

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of
ELLEN REESE, et al

AFFIRMATION

Petitioners,

Index No 2009-8865

-vs-

CHRISTOPHER L. JACOBS,

Respondent

PETER A. REESE, an attorney duly licensed to practice in the courts of New York State, with an office at 49 Starin Avenue, in the City of Buffalo, County of Erie and State of New York hereby affirms as follows, under penalty of perjury:

1. I am attorney for the Petitioners and make this affirmation in opposition to the Motion to dismiss and for sanctions and the Affidavit of Paul G. Joyce, sworn to on August 28, 2009.
2. Mr. Joyce alleges that this case is now moot since the Respondent filed a legally sufficient, albeit untimely, disclosure report on July 17, 2009.
3. This is incorrect as the untimely supplemental report fails to comply with the law.
4. In fact, there are a long list of errors and omissions in the report.
5. No addresses of donors are listed (276 times by my count).
6. In many cases (179 times by my count), the names of the donors are incomplete and/or unusable, and fail to properly identify the contributors. for example:

<u>Page</u>	<u>Lines</u>	<u>Date</u>	<u>Name</u>
1	1-3	2/5	Christopher L J...
1	4	2/20	Gary & Willow ...
1	5	2/20	B Kevin & Tyann ...
1	7	2/20	Anne & Karl Cla ...

1	11	2/20	Stephen & Cath ...
1	15	2/25	(blank)
1	17	2/25	Anthony Amico...
1	20	2/25	Lawley Ross & ...
1	21	2/25	Jaekle Fleisc...
1	22	2/25	Cash (\$3,590)
1	26	2/28	Thomas & Kathi...
1	27	2/28	Cynthia & Andr...
1	29	2/28	Mary Giallanza...
1	31	2/28	Baynes Freight...
1	32	2/28	Collucci & Gala...
1	33	2/28	Linda & Richard...

7. An anonymous contribution and a large "Cash" donation are reported above. The Education Law does not appear to recognize such items.
8. What appear to be Election Law §14-100 Political Committees lack the details required by the Education Law:

<u>Page</u>	<u>Lines</u>	<u>Date</u>	<u>Name</u>
1	67	2/26	Friends of Deni...
2	65	2/26	Higgins for Co...
3	18	2/28	Friends of Mich...
3	23	2/28	Friends of Jack...
4	30	4/27	Friends of Ant...

9. All in all, in the four page "DONATIONS" report, there are, including addresses missing, well over four hundred errors or omissions (460 by my count).
10. In the face of this untimely and totally incomplete report, Respondent attempts to divert the Court's attention from his own legal lapses by making misplaced allegations against Petitioner's counsel.
11. This tactic is well known Downstate where lawyers drop sanctions motion with impunity, but it is thankfully is rare among the Erie County Bar.
12. Because the untimely, erroneous and incomplete report was "received" by the Board of Education seven whole days before the Petition was signed, the present action is labeled frivolous and sanctions are requested.

13. First of all, the Board is notoriously slow in responding to FOIL requests so there is no guarantee that the reports were made available that day or even that week.
14. More importantly, Petitioners were led to believe that Respondent would not be filing any further reports. Following the court appearance in July 10, 2009, regarding a motion to renew, Petitioner's counsel asked Mr. Joyce why his client did not file a corrected set of reports so that no further litigation would be necessary. Mr. Joyce asserted that Respondent did not need to reveal the identity of his contributors and that no further reports would be filed. Apparently Mr. Joyce based his position on a memorandum which was supplied by the Erie County Board of Elections. Following this conversation, Mr. Joyce was fully aware that Petitioners intended to file a new proceeding to force Respondent to comply with §1528 of the Education Law.
15. Nor was the subsequently filed report sent to Petitioner's counsel or any notice given of its filing, even though he told Respondent's counsel and this Court that he intended to file another action to compel such a report.
16. Affiant did not seek to inspect any new any new filing at the Board of Education, based on the representations which had been made to him on July 10, 2009 (See Paragraph 14. above) as no new filing was expected and the final date for filing such reports (May 25, 2009) had long since passed. Since no reports were scheduled to be filed and none was expected, Petitioner's counsel did not think that it was necessary to check for the existence of a filing which he had been informed would not be made.
17. Essentially, Petitioners were "sandbagged," except that the bag was empty as the report is so defective as to amount to a virtual legal nullity.
18. Had Petitioners been aware of the existence of the July 17, 2009 filing, they would have included the same in their Petition. The failure to include the same is merely an oversight.
19. Indeed Petitioners would have been delighted to have Respondent voluntarily comply with the statutory disclosure requirements, so as to obviate the need for cost and effort involved in the initiation of the present action.
20. Mr. Joyce states that the petition asserts "a materially false statement," yet he fails to specify which statement is false.

