

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA

IN RE: 2020 GENERAL ELECTION)
PROVISIONAL BALLOT)
CHALLENGES)
)

No. 4152 of 2020

OPINION AND ORDER OF COURT

By Harry F. Smail, Jr., Judge:

This matter is before the Court on a *Petition for Review in the Nature of a Statutory Appeal* filed by Nicole Zicarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District. Zicarelli presents two challenges to the Westmoreland County Board of Elections’ (the “Board”) decisions regarding challenged provisional ballots submitted pursuant to the November 3, 2020 general election. Zicarelli challenges first the Board’s decision to count 250 provisional ballots which were cast where the voter had also signed the precinct’s poll book (the “poll book issue”). Zicarelli additionally challenges the Board’s decision to count nine (9) provisional ballots which were submitted without secrecy envelopes, while denying to count an additional three (3) which were submitted without secrecy envelopes (the “secrecy envelope issue”). Petitioner’s appeal will be granted for the reasons that follow.

PROCEDURAL HISTORY

The instant matter commenced with the timely filing of the Petition for Review by Zicarelli on November 18, 2020. This matter was scheduled for argument before this Court on November 20, 2020. Intervention in this matter was requested by the Pennsylvania Democratic Party and Jim Brewster, incumbent candidate for the Senate of Pennsylvania from the 45th Senatorial District. Intervention was granted, and Intervenors filed a Brief in Opposition to Petition for Review in the Nature of a Statutory Appeal. Counsel for Zicarelli, Brewster, the

Board, and the Democratic Party presented argument before this court at the scheduled time and place, and this Court took all arguments and pleadings under consideration in rendering the within opinion and order.

LEGAL STANDARDS

The standard of review in a statutory appeal in which the court has taken no additional evidence is limited to review for an abuse of discretion or error of law. *Newtown Twp. Bd. of Sup'rs v. Greater Media Radio Co.*, 587 A.2d 841 (Pa. Cmwlth. 1991). “An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused.” *Paden v. Baker Concrete Constr., Inc.*, 658 A.2d 341, 343 (Pa. 1995) (citing *Mielcuszny v. Rosol*, 176 A. 236 (Pa. 1934)).

County Boards of Elections are granted “plenary powers in the administration of the election code.” *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952). Under Pennsylvania law, “the Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice.” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). Pennsylvania appellate Courts have repeatedly reiterated that “all things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004).

Pennsylvania’s constitution makes explicit in its first Article that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise

of the right of suffrage.” Pa. Const. art. I, § 5.¹ The Pennsylvania Supreme Court notes that “Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation. This interpretation is consistent with both the historical reasons for the inclusion of this provision in our Commonwealth's Constitution and the meaning we have ascribed to it through our case law.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

In its recent decision involving the propriety accepting of mail-in ballots which were not correctly dated, the Pennsylvania Commonwealth Court noted the following:

Our Election Code does not contemplate a process that bogs down county boards of election or the many election day volunteers to track down voters who committed errors of law in casting their ballots in order to verify the information that the elector, through his or her own negligence, failed to provide on the elector’s mail-in or absentee ballot. Decisions as to whether these defective ballots must be set aside are to be made at the canvass or pre-canvass based on objective criteria established by the General Assembly and what is before the elections board – that being the ballot itself.

In re: 2,349 Ballots in the 2020 General Election, No. 1162 C.D. 2020 (Nov. 19, 2020 (Slip Op. at 12 n. 13) (citations omitted).

APPELLATE ISSUES

POLL BOOK ISSUE

The Court will first address Zicarelli’s challenge to the Board’s decision to uphold the challenge to the 250 provisional ballots which were subject to the poll book issue, and thus permitted their counting. At time of hearing before the Board, testimony was submitted which

¹ The Pennsylvania Supreme Court has repeatedly reiterated that “that the Free and Equal Elections Clause of the Pennsylvania Constitution requires that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 369 (Pa. 2020) (citation omitted).

indicated that numerous Westmoreland County precincts were affected by an issue in which poll workers incorrectly directed voters who were required to submit provisional ballots to additionally sign the precincts' poll books, indicating that they had voted at the poll on a voting machine. *See, e.g.*, 11/13/2020 Tr. at 18, 11/16/2020 Tr. at 18-19, 29-30. This resulted in two separate and distinct sworn affirmations by each voter that he or she had voted; one found on the provisional ballot envelope and one found in the poll book.

