting pursuant to [N-PCL] section 618 should not interfere in the internal affairs of a corporation . . . unless a clear showing is made to warrant such action"). In Scipioni, the court held: "inasmuch as there is no indication that the nominating committee violated the by-laws or that the election was tainted with fraud or other wrongdoing, Special Term erred in interfering with the internal affairs of respondent." Id. The court finds similarly here on the present record.

Petitioner asserts that the RPO failed to properly establish the record date, December 21, 2012, by either a meeting of the Board or by a valid vote of the Executive Committee of the Board. Further, she asserts that the Executive Committee failed to advise the Board of its vote at the next meeting of the Board on January 11, 2013. First, the Record date was properly set. Section 611 of the Not for Profit Law specifically provides that "[t]he by-laws may provide or, in the absence of such provision, the board may fix, in advance, a date as the record date for the purpose of determining the members entitled to notice of any meeting of members or any adjournment thereof. Such record date shall not be more than fifty nor less than ten days before the date of the meeting." The RPO by-laws provide at article

II(5)(a) that:

> The Board may fix date as the record date for the purpose of determining members entitled to vote any meeting of members or any adjournment thereof. The record date shall not be more than fifty (50) nor less than ten (10) days before the date of the meeting.

As the Annual meeting was set for January 23, 2013, article II(5)(a) required that the Record date fall between December 4, 2012 and January 13, 2013.

The Executive Committee ("Committee") is permitted under article V(2) of the RPO by-laws to act in cases where the Board is not in meeting, with exceptions not relevant here. Board Secretary Smith submits in his affidavit that the Record date was set pursuant to a meeting of the Executive Committee. Affidavit of Jules L. Smith, March 15, 2013, ¶24. This meeting was essentially conducted via e-mail by all members of the Committee (thus a quorum of Committee members), and all but one the members consented to December 21, 2012 as the record date. Id. RPO by-laws permit directors to participate in "committee meetings by conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time." By-Laws, article III(5). This provision is permitted by and quotes the language found in, N-PCL §708(c). The December record date conforms with RPO past practices. Steinmiller Affidavit, ¶8. Such lead time is necessary to allow a sufficient period to prepare the notices and ballots, verify

the membership list and addresses, and print and send the meeting notifications and ballots. Steinmiller Affidavit, ¶4.[1]

Petitioner objects to this procedure setting the record date, stating that the procedure did not conform to N-PCL §614. That objection is without merit as that section applies to votes of members. N-PLC §614 ("Whenever, under this chapter, members are required or permitted to take any action by vote . . . such action may be taken without a meeting on written consent, setting forth the action so taken, signed by all of the members entitled to vote thereon").

Petitioner may be referring to N-PCL §708(b). That section provides that "any action required or permitted to be taken by the board or any committee thereof may be taken without a meeting if "all members of the board or the committee consent in writing to the adoption of a resolution authorizing the action." Apparently, petitioner is asserting that the Executive Committee did not conduct a meeting, and therefore the Record date was not properly set because there was one objection to the date, as too early, by a member of the Executive Committee, one Mr. Burke.

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[1] According to Ronald Steinmiller, RPO Vice President of Finance and Administration: "For the 2013 Annual Meeting, for example . . . we began reviewing the member list on December 19, 2012, and finished that review on December 21, 2012. We transmitted the information to the printing company on December 22, 3012, the printer completed its work on December 28, 2012 and transmitted the documents to the mailing house, and the mailing went out to the members on January 3, 2013." Steinmiller Affidavit, ¶5.

See Affidavit of Jules L. Smith, March 15, 2013, ¶24.