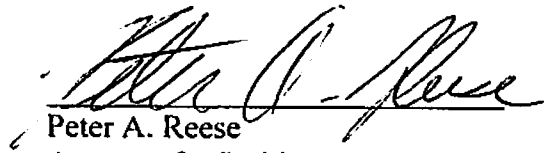
21. In fact, there are no false statements in the Petition. Even though Petitioners were unaware of the July 17, 2009 filing, Respondent continues to fail to comply with the requirements of Education Law §1528.
22. The Petition lists four reports the Petitioners were aware of and alleged that these reports failed to comply with the law in various ways.
23. Those statements were true to the best of Petitioner's knowledge and that of their counsel.
24. There being no hint that the present action is frivolous or improper in any way, Mr. Joyce resorts to the prior lawsuit and an administrative appeal filed with the Commissioner of Education as ammunition in support of his motion for sanctions.
25. He quotes the Court in the first action describing the case as "being without merit."
26. That language appears in thousands of court decisions as meaning that the court disagrees with the position of one party and is ruling in favor of another. It does not mean "frivolous".
27. In this instance, the Court based its ruling on affidavits filed in response to the Petition in the prior action, facts unknown and unknowable to counsel prior to the case being filed. Any lack of merit was factual not legal. The court rule authorizing sanctions speaks of a filing that is "completely without merit in law."
28. There is no evidence that the first action was completely without merit in law nor did the Court so rule. In fact, the Court ruled that the statute had been violated but dismissed the case as no remedy is presently provided under the law.
29. Mr. Joyce's reliance on the administrative appeal is even thinner in substance. This is an appeal to the Commissioner of Education to investigate the many irregularities which surrounded the May 5, 2009, election. It is based on the outcome of the election, which had not taken place at the time of the prior action in this Court, and the results of the prior litigation brought before this Court is fully disclosed in the said appeal. It is in fact an attempt to exhaust administrative remedies prior to a possible court action to overturn the election results. No decision from the Commissioner has been received to date. There is no place for discussion of this administrative matter in the context of the present case.
30. On information and belief, other parties dissatisfied with the conduct and outcome of the said school board election have initiated a federal court action to nullify the election

based on irregularities in the absentee ballot process. See *Rudford et al v. Erie County Board of Election, et al.* 09-CV-583-WMS

31. Mr. Joyce also states that the appeal accused Mr. Jacobs of “extensive and pervasive illegal activities,” yet presents no basis for believing that this assertion lacked a reasonable basis in fact other than his own personal opinion.
32. “These statements are ludicrous,” he states. See, Joyce at par. 20.
33. Thus, Mr. Joyce seeks sanctions because of Petitioners behavior in three proceedings; however, in none of the three matters was there any improper behavior.
34. Thus, the motion for sanctions is itself frivolous and is an attempt to distract attention from Respondent’s failure to comply with the financial reporting requirements of the Education Law.
35. “Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section.” 22 NYCRR §130-1.1(c)
36. The cases cited by Respondent’s counsel bear no resemblance or relevance to this case. They involve an apparent attempt to avoid paying the statutory fee of \$.25 per page for copies obtained pursuant to the Freedom of Information Law (*Fenstermaker*) and an attempt to enforce a “no-pet” provision of a condominium’s rules and regulations (*Kaufman*).
37. The Court should not allow frivolous action motions to be used as a tactic to divert a pro bono counsel from his duty to represent his clients zealously in this public interest lawsuit, and force him instead to spend precious time and energy defending his own heretofore unblemished professional reputation.
38. As Respondent’s late filed supplemental disclosure report is so fraught with error as to be a legal nullity, the Court should grant the relief request and order Respondent to finally file a complete and accurate reports.

Wherefore, Petitioners respectfully request that Respondent’s Motion to dismiss the Petition and for sanctions be denied, and for the Court to grant the relief requested in the Order to Show Cause.

Dated: Buffalo, New York
August 31, 2009

A handwritten signature in black ink, appearing to read "Peter A. Reese", written over a horizontal line.

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