Evidence was presented to the Board at the November 16, 2020 hearing in the form of unsworn testimony from twenty three (23) of the at-issue voters themselves that they had only voted once, by provisional ballot and not via the voting machines as indicated by the poll books, with an additional four (4) providing sworn testimony. *See, e.g.*, 11/16/2020 Tr. at 3. Additionally, nineteen (19) sworn affidavits from voters were submitted stating that the individuals had only voted once, again only by provisional ballot. 11/16/2020 Tr. 40-47, 54-58. This results in a total of forty six (46) provisional ballots, challenged for two signatures, which were supported by additional evidence that the voter had voted only once.

In making its decision, the Board accepted all 250 votes on their assumption that the discrepancy of double signatures in each case was most likely caused by error on the part of the judges of elections, owing to probable deficiencies in their poll worker training. 11/16/2020 Tr. at 68-70. The Board decided to accept all 250 votes on this basis, in lieu of individually contacting each voter who had not already provided additional evidence in order to discern whether he or she had voted only once in order to avoid "going down the rabbit hole" of contacting all affected voters. *Id.*

In determining challenges to provisional ballots, "the county board of elections... shall count the ballot if the county board of elections confirms that the individual did not cast any

other ballot, including an absentee ballot, in the election.” 25 P.S. § 3050(a.4)(5)(i). The two signatures by each of the aforementioned 250 voters triggered the Board’s duty to inquire into whether each of these voters had only properly voted once, and thus whether the provisional ballots should be counted. Although witness testimony generally should be sworn in court proceedings, the Pennsylvania Rules of Evidence do not apply to the Board’s review of provisional ballot challenges. 42 Pa.C.S. §5901, 25 P.S. § 3050(a.4)(4)(iii).

Here, it is clear that the Board abused its discretion in accepting two hundred and four (204) ballots where provisional ballots were submitted and the poll book was signed without any further substantiating evidence indicating that only one vote was cast by each voter. Although counsel for the Board and Brewster argue that the affirmation and signature on the provisional ballot which states that the provisional ballot is the sole vote cast is sufficient evidence of the same, this is clearly evidence deficient; indeed, the fact of the two existent affirmations -- one of which being the provisional ballot affirmation -- is the sole cause of the challenge to these 250 provisional ballots.

While the Court is sympathetic to the legitimate concerns regarding disenfranchisement of the 204 voters whose ballots were not supported by evidence before the board, the Court must apply statutes as written. “When the words of a statute are clear and free from all ambiguity, it should be interpreted solely from the plain meaning of its words and the letter of the statute is not to be disregarded under the pretext of pursuing its spirit.” *In re Septa MVFRL Interest Litig.*, 996 A.2d 1099, 1105 (Pa. Cmwlth. 2010). 25 P.S. § 3050(a.4)(5)(i) requires that the Board of Elections “shall count the ballot if the county board of elections *confirms that the individual* did not cast any other ballot, including an absentee ballot, in the election.” (emphasis added).

In the case of the 204 ballots where additional evidence regarding each additional voter was not received, the Board was derelict in their mandate under the Elections Code to confirm that each *individual* did not cast any other ballot. The statute makes plain that these are decisions to be made on an individual, ballot by ballot, voter by voter basis. The Board plainly abused its discretion by failing to fulfill its obligation, even if that entailed “going down the rabbit hole” of contacting each voter individually to ascertain that they had voted only once. Contrary to the Board’s embellished assertion that they must needs contact “a million people” to fulfill their duty under the statute, it is apparent that effort needed to be made only to contact the additional 204 individuals who had not already provided additional evidence. 11/16/2020 Tr. at 68.

