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# COUNTY OF ERIE

JEREMY A. COLBY  
ERIE COUNTY ATTORNEY

**CHRIS COLLINS**  
COUNTY EXECUTIVE  
DEPARTMENT OF LAW

MARTIN A. POLOWY  
FIRST ASSISTANT COUNTY ATTORNEY

THOMAS F. KIRKPATRICK, JR.  
SECOND ASSISTANT COUNTY ATTORNEY

December 5, 2011

GA

Mr. Robert M. Graber, Clerk  
Erie County Legislature  
92 Franklin Street, 4th Floor  
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	<i>Slisz, Richard A. vs Augustine R. Beyer, Ralph M. Mohr and Dennis E. Ward</i>
Document Received:	Order to Show Cause
Name of Claimant:	Richard A. Slisz 216 Niagara Shore Drive Tonawanda, New ork 14150
Claimant's attorney:	Peter A. Reese, Esq. 49 Starin Avenue Buffalo, New York 14214

Should you have any questions, please call.

Very truly yours,

JEREMY A. COLBY  
Erie County Attorney

By:   
THOMAS F. KIRKPATRICK, JR.  
Second Assistant County Attorney  
thomas.kirkpatrick@erie.gov

TFK/mow  
Enc.

cc: JEREMY A. COLBY, Erie County Attorney

1D-4

At a Special Term of the Supreme Court held in and for the County of Erie, at the Courthouse in the City of Buffalo, New York, on the 28 day of November, 2011. *TJW*

PRESENT: HON. Hon. Timothy J. Walker, J.S.C.  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

PAID  
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NOV 28 2011

In the Matter of the Application of  
RICHARD A. SLISZ,  
Candidate for Councilmember, Third Ward,  
City of Tonawanda,

ERIE COUNTY  
CLERK'S OFFICE

Petitioner,

ORDER TO SHOW CAUSE

-against-

Index No. 2011-4632

AUGUSTINE R. BEYER  
Candidate for Councilmember, Third Ward,  
City of Tonawanda, and

FILED  
ACTIONS & PROCEEDINGS

RALPH M. MOHR and DENNIS E. WARD,  
Commissioners, constituting the  
ERIE COUNTY BOARD OF ELECTIONS,

*Peter Reese*  
29 November 29 2011  
9:49

Respondents

*Both Buchicchio*  
ERIE COUNTY  
CLERK'S OFFICE

Upon the annexed Petition of RICHARD A. SLISZ, duly verified the 23<sup>rd</sup> day of November, 2011, and with its exhibits and attachments thereto, it is hereby

ORDERED that the Respondents herein show cause before this Court at a Special Term, Part 20, to be held at 25 Delaware Ave., in the City of Buffalo, on the 7<sup>th</sup> day of December, 2011, at 9:30 o'clock in the a. m. of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein:

1. Ordering a manual audit of the voter verifiable audit records of all the ballots cast in the general election for the public office of Councilmember for the Third Ward of the City of Tonawanda which took place on November 8, 2011; and

2. Prohibiting Respondent Commissioners from certifying the results of general election for the public office of Councilmember for the Third Ward of the City of Tonawanda which took place on November 8, 2011, until such manual audit has been completed and the results of any disputed ballots have been determined by this Court; and

3. Directing Respondent Commissioners to bring to the hearing of this matter the absentee ballots cast in the first election district of the Third Ward of the City of Tonawanda in the general election held on November 8, 2011, and the tabulated result tape for the scan of absentee ballots in this election district, all in the custody of a Board of Elections employee qualified to testify to the authenticity thereof; and

4. Directing Respondent Commissioners to bring to the hearing of this matter the preliminary or final results of the canvass of ballots cast in the Third Ward of the City of Tonawanda in the general election held on November 8, 2011, and the preliminary or final results of the audit of the voter verifiable audit records from three percent of voting machines or systems conducted pursuant to §9-211 of the Election Law, also in the custody of a Board of Elections employee qualified to testify to the authenticity thereof; and

5. Granting all other, further, and/or alternative relief as it deems just and proper.

Sufficient cause appearing therefore, leave is hereby granted to the petitioner to submit upon the return day of this Order to Show Cause, ~~and on the argument and hearing thereof, such~~ <sup>and</sup> ~~additional affidavits, exhibits and other proof as may be necessary~~, and it is further