To the extent petitioner does assert an argument pursuant to Section 708(b),[2] the court finds that argument without merit as the Committee conducted its meeting by "similar communications equipment," albeit via e-mail, as authorized in the by-laws and Not for Profit Corporation Law, and therefore unanimous consent was not required. E-mail permits all members to "hear" each other, that is all statements, debate etc. is available to all participants at the same time and by replying to statements etc. deliberations may take place. The court concludes that this is sufficient for the committee to have met to determine this issue. There is nothing in the record to suggest that this method is not commonly employed by the Committee as no Committee member objected to the meeting procedure. Affidavit of Jules L. Smith, March 15, 2013, ¶24. Moreover, the fact that no committee member objected to the procedure confirms that the committee in fact intended their exchange of e-mails as a meeting. The court finds no New York case law determining whether e-mail constitutes "similar communications equipment" for purposes of N-PCL §708, but the court finds no inherent reason to find otherwise here.[3]

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[2] The provisions in Section 708(b) were last updated in 1983 (1983 N.Y. Laws 92, effective May 17, 1983) and did not contemplate e-mail and computers as communications equipment.

[3] Courts often deliberate whether e-mail exchanges violate open meetings laws. See e.g., Lambert v. McPherson, 98 So.3d 30 (2012) (because the e-mail was only one board member's

The Committee's action was reported to the full Board, in compliance with article V(2)(d) of the by laws[4] via a notice from the Secretary of the Board of Directors to the Board on December 21, 2012.[5] Jules L. Smith on March 15, 2013, ¶21, Ex.2. Secretary Smith further avers that, at the next the regular meeting of the Board on January 11, 2013, no director objected to the Committee's action in setting the record date. Id., at ¶24. Accordingly, there is no merit to petitioner's contention that the Committee improperly set the record date or failed to present

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declaration of his ideas or opinions, not "an exchange of information or ideas among a quorum of board members concerning a specific matter that the members expected to be presented to the board for a decision" e-mail did not violate open meeting law); Intermountain Rural Elec. Ass'n v. Colo. PUC, 2012 C.O.A. 123, P1 (Colo. Ct. App. 2012)("This case raises the issue whether these e-mail exchanges constituted "meetings" for purposes of the Colorado Open Meetings Law . . . [b]ecause we conclude that considering and providing input on proposed legislation was not connected to the [Public Utility Commission's] policy-making function, we hold that the exchanges did not constitute such meetings"). Courts have found e-mail exchanges violate open meeting laws, see DA for the N. Dist. v. Sch. Comm. of Wayland, 455 Mass. 561 (Mass. 2009)(e-mail exchange violated the letter and spirit of the open meeting law), but that is not a problem under the N-PCL.

[4] "Any action taken by the Executive Committee, and the minutes of its meetings shall be reported to the Board of Directors prior to or at the next regular meeting of the Board of Directors."

[5] Article V(2)(d) of the by-laws provides that notice of the Executive Committee's action must be provided "prior to or at the next regular meeting of the Board of Directors," contrary to petitioner's allegation, as evidenced by Secretary Smith's averment and his letter of December 21, 2012, found at Exhibit 2 of his March 15, 2013 affidavit (emphasis in quote supplied).

its action to the board.

Petitioners also contend that those persons becoming members after December 21, 2012, were disenfranchised because they were not eligible to vote in the January 21, 2013 meeting. This contention is also without merit. A record date must be established pursuant the Not for Profit Corporation Law. By its nature and purpose, those establishing membership after that date cannot vote. A Record date simply cannot be set that includes those becoming members after the record date - such defeats the purpose of a Record date. While this may be a "disenfranchisement," such is permitted under the law. Because those joining between December 21, 2012, and December 31, 2012 (assuming the new membership years started January 1, 2013) were not permitted to vote, there is no reason to order a new election. Moreover, there is no showing that any persons or organizations qualified for membership after the Record date.

Petitioner further contends that the RPO failed to notify certain "significant segments of its members" of the January 23, 2013 meeting. Failure to give adequate notice of a meeting for the election of directors as required by the by-laws is a ground for vacating such an election. Matter of Kaminsky, 251 App. Div. 132; Matter of Keller, 116 App. Div. 58; Matter of Gilman v. Long Is. Home Bldrs. Inst., 11 Misc.2d 393; Matter of Green Bus Lines, 166 Misc. 800)." Azzi v. Ryan, 120 Misc.2d 121, 122-123 (Sup.

