

**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION**

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|--|---|------------------------------------|
| Sean Gill, Robert Smith, Tim Ramos, Jackie Rivera | : | |
| - VS - | : | File No. 2022-C-1849 |
| Lehigh County Board of Elections, Phillips Armstrong, Jennifer Allen, Dennis Nemes, Timothy A Benyo, Diane Gordian | : | Assigned Judge: Thomas A. Capehart |
| -VS- | : | |
| Pennsylvania Alliance for Retired Americans | : | |

OPINION

* * *

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**Admitted Pro Hac Vice*

* * *

CAPEHART, J.:

The Court must determine whether Petitioners, Sean Gill, Robert Smith, Tim Ramos, and Jackie Rivera (“Petitioners”) are entitled to a mandatory preliminary injunction requiring the Lehigh County Board of Elections (“Board”) to i) provide in-person monitoring of its five (5) county-wide ballot drop boxes, ii) locate all ballot drop boxes in buildings, and iii) limit the hours of the 24/7 ballot drop box at the Lehigh County Government Center. For the reasons that follow, the Court finds Plaintiffs are not entitled to such extraordinary relief.

PROCEDURAL HISTORY AND UNCONTESTED FACTS

On September 1, 2022, Plaintiffs/Petitioners, four (4) Lehigh County registered voters intending to vote in the November 2022 general election, filed a Complaint in Equity and Mandamus, a Petition for a Preliminary Injunction, and a subsequent Emergency Petition for Special Injunction¹, against the Board and individual Board members, Phillips Armstrong, Jennifer Allen, and Dennis Nemes, and two (2) Lehigh County election officials, Timothy A. Benyo, Chief Clerk (“Chief Clerk Benyo”), and Diane Gordon, Deputy Chief Clerk. (individually and collectively “Respondents”). Petitioners sought to enjoin Respondents from offering voters the

¹ On September 9, 2022 the Court approved a Stipulation between Petitioners and Respondents and precluded the receipt of ballots through drop box locations except for in-person ballots received at the Lehigh County Government Center between 8am and 4pm, pending a full hearing on the Petition for Preliminary Injunction. Thus, the emergency petition is now rendered moot.

opportunity to submit a mail-in ballot to ballot drop boxes unless the drop boxes are located inside a building, accessible only between 9am and 5pm, Monday through Friday, and physically monitored in-person. And, although Lehigh County ensures video monitoring of drop boxes with only the Government Center drop box available on a 24/7 basis, Petitioners assert the aforementioned requirements must be ordered by the Court to ensure that Lehigh County does not accept third-party return of ballots in contravention of state law set forth in In re Canvass of November 4, 2003 General Election, 843 A.2d 1223, 1234 (Pa. 2004).²

On or about September 9, 2022, the Pennsylvania Alliance for Retired Americans (“PARA”)³ filed a Petition seeking to intervene and subsequently filed several Motions seeking to admit out of state attorneys, *pro hac vice*. In anticipation of intervening, and on the same date, PARA filed an Answer in opposition to the pending petition for preliminary injunction. Prior to the October 7, 2022 hearing, and prior to any hearing on the merits of Petitioners’ request for injunctive relief, the Court granted *pro hac vice* admission for PARA’s attorneys for the limited purpose of intervention. After a contested hearing on this issue, the Court granted PARA leave to intervene on behalf of its members,⁴ and counsels’ *pro hac vice* status was no longer limited.

OCTOBER 7, 2022 HEARING

Lehigh County District Attorney James B. Martin (“D.A. Martin”) testified at the October hearing on behalf of Petitioners. Prompted by a letter from the Lehigh County Republican Chair raising concerns of individuals returning multiple ballots at drop boxes during the 2021 general

² Although the In re Canvass of November 4, 2003 General Election decision addressed the validity of absentee ballots, and not no-excuse mail-in ballots at issue in the instant matter, all parties agree that all mail-in ballots must be delivered in-person by the voter who executed the ballot, and the voter is allowed to submit only their ballot to the drop box, otherwise these ballots are “void.” In re Canvass of November 4, 2003 General Election, 843 A.2d 1223, at 1234.

³ PARA is a state wide association of working and retired seniors with approximately 8,700 Lehigh County members within its ranks.

