

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 1100 CD 2020

**IN RE: MOTION FOR INJUNCTIVE RELIEF OF
NORTHAMPTON COUNTY REPUBLICAN COMMITTEE**

**APPEAL OF: NORTHAMPTON COUNTY
REPUBLICAN COMMITTEE**

**BRIEF OF
PENNSYLVANIA DEMOCRATIC PARTY**

**Appeal from Order entered November 3, 2020,
in the Court of Common Pleas of Northampton County
Docketed at No. C0048CV2020-6915**

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I. STATEMENT OF JURISDICTION

The Commonwealth Court has jurisdiction over this Appeal pursuant to 42 Pa. C.S.A. § 762 which grants the Commonwealth Court of Pennsylvania exclusive jurisdiction over Appeals from Final Orders relating to elections, campaign financing or other election proceedings.

II. ORDER IN QUESTION

AND NOW, this 3rd day of November, 2020, upon consideration of the oral motion of the Northampton County Republican Committee to Enjoin the Northampton County Board of Elections from disclosing the identity of cancelled ballots during pre-canvassing, the upon consideration of the arguments presented thereon, it is hereby ordered that the motion for injunctive relief is hereby **DENIED**.

The court reporter shall immediately transcribe the November 3, 2020 hearing in anticipation that the Northampton County Republican Party will file a Notice of Appeal to the Pennsylvania Commonwealth Court.

BY THE COURT:

/s/ Michael J. Koury, Jr. _____
MICHAEL J. KOURY, JR.,
PRESIDENT JUDGE

III. STATEMENT OF QUESTION INVOLVED

DID THE LOWER COURT ERR IN DENYING AN ORAL MOTION SEEKING AN INJUNCTION AGAINST THE NORTHAMPTON COUNTY BOARD OF ELECTIONS TO PROHIBIT THE BOARD FROM DISCLOSING THE NAMES AND IDENTIFYING INFORMATION OF VOTERS WHOSE MAIL-IN BALLOTS WERE CANCELLED DURING PRE-CANVASSING WHERE PETITIONER PRESENTED NO EVIDENCE TO ESTABLISH IMMEDIATE AND IRREPARABLE HARM, LIKELIHOOD OF PREVAILING ON THE MERITS, OR HARM TO THE PUBLIC INTEREST?

Suggested Answer: “NO”

IV. STATEMENT OF THE CASE

On Election Day, November 3, 2020, the Northampton County Republican Committee presented an oral motion seeking an injunction against the Northampton County Board of Elections to prohibit the Board from disclosing the names and identifying information of voters whose mail-in ballots were cancelled during pre-canvassing that had commenced at 7:00 A.M. on that day. Prior to the activities on that day, the Board of Elections examined all mail-in ballots for facial conformity with the Election Code and cancelled those ballots that did not conform, reporting that action to the Department of State who logged it into the SURE System, which would allow public access for anyone to determine whether a voter's vote was cancelled, i.e. deemed void. Automatic notification had been provided to all those prior to November 3 whose ballots were deemed cancelled to allow them an opportunity to cure the deficiency by the filing of a provisional ballot.

On November 3, 2020, the Board of Elections commenced opening of the ballots and at that time it was determined certain ballots were not in conformity with the Election Code due to either failure to use the "privacy envelope" or the placement of identifying markings on the privacy envelope itself, each of which would result in cancellation.

The Board of Elections was requested by the Pennsylvania Democratic Party to disclose to both the Pennsylvania Democratic Party and the Northampton County Republican Committee, or any other canvass watchers present, the identities of those voters whose ballots were cancelled so that notification could be made to give them an opportunity to cure as well.

The effort to secure that information was nonpartisan and solely for the purpose of voter protection, i.e. not disenfranchising electors for procedural reasons.

The Election Code allows those who have filed cancelled mail-in ballots to cure any deficiency by filing a provisional ballot at their polling place thereby giving them an opportunity to cast a ballot subject to further review.