Respondents argue that evidence of the pattern of error on the part of the poll workers and judges of elections constitutes sufficient evidence to determine that all 204 provisional ballots were the only ballots cast by those particular electors. Respondents rely on Pennsylvania Rule of Evidence 406 in claiming a pattern or practice of error at the polls. While it may indeed be true that a failure of adequate training for poll workers is the cause of all issues presently in front of this Court, this is simply not enough to satisfy the mandate of 25 P.S. § 3050(a.4)(5)(i), which requires individual validation of each ballot to ensure that no voters submitted more than one ballot in any fashion.

The Board of Elections is a body intended to uphold one of our most cherished and trusted institutions - our guaranteed right to free and fair elections in the Commonwealth. In its dereliction of this duty to the electorate, as well as its duty to the poll workers and judges of elections who braved an unprecedented pandemic to conduct the 2020 general election, the Board clearly abused its discretion in not conducting its due diligence in the confirmation of each individual’s vote under 25 P.S. § 3050(a.4)(5)(i). Though the Board termed this conduct

“temporary” “for this election, for 2020” only, the Court cannot abide the Board’s failure to comply with the statute in any instance. 11/16/2020 Tr. at 68-70.

Indeed, the nonchalant manner in which the Board dismissed its responsibilities to the electorate shocks the conscience of this Court. While the Court is loathe to impose the consequences of a failure of the Board onto an innocent electorate, as well as the two candidates here who earnestly ran their campaigns pursuant to the law, the Court must apply the provisions of the Elections Code consistently and as written by our legislature. Judicial activism in the form of indifference to the clear intent of the legislature is a violation of the separation of powers, and it cannot be indulged in regardless of the Court’s sympathy to the guiltless electors in this instance. The Board’s contention that the sworn and unsworn testimony provided by some voters can be broadly and generally applied to all similar situations runs counter to the plain mandate of 25 P.S. § 3050(a.4)(5)(i), which requires that the Board of Elections “shall count the ballot if the county board of elections confirms that the individual” voted only once.

Considering all evidence before the board and construing strictly 25 P.S. § 3050(a.4)(5)(i), it is clear that the Board erred in counting the 204 ballots which were not supported by individual additional evidence, and so the Board’s decision regarding those 204 ballots must be reversed, while the Board’s decision to accept the 46 ballots which were supported by individual additional evidence must be affirmed.

SECURITY ENVELOPE ISSUE

The Court will now address Zicarelli’s challenge to the Board regarding the secrecy envelope issue. At time of hearing on November 13, 2020, the Board was made aware of three (3) challenged provisional ballots which were submitted without secrecy envelopes in the Lower Burrell 4th Ward 2nd Precinct. 11/13/2020 Tr. at 68. Evidence was received pertaining to a note that was allegedly left by the judge of elections at the Lower Burrell precinct indicating that he

had mistakenly erred in his instructions regarding the secrecy envelopes. 11/13/2020 Tr. at 60-61. The Board denied challenges to these three (3) challenged ballots and thus did not permit them to be counted. At the continuation of hearing on November 16, 2020 the Board was made aware of nine (9) challenged provisional ballots which were submitted without secrecy envelopes in the Derry Township-Cokeville Precinct. 11/16/2020 Tr. at 12-17, 19, 26-27. One voter testified that he was not directed to utilize a secrecy envelope when casting his provisional ballot at this precinct. 11/16/2020 Tr. at 10-11. The board upheld the challenges to these nine (9) challenged ballots, and thus permitted them to be counted.

Ziccarrelli argues that regardless of whether the challenges regarding the secrecy envelopes are upheld or denied, that they must be treated identically on the basis of equal protection as well as the Free and Fair Elections Clause of the Pennsylvania Constitution. At time of argument, all parties agreed that the provisional ballots which were lacking secrecy envelopes should be treated in the same manner, and that the arbitrary manner in which the decisions were made was inappropriate. It is clear that the Board abused its discretion in treating the identical challenges in a disparate manner violative of the Free and Fair Elections Clause of the Pennsylvania Constitution. It is clear from the administration of free and fair elections comes requires the Board and the Court to treat voters in a consistent and equal manner, and to base their decisions solely on the application of the controlling statutes as they are written along with precedent law.