⁴ See, Pa.R.C.P. No. 2327.

election, D.A. Martin conducted an investigation into alleged violations of election law concerning voter use of drop boxes from October 18, 2021 through November 2, 2021. D.A. Martin had county detectives review the video surveillance of the five (5) drop boxes during this time, although admittedly, D.A. Martin's review was not made with scientific certainty. D.A. Martin provided an April 4, 2022 Memorandum to the Board,⁵ summarizing the findings of the investigation. D.A. Martin testified the investigation revealed at least 288 instances where a voter dropped off more than one ballot into a drop box, however, the vast majority of multiple ballot submissions consisted of a voter depositing two (2) ballots inside the drop box, likely that of a spouse or other household member. *Plaintiffs' Exhibit 1*, p.6. At least 29 ballots were returned to the Lehigh County Government Center drop box after business hours. Critically, D.A. Martin acknowledged in his report that there was "no smoking gun" uncovered during this investigation, as the video did not demonstrate a large number of ballots being dropped into the drop boxes at one time, and the most egregious example seen by the county detectives was one person dropping off four (4) or five (5) ballots. *Plaintiffs' Exhibit 1*, pp. 6-7. D.A. Martin declined to prosecute any persons who could be identified that returned multiple ballots, citing to the inherent unfairness of prosecuting a few identified individuals when many more Lehigh County voters returned their ballots through the U.S. mail without any surveillance at all. *Id.* at 6.

D.A. Martin testified that in a letter dated April 26, 2022, he requested the Board improve signage on and around drop boxes, provide in-person monitoring of the drop boxes, and limit the hours of the 24/7 drop box located at the Lehigh County Government Center. He also advised he would be deploying Lehigh County detectives for the May, 2022 primary election to randomly surveil the ballot drop boxes. D.A. Martin's press release advising the voters of Lehigh County in

⁵ *Plaintiffs' Exhibit "1"*.

this regard resulted in two (2) letters from the Pennsylvania Department of State and ACLU taking advising D.A. Martin that the proposed action was unwarranted and potentially unconstitutional. Regardless of the warnings received, D.A. Martin provided in-person monitoring by plain clothes county detectives for the May, 2022 primary.⁶

For the May, 2022 primary election Chief Clerk Benyo, working closely and cooperatively with D.A. Martin, and on behalf of the Board, created conspicuous signage in both English and Spanish with improved warnings to limit the return of multiple ballots at the drop box locations. That signage specifically provides in clear red lettering:

Official Ballot Return

Counterfeiting, forging, tampering with or destroying ballots is a second-degree misdemeanor.

Third-party return of ballots is prohibited unless assisting a disabled voter or an emergency absentee voter. Such assistance requires a signed declaration by the voter and the person rendering assistance.

Contact Lehigh County Election Board immediately if the receptacle is full, not functioning or is damaged. (610) 782-3194 electionboard@lehighcounty.org

Intervenor's Exhibit "B".

The Board did not, however, provide in-person monitoring or limit the hours at the Government Center drop box for the May, 2022 primary election, as suggested by D.A. Martin. Nevertheless, following the May, 2022 primary election and a review of drop box video from that election, D.A. Martin reported that very few instances of voters depositing more than one ballot were noted. Plaintiff's Exhibit "4". Somewhat surprisingly, when asked at the hearing if the in-person monitoring reduced the incidents of third-party ballot drop offs, D.A. Martin opined that he was not sure, but the publicity certainly was an important factor in reducing the observed

⁶ D.A. Martin testified that the monitoring was done randomly and only during certain portions of the day.

violations to nearly zero. Critically, D.A. Martin testified that he uncovered no evidence of election fraud in either the November, 2021 general election or the May, 2022 primary election regarding submission of mail-in ballots to drop boxes.

Next, the Court heard testimony from Chief Clerk Benyo. He testified that in his capacity as chief clerk, he oversees all elections for the Board, including all compliance issues. He is fully familiar with the Election Code, including Act 77⁷. Lehigh County first implemented the use of ballot drop boxes in November, 2020, and presently employs the below listed five (5) drop boxes as follows:

Lehigh County Government Center
24 Hour Drop Box access for deposit located outside at the entrance.

Whitehall Township Building
Monday-Friday 8am – 4 pm

Lehigh County Authority Lobby
Monday-Friday 8:15am – 4:45 pm

Fountain Hill Borough Building
Monday-Friday 8:30am – 4:30 pm

Macungie Borough Building
Monday-Friday 8am – 4 pm

All drop boxes are secure, are video monitored, and are located inside a building, except for the drop box located at the Government Center located inside the entrance doors in the vestibule of the building, and accessible from the outside by a mail slot. Chief Clerk Benyo testified that the County complies with all laws, follows all guidance provided by the Pennsylvania Department of State, and has provided information about the proper submission of mail-in ballots to drop box on

⁷ Act of Oct. 31, 2019, P.L. 552, No. 77, as amended. Among other things, Act 77 authorized no-excuse mail-in ballots, and the law was held constitutional by the Pennsylvania Supreme Court in *McLinko v. Department of State*, 279 A.3d 539 (Pa. 2022).

the official Lehigh County website.⁸ This instruction tells voters that they are only allowed to place their mail-in ballot into the drop box and conspicuous signage in this regard is posted at all drop box locations.⁹ Since mail-in ballots have been in use, no fraud has been detected in Lehigh County with the mail-in ballot process.

