

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

**NICOLE MISSINO, GREGORY
STENSTROM, and LEAH HOOPES,**

Plaintiffs,

v.

**DELAWARE COUNTY BOARD OF
ELECTIONS
and
DELAWARE COUNTY BUREAU OF
ELECTIONS**

Defendants.

No.: CV-2022-008091

CIVIL ACTION

**BRIEF IN SUPPORT OF
PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
PENDING HEARING FOR PRELIMINARY INJUNCTION**

Since the closing of the polls on November 8, Defendants have committed serious violations of the Pennsylvania Election Code (Act 320 of 1937; 25 P.S. § 101, *et seq.*) over and above the pre-election violations already demonstrated in this Court.

Of immediate concern, Defendants have breached their statutory and fiduciary duties:

1. by mailing official ballots to unverified voters — a fact that Defendants have already admitted in this Court.
2. by deleting at least 2,778 records of requests for mail-in ballots;
3. by deleting, after Election Day, at least 194 voter registration records of individuals whose mail-in ballots were counted in the vote totals.
4. by permitting a partisan third-party to control and tabulate mail-in ballots.
5. by adulterating the chain of custody by detouring the election-night journey of the county's physical ballots and v-drives for six hours into a closed building, where poll watchers were prohibited from entering, before continuing the delivery to the centralized counting center at the Wharf Building in Chester.

Defendants' egregious breaches of statutory and fiduciary duties require scrutiny before the Delaware County election results can be lawfully, accurately, and confidently certified.

Accordingly, Plaintiffs respectfully ask this Court to:

1. enter a temporary restraining order prohibiting Defendants from certifying the Delaware County results of the November 8, 2022 general election;
2. permit Plaintiffs and Plaintiffs' representatives to observe and document, by video, audio, and photographic recording, all election-related activities undertaken by Delaware County until further order of this Court;
3. schedule a hearing for a preliminary injunction on certification of the election results at which Plaintiffs can present further evidence gathered during observation of the remaining election-related activities; and
4. order Defendants and their agents to preserve all physical and electronic records and items without alteration or destruction for Plaintiffs' inspection and discovery in this civil action.
5. within 24 hours, or 72 hours before certification, produce the following to either prove or refute identification of "qualified electors" against the Pennsylvania SURE voter registration database and other Department of State databases.
6. The outside envelope images of each mail in ballot that was run through the BlueCrest mail sorter, and the envelope count maintained by the sorter for the period of October 7th to present, via readable, exported electronic file on SSD media.
7. The complete system logs for the BlueCrest sorter for the period of October 7th to present via readable, exported electronic file to determine when pre-canvassing occurred prior to public observation, also provided via readable, exported electronic file on SSD media.
8. (Note: These are defined and designed functions for the BlueCrest sorter and easily performed by a system administrator that can be easily performed in less than an hour)
9. within 24 hours, observer and volunteer sign in logs for the Wharf Building for November 4th, 2022, to present
10. produce vDrive Cast Vote Record (CVR) and ballot images all machines that scanned or otherwise tabulated or counted ballots for the 165th District, at a minimum, and the County as a whole (which can be easily and readily produced from the vDrives as a designed and defined function of the Hart Verity Election Management System (EMS) in less than a day by a single system administrator)

I. FACTUAL BACKGROUND

For expedience, the facts are stated in the relevant argument subsections below.

II. ARGUMENT

Plaintiffs meet all requirements for immediate injunctive relief. A party seeking preliminary injunctive relief must show:

- (1) “that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages”;
- (2) “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”;
- (3) “that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”;
- (4) “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”;
- (5) “that the injunction it seeks is reasonably suited to abate the offending activity”;
and,
- (6) “that a preliminary injunction will not adversely affect the public interest.”

Warhime v. Warhime, 860 A.2d 41, 46-47 (Pa. 2004) (quoting *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount Inc.*, 828 A.2d 995, 1002 (Pa. 2003)).