This Court must then address these essentially identical challenges based on the lack of secrecy envelopes in the two at-issue precincts, considering that all challenges should be either upheld or denied. Pennsylvania law plainly states that “[a] provisional ballot shall not be counted if... a provisional ballot envelope does not contain a secrecy envelope.” 25 P.S. §

3050(a.4)(5)(ii). “The word ‘shall’ carries an imperative or mandatory meaning.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004). In the context of mail-in ballots, the Pennsylvania Supreme Court has recently held that “that the secrecy provision language... is mandatory and the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

A plain reading of the provisional ballot statute makes clear that lack of a secrecy envelope is a fatal defect to the counting of a provisional ballot. As stated previously, appellate Courts in Pennsylvania have repeatedly reiterated that “[w]hen the words of a statute are clear and free from all ambiguity, it should be interpreted solely from the plain meaning of its words and the letter of the statute is not to be disregarded under the pretext of pursuing its spirit.” *In re Septa MVRFL Interest Litig.*, 996 A.2d 1099, 1105 (Pa. Cmwlth. 2010). The words of the statute in this instance are unambiguous and mandatory; a provisional ballot lacking secrecy envelope shall not be counted.

It is clear that voters at both precincts suffered from confusion and misdirection through no fault of their own. That is of no moment, however, where the law is explicit that provisional ballots submitted without secrecy envelopes are facially and fatally defective. This Court is therefore constrained to hold that none of the twelve (12) challenged provisional ballot challenges can be upheld, and so the twelve (12) provisional ballots lacking secrecy envelopes in the Lower Burrell 4th Ward 2nd and Derry Township-Cokeville Precincts cannot be counted. The decision of the Board with regard to the Lower Burrell ballots must consequently be affirmed, and the decision of the Board with regard to the Derry Township-Cokeville ballots must be reversed.

Accordingly, this Court enters the following Order:

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No. 4152 of 2020

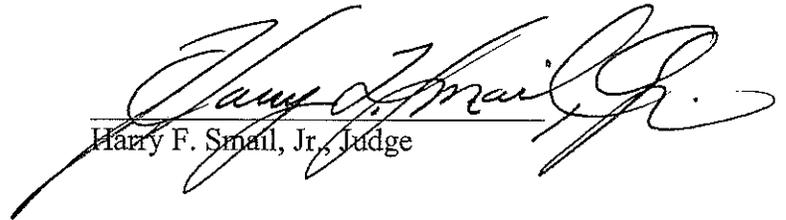
ORDER OF COURT

AND NOW, to wit, this 23rd day of November, 2020, consistent with the foregoing analysis, and after careful consideration, it is hereby ORDERED, ADJUDGED and DECREED that the *Petition for Review in the Nature of a Statutory Appeal* filed by Nicole Zicarelli is GRANTED in accord with the rationale contained in the foregoing opinion, and the decisions of the Westmoreland County Board of Elections regarding the challenged provisional ballots are AFFIRMED in part and REVERSED in part as follows:

1. The Westmoreland County Board of Elections' decision to permit the counting of the two hundred and four (204) challenged provisional ballots in which the poll book was also signed by the voter and as to which no additional evidence was presented is REVERSED.
2. The Westmoreland County Board of Elections' decision to permit the counting of the forty six (46) challenged provisional ballots in which the poll book was also signed by the voter and as to which additional sworn and/or unsworn evidence showing that the voter had not voted twice was presented is AFFIRMED.
3. The Westmoreland County Board of Elections' decision to permit the counting of the nine (9) challenged provisional ballots cast in the Derry Township-Cokeville Precinct is REVERSED.

4. The Westmoreland County Board of Elections' decision to exclude the three (3) challenged provisional ballots cast in the Lower Burrell 4th Ward 2nd Precinct is AFFIRMED.
5. The Westmoreland County Elections Bureau is hereby directed not to count or certify the 216 ballots as defined herein.
6. In accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:



Harry F. Smail, Jr., Judge

ATTEST:

Prothonotary

cc: Matthew H. Haverstick, Esq.
Meilssa Guiddy, Esq.
Christopher Nichols, Esq.
James Antoniono, Esq.
Marco S. Attisano, Esq.