Chief Clerk Benyo credibly testified that, at this late date, the Board would be unable to properly find people to physically man the ballot drop box locations and, if required to do so by the Court, the Board would likely be required to remove of all drop boxes in order to comply with the court's directive.

ACT 77

In 2019, the Pennsylvania Governor Wolf signed legislation known as Act 77 and modified the Pennsylvania Election Code by creating, for the first time, no-excuse mail-in voting in Pennsylvania.¹⁰ As previously stated, our Supreme Court recently held that no-excuse mail-in voting passes constitutional muster. *McLinko v. Commonwealth, Department of State*, 279 A.3d 539 (Pa. 2022). And, in accordance with the decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), a county election board is permitted to use drop boxes for the return of mail-in ballots. Accordingly, Pennsylvania's county-based election system vests county boards of elections with "jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions" of the Election Code. 25 Pa.C.S. §2641(a). The Election Code further empowers the county boards to "make and issue such rules, regulations and instructions,

⁸ <https://www.lehighcounty.org/Departments/Voter-Registration>

⁹ See, *Intervenor's Exhibit "A"*. The color photograph depicts the front windows of the Lehigh County Government Center with the posted and red lettered sign conspicuously displayed and secured to the window. In the top right-hand portion of the photograph a security camera is visible.

¹⁰ Prior to Act 77, the Election Code permitted mail-in voting by absentee ballot only. But like absentee voting, Pennsylvania's mail-in voting system requires voters to "opt-in" by requesting a ballot from either the Secretary or the voter's county board of elections. See 25 Pa.C.S. §3146.2(a) and §3150.12(a). In this respect, Pennsylvania differs from states that automatically mail each registered voter a ballot, a practice known as "universal mail-in voting".

not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." *Id.* at §2642(f).

Therefore, to assist counties with its duties under the Election Code regarding the use of drop boxes, the Pennsylvania Department of State issued rigorous "Pennsylvania Absentee and Mail-in Ballot Return Guidance" ("Ballot Return Guidance") *i.e.*, "best practices" with respect to drop boxes. *Intervenor's Exhibit "C"*. The Ballot Return Guidance advises county election boards that drop box hours do not have to be limited to weekday or normal business hours.¹¹ Ballot drop boxes are referred as "secured receptacles" and each ballot return site should have a secure receptacle (*i.e.* drop box) permitting voters to return their own voted ballot.¹² Ballot return sites, including drop boxes, must be official, secure, and marked by signage stating "Official Ballot Return".¹³ All drop boxes must be secured by a lock and sealed with a tamper-evident seal.¹⁴ Only personnel authorized by the county board of elections is allowed access to the ballots inside of a drop box.¹⁵ The use of video surveillance is recommended when "feasible", and video surveillance should be retained by the county election office through 60 days following the deadline to certify the election.¹⁶

Chief Clerk Benyo testified all Lehigh County drop boxes are in compliance with the aforementioned state sanctioned "best practices", and all drop boxes are monitored by video surveillance, which is not specifically mandated by the guidelines. In fact, there is no dispute among the parties that the Board complies with the state departmental requirements and drop box

¹¹ *Intervenor's Exhibit "C"*, p.3.

¹² *Intervenor's Exhibit "C"*, p.5.

¹³ *Id.*

¹⁴ *Intervenor's Exhibit "C"*, p.6.

¹⁵ *Id.*

¹⁶ *Id.*

ballots and that all such ballots are securely collected by only authorized individuals to ensure proper chain of custody, transport, receipt, and processing.

LEGAL BASIS FOR INJUNCTIVE RELIEF

The purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of, thereby preventing irreparable injury or gross injustice. Santoro v. Morse, 781 A.2d 1220, 1229 (Pa. Super. Ct. 2001). Petitioners have the burden of proving their entitlement to injunctive relief. Warehime v. Warehime, 860 A.2d 41, 47 (Pa. 2004). To meet this burden, Petitioners must establish each of the following “essential prerequisites”:

First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.”