Here, Plaintiffs easily meet all six of these requirements, as detailed below.

A. **The temporary restraining order requested is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.**

Plaintiffs have a pending action in this Court alleging that Defendants have violated, and continue to violate, their fiduciary duties. Defendants are responsible to the citizens of Delaware County, of this Commonwealth, and of the United States to conduct and tabulate elections in a manner that is lawful, transparent, and accurate. As detailed below, Defendants have failed to do

so on all three counts. Defendants have violated the law, concealed the chain of custody of election materials, such as ballots, scanners, and v-drives, actively prevented public observation of election activities, and have published wildly inaccurate information to the public. Because elections occur annually, Plaintiffs will not have an opportunity to discover evidence for use in their civil action until next year. More importantly, the societal strife and mistrust Defendants have created by violating their duties will continue to fester in this community for another two years, until the next Federal election. These harms to the public and to Plaintiffs are immediate and irreparable and cannot be compensated by damages.

B. Greater injury would result from refusing an injunction than from granting it, and issuance of an injunction will not substantially harm other interested parties in the proceedings.

The injury to the public and to Plaintiffs of the complete loss of confidence in the legitimacy of elections is exponentially larger than the mere inconvenience to Defendants' of allowing the citizenry to exercise their right to observe the procedures by which their votes are tallied.

C. The temporary restraining order will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct

Preventing Defendants from certifying the results of the November 8, 2022 general election and allowing Plaintiffs to observe the procedures Defendants utilize in reconciling the election results will hold the parties in their current state, rather than allowing Defendants to continue to conceal their actions from public scrutiny.

D. The activity the temporary restraining order seeks to restrain — Defendants' unlawful concealment of their violations of their fiduciary duties — is actionable, and Plaintiffs are likely to prevail on the merits.

Plaintiffs Complaint states causes of action for Defendants' breach of their fiduciary duties relating to the conduct of elections. Plaintiffs will demonstrate dozens of breaches by Defendants in the trial of this action but have selected the following five for presentation here.

1. Defendants breached their statutory and fiduciary duties by mailing ballots to individuals that Defendants had not verified as "qualified electors."

As previously demonstrated in this Court, Defendants violated Section 1305-D of Act 77 of 2019 (which are part of the Election Code) by mailing official ballots to individuals that Defendants had not verified as "qualified electors."

There are six steps that must occur in sequence before an individual can receive an official mail-in ballot:

1. The individual must be registered to vote.
2. The individual must submit an application for a mail-in ballot.
3. The county board of elections must verify that the applicant's proof of identification in the application is legitimate.
4. The county board of elections must verify that the information in the application (such as address, date of birth, etc.) matches the individual's voter registration information.
5. The county board of elections must approve the application for a mail-in ballot.
6. The county board of elections must deliver or mail the ballot to the applicant.

Only a "registered elector" may vote in an election. Election Code § 1301(b), ("No individual shall be permitted to vote at any election unless the individual is registered under this subsection."). An individual can be a "registered elector" only if the individual:

1. "will be at least 18 years of age on the day of the next election;"
2. "has been a citizen of the United States for at least one month prior to the next election;"

3. “has resided in this Commonwealth . . . for at least 30 days prior to the next ensuing election;”
4. “has resided in . . . the election district where the individual offers to vote for at least 30 days prior to the next ensuing election;” and
5. “has not been confined in a penal institution for a conviction of a felony within the last five years.”

Election Code § 1301(a).

The individual must meet all five conditions to be a registered elector. *Id.* A “registered elector” is a “qualified elector” if the elector still meets the above five requirements at the time of the relevant election. Election Code § 701 (Qualifications of Electors).

Second in time, the “qualified elector” must submit an application for a mail-in ballot.

Third, the county board of elections must verify the applicant’s identification and, fourth, must verify that the application information matches the applicant’s voter registration information:

(a) Approval process.-- The county board of elections, upon receipt of any application of a qualified elector under section 1301-D, shall determine the qualifications of the applicant by *verifying* the *proof of identification* and *comparing the information provided on the application with the information contained on the applicant's permanent registration card*.