As the Court is aware, provisional ballots, under the Election Code, are subject to scrutiny, and subject to challenge. At the time of the writing of this Brief, provisional ballots are being examined by representatives of all parties and candidates. The parties and candidates have been informed that formal Challenges will be permitted during the provisional ballot canvass this coming Monday, i.e. November 9, 2020. Hearings by the Board of Elections on those Challenges are now scheduled for November 13, 2020, and judicial review upon appeal, if any, scheduled for November 18, 2020.

We do not know and there is no record of whether any of the individuals whose names were provided to the Pennsylvania Democratic Party or Northampton County Republican Committee on November 3 whose deficient ballots were discovered that day even submitted provisional ballots; however, if they did, the Northampton County Republican Committee would be able to challenge the provisional ballots for whatever legal reasons it deems appropriate, including the fact that they never should have been informed of the deficiency or been allowed to cure.

The parties appeared for a Special Election Hearing on November 3, 2020. The motion made by the Northampton County Republican Committee was an oral motion; no testimony or evidence was submitted except a directive issued by the Commonwealth of Pennsylvania Department of State directing County Boards of Elections to provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected. For ease of reference, we attach that as Exhibit “A.”

An Order was entered denying the motion and on November 5, 2020, the Lower Court filed a Rule of Appellate Procedure 1925(a) Statement explaining the bases for denial.

V. ARGUMENT

The sole object of the preliminary injunction request was to prevent voters from curing deficiencies in mail-in ballots that had been submitted to the Northampton County Board of Elections. Petitioner did not want those voters to know that their mail-in ballots would be cancelled. Petitioner did not want to give those voters an opportunity to cure the deficiency by the filing of a provisional ballot as provided by law.

The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined. *Appeal of Little Britain Township from Decision of Zoning Hearing Board of Little Britain Township, Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa. Comm. 1994). A preliminary injunction is a temporary remedy granted until the parties' dispute can be fully resolved. The party seeking a preliminary injunction bears a heavy burden of proof and must establish all of the following criteria:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages:

(2) greater injury will occur from refusing to grant the injunction than from granting it;

(3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;

(4) the petitioner is likely to prevail on the merits;

(5) the injunction is reasonably suited to abate the offending activity;
and

(6) the public interest will not be harmed if the injunction is granted.

Brayman Construction Corp. vs. Department of Transportation, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. vs. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Patriot-News Company vs. The Empowerment Team of the Harrisburg School District Members*, 763 A.2d 539, 546 (Pa.Comm. 2000). “When a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra vs. School District of the City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972).

Petitioner presented no testimony nor was able to articulate “immediate and irreparable harm.” If those voters in question learned about the deficiency and filed provisional ballots then Petitioner could contest the validity of those ballots during the Provisional Ballot Challenge process.

Not only was there no harm, but little in the argument that was presented in the Lower Court addressed the fundamental due process and equal protection rights of the voters themselves who ought to have had the same opportunity as others to be notified of a deficiency in a timely manner so as to cure. The Board of Elections was following the directive of the Secretary of State.

In summary, Petitioner is not without a remedy, it may seek judicial intervention and relief if any of the individuals who were notified filed a provisional ballot, and it follows the appropriate Election Code provisions to challenge that ballot.

VI. CONCLUSION

Accordingly, Pennsylvania Democratic Party respectfully prays your Honorable Court dismiss Petitioner's Appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gary Neil Astreak', written over a horizontal line.

GARY NEIL ASTREAK, ESQUIRE
Attorney for
Pennsylvania Democratic Party

From: Marks, Jonathan <jmarks@pa.gov>
Sent: Monday, November 2, 2020 8:38 PM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: Important DOS Email - Clarification regarding Ballots Set Aside During Pre-canvass
Importance: High

Dear County Election Directors,

The Department of State has been asked whether county boards of elections can provide information to authorized representatives and representatives of political parties during the pre-canvass about voters whose absentee and mail-in ballots have been rejected. The Department issued provisional ballot guidance on October 21, 2020, that explains that voters whose completed absentee or mail-in ballots are rejected by the county board for reasons unrelated to voter qualifications may be issued a provisional ballot. To facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.

Kind regards,

Jonathan M. Marks
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Appendix I