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003) (internal citations omitted). If any one of these essential prerequisites is lacking, Petitioners fail to meet their burden. Warehime, 860 A.2d at 46.

Additionally, an injunction that commands the performance of an affirmative act, a “mandatory injunction” is the rarest form of injunctive relief and is often described as an extreme remedy. Woodward Twp. v. Zerbe, 6 A.3d 651, 658 (Pa. Commw. Ct. 2010). The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for

a restraining-type injunction. *Id.* The power to grant or refuse injunctive relief rests in the sound discretion of the court under the circumstances and the facts of the particular case. *Id.* (further citation omitted). In that regard, and like the factors applicable to general injunction relief, an applicant seeking mandatory injunctive relief must establish the following elements: (1) irreparable harm will occur that is not compensable by money damages; (2) greater injury will result from the denial of the injunction than by granting the injunction; (3) the injunction will restore the status quo between the parties; and (4) the party seeking relief has a clear right to relief in an actionable claim. *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547 (Pa. Commw. Ct. 2011).

ANALYSIS

Based upon the evidence established at the hearing, and weighed by this Court, Petitioners have not met their burden of proof to establish all elements required for the issuance of a mandatory preliminary injunction.

The parties agree that the third-party delivery (or dropping off) of a ballot at a drop box without proper written authorization is a violation of the Pennsylvania Election Code and the law.¹⁷ In order to prevent the unlawful third-party return of ballots, Petitioners, however, seek to mandate policies and actions by the Board that are not specifically required under the law, or the Election Code. Petitioners argue because third-party delivery of ballots renders those improperly delivered ballots void, the counting of which may dilute their votes, the Board is required to physically man drop boxes, keep them in a building, and limit drop box hours. Petitioners have failed to cite to any provision in the Election Code mandating those specific actions be taken.¹⁸ Nor do Petitioners

¹⁷ *See, fn 3, supra.* Additionally, the Ballot Guidance provided by the Pennsylvania Department of State specifically advises that voters are only allowed to hand in their own ballot and Chief Clerk Benyo confirms the Board adopts that position as reflected by the information maintained on the official county website.

¹⁸ In fact, Section 1306-D of the election code provides as follows: General rule.--At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on

cite cases where a court has mandated an election board to do so. And while the Board is required to comply with the law, in absence of specific provisions to the contrary, the Board is not required to implement the actions demanded by Petitioners, particularly where the Board is fully compliant with the law and has undertaken and implemented best practice policies that effectively address the harm alleged by Petitioners. Therefore, the Court is unable to conclude Petitioners have a clear right to the relief sought.

Further, any alleged harm appears to be speculative. See, Donald J. Trump for President v. Boockvar, 493 F. Supp.3d 331 (W.D. Pa. 2020)(The alleged harm of vote dilution in challenge to unmanned drop boxes was speculative). Photographs and video stills of individuals delivering more than one ballot observed in a prior election is speculative as it may not happen in the next election. Id. at 378-79. In this matter, the time period between the November, 2021 general election and the May, 2022 primary election benefited Lehigh County voters as the guidance from the state, better information from the Board, and the clear and conspicuous signage posted at secure and video monitored drop box locations reduced third-party ballot delivery to nearly zero. In this regard, D.A. Martin's hearing testimony is quite weighty; he concluded that during the May, 2022 primary elections the incidents of third-party ballot returns at county drop boxes "were very few", and it could not be determined with 100% certainty that it occurred at all. In fact, D.A. Martin attributed the publicity surrounding the issue, and not in-person monitoring, as a primary reason for the reduction of third-party ballot delivery to nearly zero. So, not only is the alleged harm speculative, but it appears that the actions of the Board and the publicity surrounding third-party

which is printed, stamped or endorsed "Official Mail-in Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. **Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in-person to said county board of election.** (emphasis added). 25 Pa.C.S. §1301-D

ballot returns following the 2021 general election proved effective. Thus, the evidence at the hearing establishes the opposite of what Petitioners contend, as in-person monitoring of drop boxes had little or no effect in reducing third-party delivery of mail-in ballots. Accordingly, Plaintiff is unable to prove actual immediate and irreparable harm will occur if a mandatory injunction is not issued.

Additionally, a mandatory injunction is typically issued to direct a party to return the parties to the *status quo ante*, but all actions by the Board have been and remain consistent with the current state of the law. The Election Code is silent on whether drop boxes must be limited to regular business hours or be monitored in-person or placed inside a building. In that regard, Chief Clerk Benyo credibly testified that the Board followed all mandates of the Election Code, as well as the guidance from the Department of State, and at no time limited all its drop boxes to regular business hours inside of buildings or provided in-person monitoring. Petitioners evidence therefore, does not satisfy this element.