Act 12 of 2020 § 1302.2-D(a) (Approval of application for mail-in ballot) (emphasis added).

The fifth step — approval of the application — comes *after* the verifications are complete: “If the board is satisfied that the *applicant is qualified to receive an official mail-in ballot*, the application shall be marked ‘*approved*.’” *Id.* at (a)(1) (emphasis added).

The sixth and final step — delivery or mailing of the ballot to the applicant — can only happen after the approval of the application:

The county board of elections, upon receipt and *approval* of an application filed by a qualified elector under section 1301-D, shall commence to deliver or mail official mail-in ballots as soon as a ballot is certified and the ballots are available.

Act 77 of 2019 § 1305-D (emphasis added).

Thus, in order to approve an application for a mail-in ballot, the board of elections must verify the qualifications of the applicant. Only after approving the application for a mail-in ballot can the board of elections deliver an official ballot to the applicant. *Id.*

Defendants previously admitted in this Court, through counsel, that they sent approximately 500 mail-in ballots to applicants before verifying that they were “qualified electors,” as required by § 1302.2-D(a). Thus, Defendants have already admitted that they violated the Election Code. But the potential universe of unverified mail-in ballots is over 65,000 ballots.

2. Defendants breached their statutory and fiduciary duties by deleting at least 2,778 records of requests for mail-in ballots.

More troubling than failing to verify the qualifications of mail-in voters, Defendants have deleted at least 2,778 records of applications for mail-in ballots. In her attached affidavit (Exhibit A, hereto), Joan Weber explains that on November 4, 2022, she downloaded the County’s publicly-available dataset stating the number of mail-in ballots requested by individuals and the number of mail-in ballots distributed to individuals. On November 10, 2022, she downloaded the same dataset.

The November 4 dataset stated that total requests were 67,928. The November 10 dataset stated that total requests were 67,192. Thus, the number of mail-in ballots that Defendants assert were requested DECREASED by 736 over the course of six days. It is impossible for requests to decrease in number at a later date.

Next, the November 4 dataset stated that Defendants distributed 67,803 mail-in ballots. But the November 10 dataset stated that Defendants distributed 67,063 mail-in ballots. Thus, the number of mail-in ballots that Defendants assert they distributed DECREASED by 740 over the

course of six days. Again, it is impossible for the number of mail-in ballots distributed to have decreased in number at a later date.

Worse yet, on Election Day, November 8, 2022, Defendants published the number of mail-in ballots requested as 65,150. *See Exhibit B.* That is a DECREASE of 2,778 requests from the number stated by Defendants just four days earlier. This enormous decrease in the number of mail-in ballot applications reported by Defendants defies logic.

Defendants have a statutory and fiduciary duty to maintain meticulous records of election proceedings, especially mail-in ballots that are requested and distributed. Defendants have violated those duties to the point of destroying the citizenry's confidence in Delaware County's electoral process.

3. Defendants breached their statutory and fiduciary duties by deleting, after Election Day, at least 194 voter registration records of individuals whose mail-in ballots were counted in the vote totals.

In her attached affidavit (Exhibit A hereto), Joan Weber explains that she downloaded another publicly-available dataset that identified mail-in ballot requesters by birthdate, voting precinct, and party affiliation. Ms. Weber was able to correlate those metrics with another publicly-available dataset that lists the names of individual voters along with the above-three data points. From there, she was able to determine that, in the three days following the election, Defendants had deleted the records of 194 individuals whose mail-in ballots were actually counted in the returns of this election. In other words, Defendants counted mail-in ballots for voters that do not exist.

4. Defendants breached their statutory and fiduciary duties and adulterated the chain of custody by detouring the election-night journey of the county's physical ballots and v-drives for six hours into a closed building, where poll watchers and observers were prohibited from entering, before delivering the ballots and v-drives to the centralized counting center at the Wharf Building.