TJW  
ORDERED that opposing papers, if any, be served upon Petitioner's attorney and delivered to the Court, at least forty-eight (48) hours prior to the hearing of this matter, and it is further *so as to be received*

ORDERED that good and sufficient service shall be had herein by the service of a copy of this Order to Show Cause together with the Petition and supporting papers upon which it was granted by the following:

- TJW
- i. Personally serving Respondent BEYER, or in the alternative, leaving a copy thereof at the residence of Respondent BEYER at 335 Adam Street, in the City of Tonawanda and mailing a copy thereof via certified mail, return receipt requested, to Respondent BEYER at 335 Adam Street, Tonawanda, New York 14150.; and
  - ii. *Delivering* ~~Leaving~~ a copy thereof at the office of the Erie County Board of Elections, 134 West Eagle Street, in the City of Buffalo.

TJW Such service shall be completed on or before November 20, 2011.

DATED: Buffalo, New York  
November 28, 2011.

**GRANTED**

NOV 28 2011  
BY s/  
JOHN H. GARBO, JR.  
COURT CLERK

s/ Hon. Timothy J. Walker  
JUSTICE OF THE SUPREME COURT  
Hon. Timothy J. Walker, J.C.C.  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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In the Matter of the Application of  
RICHARD A. SLISZ,  
Candidate for Councilmember, Third Ward,  
City of Tonawanda,

Petitioner,

**PETITION**

-against-

Index No. 2011-4632

AUGUSTINE R. BEYER  
Candidate for Councilmember, Third Ward,  
City of Tonawanda, and

RALPH M. MOHR and DENNIS E. WARD,  
Commissioners, constituting the  
ERIE COUNTY BOARD OF ELECTIONS,

Respondents

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TO THE SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF ERIE:

Petitioner respectfully shows and alleges:

**Nature of the Proceeding**

1. This proceeding is brought pursuant to Election Law §§ 16-106 and 16-113 to obtain a manual audit of the voter verifiable audit records of the ballots cast in the general election for the public office of Councilmember for the Third Ward of the City of Tonawanda which took place on November 8, 2011, and the correction of any errors which may have resulted from the automated scanning of ballots in the canvass of said election.

**The Parties**

2. Petitioner RICHARD A. SLISZ, residing at 216 Niagara Shore Drive, Tonawanda, New York 14150, is a registered voter and enrolled Democratic Party member, residing within the

Third Ward of the City of Tonawanda, and is a candidate for the public office of Councilmember for the Third Ward of said City, as the nominee of the Democratic and Working Families Parties.

3. Respondent AUGUSTINE R. BYER resides at 335 Adam Street in the City of Tonawanda, County of Erie and State of New York and is a candidate for the public office of Councilmember for the Third Ward of said City, as the nominee of the Republican, Independence and Conservative Parties.

4. Respondent Commissioners RALPH M. MOHR and DENNIS E. WARD are public officers of the County of Erie, constituting the ERIE COUNTY BOARD OF ELECTIONS, and in said capacity are charged with the conduct and oversight of the said general election for the public office of Councilmember for the Third Ward of the City of Tonawanda.

### **Underlying Fact Situation**

5. The subject election took place on November 8, 2011. Balloting was done by way of paper ballots which were tabulated by automated scanning devices at four separate polling places, one for each election district.

6. The election night unofficial results indicated that Respondent BEYER was the winner by a margin of 10 votes (410 to 420).

7. The recanvass of ballots, including absentee, military and affidavit ballots took place at the Erie County Board of Elections on November 18, 2011, and the results indicated that Respondent BEYER was the winner by a single vote (434 to 435).

8. The results of the recanvass indicate that there were 38 blank, void and scattering ballots cast in the subject Councilmember election. Such ballots were not recorded as a vote for either candidate.

9. On November 21, 2011, Petitioner and his counsel performed a ballot by ballot examination of the absentee, military and affidavit ballots cast in the subject election.

10. One absentee ballot from the first election district of the Third Ward was clearly marked for both candidates, although the marking for Respondent BEYER was more distinct. This ballot was scanned as a vote for Respondent BEYER and the scanning device clearly ignored the marking in the voting target position for Petitioner.

11. The tabulated result tape for the scan of absentee ballots in this election district indicates that this particular ballot was counted in favor of Respondent BEYER.

12. If the scanning device had correctly read the marking in both voting target positions, the ballot should have registered as an "overvote" (see 9 NYCRR 6210.13(5)) and not counted for either candidate.