Concerning the public interest, and also considering whether voters will suffer greater harm by the granting of the injunction, requires the Court to recognize some basic constitutional principles impacted by Petitioners' request. The right of qualified electors to vote in a state election is recognized as a fundamental right under the equal protection clause of the Fourteenth Amendment. Harper v. Virginia State Board of Elections, 383 U.S. 663, 665, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966). This fundamental right to vote is cherished in our nation because it "is preservative of other basic civil and political rights." Reynolds v. Sims, 377 U.S. 533, 562, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The right to vote extends to all phases of the voting process, from being permitted to place one's vote in the ballot box, Ex parte Yarbrough, 110 U.S. 651, 4 S. Ct. 152, 28 L. Ed. 274 (1884), to having that vote actually counted. United States v. Mosley, 238

U.S. 383, 386, 35 S. Ct. 904, 59 L. Ed. 1355 (1915). Thus, the right to vote applies equally to the "initial allocation of the franchise" as well as "the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). And, Pennsylvania authorizes no excuse mail-in voting as a constitutional method of voting in state elections. *McLinko*, *supra*. Thus, the purpose and objective of the Election Code, including the mail-in provisions added by Act 77, is "[t]o obtain freedom of choice, a fair election, and an honest election return[.]" *Perles v. Hoffman*, 419 Pa. 400, 213 A.2d 781, 783 (1965). To that end, 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. *Id.* at 784. What Petitioners seek, the monitoring of ballot drop boxes, is already provided by 24/7 video monitoring. Adding an in-person requirement may be superfluous to this end as the evidence at the hearing proved that in-person monitoring did not conclusively reduce third-party delivered mail-in ballots to county drop boxes, however, better education and signage, as well as publicity surrounding the issue was far more effective. And, while seemingly innocuous, in-person monitoring as advanced by Petitioners is more likely than not to have the unintended result of in-person intervention at the drop box sites and may unduly interfere with voters lawfully returning their ballots to the drop box. As stated previously, with better and clearer information being provided to voters by the Board and with this information being publicly disseminated to the electorate in a timely fashion, the integrity of mail-in voting via drop boxes in Lehigh County remains safe and secure.

Next, the injunctive relief sought at this late date is likely to create confusion and uncertainty around the election, further eroding the public's confidence in our election process, particularly when mail-in ballots have already been sent to voters with information designed to assist voters when voting by mail, and any changes to these instructions is unlikely to be timely or

clear. As Chief Clerk Benyo noted, the Board's difficulty and inability to staff the drop boxes with Lehigh County employees who must be hired and trained in a very short time would essentially result in elimination of county wide drop boxes entirely. The evidence credibility established that drop boxes are used by many voters at all hours, some even after regular business hours, and thus the realistic probability of the Board removing all drop boxes should the court required Petitioners' mandates, particularly at this late date, would adversely affect the public interest and harm the rights of interested parties.

Lastly, the Board has seen fit to take steps to protect election integrity and comply with Pennsylvania law. In doing so, it has made policy decisions with which the court will not interfere, such as the decision to use drop boxes, not employ manned ballot drop boxes, as well the decision regarding the location and available times for each drop box. Where the law does not clearly dictate, the Court will not second guess the wisdom or efficacy of the Board's policy decisions.

For all the foregoing reasons said Petition is DENIED.

10/18/2022
DATE

BY THE COURT:

Thomas A. Capehart
Thomas A. Capehart, J.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL COURT DIVISION

File No.: 2022-C-1849

Miscellaneous Mandamus

Sean Gill, Robert Smith, Tim Ramos, Jackie Rivera

- VS -

Lehigh County Board of Elections, Phillips Armstrong, Jennifer Allen,
Dennis Nemes, Timothy A Benyo, Diane Gordian

Copies of this Order were e-mailed/mailed to all counsel of record and pro se litigants on
10/19/2022.

236 NOTICE

Pursuant to Pa.R.C.P. § 236, notice is hereby given that an order, decree, or judgment in
the above captioned matter has been entered.

Andrea E. Naugle
Clerk of Judicial Records

**NOTICE: All parties and counsel must maintain correct and current contact information,
INCLUDING E-MAIL ADDRESSES, with the Clerk of Judicial Records Civil Division as
well as through E-File & Serve.**

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