Ct. Queens Co. 1983). The court finds no merit to this allegation.

First, petitioner cites her own case where she did not receive notification of the meeting, but her brother, who lives at the same address, with the same last name, did receive notice. However, as revealed by petitioner, petitioner was not denied the right to vote at the annual meeting.

Furthermore, there is no evidence in this record of an unwritten rule consolidating contributions from the same address last name into family memberships or that such resulted in any member not being able to vote. Petition, ¶24(A). That this may have happened in petitioner's case is not evidence of an unwritten rule. The by-laws, at article I(1), permit the RPO to restrict family memberships to one vote per family, but as petitioner acknowledges, she and her brother were not so restricted. Consequently, it appears more than likely that the RPO may have mistakenly consolidated her and her brother's individual memberships. This is not sufficient reason to order a new election.

Petitioner also relies upon the affidavit of Carol Snook, to contend that the RPO failed to give notice to those members who only gave to the Rochester Philharmonic Youth Orchestra ("RPYO"). That Ms. Snook did not receive a notice is not proof that others

similarly situated to her failed to receive notice.[6] Moreover, including Ms. Snook, there were only 17 persons who donated at least $75 to RPYO but not the RPO. Affidavit of Ronald Steinmiller, March 18, 2013, ¶20. Assuming all 17 would have voted for petitioner and petitioner candidates, such would have made no difference in this election.

Similarly, the affidavit Peter Mauer is insufficient to require a new election. Mr. Mauer asserts that he was entitled to vote because he returned tickets to the RPO. Mr. Mauer, however, is mistaken in his assumption that his return of tickets entitled him to vote. The "RPO does not regard that as pledge or payment for membership." Affidavit of Ronald Steinmiller, March 18, 2013, ¶21. Mr. Mauer appears to have been permitted to vote by mistake. Ronald Steinmiller, the RPO Vice President of Finance and Administration avers that Maurer, at the annual meeting claimed to have made the required donation, but did not reveal that he did so by returning tickets. Affidavit of Ronald Steinmiller, March 18, 2013, ¶21.

In sum, petitioner has not shown that there was improper notice of the annual meeting here or that any member was prevented from voting by lack of notice. Sillah v. Tanvir, 18 A.D.3d 223, 224 (1st Dept. 2005)("The meeting was properly

[6] The court does not take notice of the hearsay statements in Ms. Snook's affidavit.

noticed; although it was held on a rescheduled date, the hearing evidence showed that the date was well publicized, the meeting was attended by over 200 congregants and there is no evidence that a member was prevented from voting due to lack of notice").

As to petitioner's N-PCL §621 cause of action, Not for Profit Corporation Law §621(c) provides that a corporation may require an affidavit as to the purpose of the request. This affidavit was not supplied until after the annual meeting on February 19, 2013. The affidavit from petitioner, dated February 18, 2013, provides that the purpose of requesting the names is "to send out the names and qualifications of write-in candidates for the election of RPO, Inc. directors in advance of the annual meeting that I anticipate will be ordered pursuant to Not-for-Profit Corporation Law §618." Petition, Exhibit V. This was in fact petitioner's stated purpose from the outset. The letter of Thomas Fink, dated January 11, 2013 (Petitioner, Exhibit I) provides that the purpose of requesting the membership list is to notify members that additional nominees will be offered at the membership meeting.

As discussed above, the by-laws do not permit such a procedure and the RPO should not be made to aid petitioner in this endeavor that is contrary to its by-laws. Accordingly, petitioner's purpose in pursing the membership list was not for a proper purpose and the N-PCL §621 cause of action is also

dismissed.

The election results of January 23, 2013 annual meeting are hereby confirmed. Petitioner's argument that a cross-motion is required before such relief may be granted is also without merit. Supreme Court is required, "[u]pon the petition of any member aggrieved by [the] election" to "forthwith hear the proofs and allegations of the parties, and confirm the election, order a new election, or take such other action as justice may require." Not-for-Profit Corporation Law §618.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: April 15, 2013
Rochester, New York