13. On information and belief Respondent Commissioners intend to certify the results of the subject election and declare Respondent BEYER the winner without conducting a manual audit of the voter verifiable audit records of the all ballots cast therein (including election day polling place scanned ballots) and relying solely on the results of ballot scanning performed by the automated scanning devices.

14. This action is brought on an anticipatory basis to avoid delays in the manual tabulation of the subject ballots (which only involve four election districts, and less than 900 ballots) and to avoid the need to bring an action to decertify election results at a later date.

15. On information and belief, the scanning devices used by Respondent Commissioners in the conduct of this election are not capable of accurately tabulating all ballots cast and scanned.

16. As indicated with the example of the specific absentee ballot above, the scanning

devices utilized are not capable of detecting and tabulating all obvious marks in the voting target areas of the ballots.

17. Furthermore, the scanning devices are not capable of detecting all of the valid votes cast by voters as recognized by New York State Board of Elections Regulation 9 NYCRR 6210.15 *Standards for determining valid votes on optical scan voting systems and/or paper ballots.*

18. More specifically, the scanning devices used in the conduct of the subject election are not capable of detecting a vote for a candidate signified when a voter "...marks vote choices by circling the entire voting position target area for a candidate..." See 9 NYCRR 6210.15(4).

19. In addition, the scanning devices used in the conduct of the subject election are not capable of detecting a vote for a candidate signified by "Any ballot which has any other mark or marks in the target area or sensitive area including circling the target area and/or candidate's name or making a mark through the target.... [which] shall be counted as a vote for the candidate..." See 9 NYCRR 6210.15(7).

20. Furthermore, the scanning devices used in the conduct of the subject election are not capable of detecting a vote for a candidate signified by "Any ballot which has a mark that is clearly next to (either before or after) a candidate's name or across the name, [which] shall be counted as a vote for the candidate..." See 9 NYCRR 6210.15(9).

21. In light of the demonstrated specific errors which the scanning devices used in this election are prone to make, the scanners obvious limitations in automatically determining valid votes, the fact that there are 38 blank, void and scattering ballots, and the closeness of the subject election, *there is* "a substantial possibility that the winner of the election as reflected in



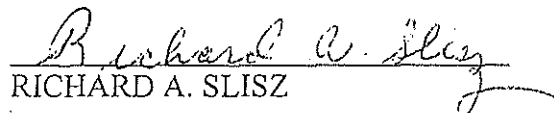
the voting machine or system tally could change if a voter verifiable record audit of additional voting machines or systems or of all voting machines or systems applicable to such election were conducted.” Election Law §16-113.

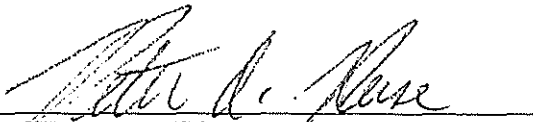
22. Petitioner has no adequate remedy for relief at law or in equity, other than the relief herein requested.

23. No prior application has been made for the relief sought herein, or as is set forth in the proposed Order to Show Cause, hereto annexed.

WHEREFORE, Petitioner respectfully prays for the Court to grant the relief requested in the annexed Order to Show Cause and for a final order granting the relief requested therein, and for such other and further relief as to the Court may seem just, proper and equitable under the circumstances of this case.

DATED: November 23, 2011

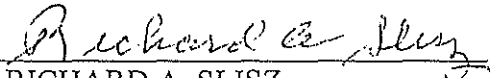
  
RICHARD A. SLISZ

  
PETER A. REESE  
Attorney for Petitioner  
49 Starin Avenue  
Buffalo, New York 14214  
(716) 870-5450  
PReese270@aol.com

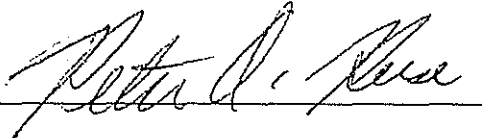
**VERIFICATION**

STATE OF NEW YORK )  
COUNTY OF ERIE ) ss.:  
CITY OF BUFFALO )

RICHARD A. SLISZ, being first duly sworn, deposes and says that he is the petitioner in the foregoing action and that he has read the foregoing Order to Show Cause and Petition and knows the contents thereof, that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters, he believes them to be true.

  
RICHARD A. SLISZ

Sworn to before me this 23rd  
day of November, 2011.

  
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**PETER A. REESE**  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires Sept. 30, 2014