At the close of the polls on November 8, 2022, the Judges of Elections for all voting precincts in the county delivered their voted ballots, unused ballots, tabulating machines, and v-drives to the Media Voter Services Center at 201 West Front Street, as instructed by Defendants. Defendants are required to audit, reconcile, and certify the election results on November 22nd, 2022. Defendants designated the Wharf Building in Chester, Pennsylvania, as the location for the audit, reconciliation, and certification of the election results. Thus, all of the items the Judges of Elections returned to the Voter Services Center had to be transported to the Wharf Building.

Because confidence in the integrity of elections is of paramount importance to the stability of our society, these election items must be strongly protected and a strict chain of custody of these election items must be well documented. Accordingly, law enforcement personnel were present to escort vehicles transporting the election items from the Voter Services Center to the Wharf Building.

As detailed in the attached affidavit of Julie Yu (Exhibit C, hereto), the undocumented, unpublished, circuitous transit of Drop Box ballots, and observations specific to time lags that are incongruent with Plaintiff Stenstrom's observations as a certified poll watcher from 7am Election Day on November 8th to 7:30am on November 9th, 2022 (24 hours continuous observation) indicate breaks in chain of custody, and inexplicable lapses in time between when election materials (ballots, vDrives, green bags, grey bags, etc.) were dropped off at intermediate waypoints and made their way to the Wharf Building. No poll watchers or observers were permitted to enter the building or observe the conduct of Defendants or confirm the security of the voted ballots, unused ballots, tabulating machines, and v-drives.

5. Defendants breached their statutory and fiduciary duties by permitting a partisan third-party to control and tabulate mail-in ballots.

Defendants have a statutory and fiduciary duty to prevent partisan third parties from controlling and tabulating all ballots. In a clear breach of those duties, Defendants allowed a politically-partisan group, wearing vests purporting themselves to be “Voter Protection” services, to handle, control, and even tabulate ballots at the Wharf Building. The participation of this partisan third party in the tabulation process is described in the affidavit attached hereto as Exhibit D.

E. The temporary restraining order is reasonably suited to abate the offending activity.

As demonstrated above, Defendants’ offending activity is twofold. First, Defendants are continuing to violate Pennsylvania law and breach their fiduciary duties. Second, Defendants are attempting to conceal their violations and breaches from Plaintiffs and the public. The temporary restraining order Plaintiffs propose will prevent Defendants from certifying an unlawfully-conducted election and remove the barricades Defendants have erected to conceal their activities.

F. The temporary restraining order will not adversely affect the public interest, it will promote it.

It is undeniable that the public interest is best served by allowing the public to view the procedures and conduct of elections. Defendants’ actions, such as delivering mail-in ballots to unverified recipients, deleting records, detouring the County’s ballots and v-drives to a closed building in the middle of the night before delivering them to the counting center, and allowing a partisan group to control and count ballots, are decidedly NOT in the public interest.

III. RELIEF REQUESTED

Defendants' egregious breaches of their statutory and fiduciary duties have already destroyed public confidence in Delaware County's election process. Indeed, the County is considered by many Americans as a hotbed of corruption. Defendants' actions surrounding this election require immediate scrutiny before the Delaware County election results can be lawfully, accurately, and confidently certified. Accordingly, Plaintiffs respectfully ask this Court to:

1. enter a temporary restraining order prohibiting Defendants from certifying the Delaware County results of the November 8, 2022 general election;
2. permit Plaintiffs and Plaintiffs' representatives to observe and document, by video, audio, and photographic recording, all election-related activities undertaken by Delaware County until further order of this Court;
3. schedule a hearing for a preliminary injunction on certification of the election results at which Plaintiffs may present further evidence gathered after observing and documenting the remaining election-related activities; and
4. order Defendants and their agents to preserve all physical and electronic records and items without alteration or destruction for Plaintiffs' inspection and discovery in this civil action, with clear penalties for defiance of such preservation order.
5. within 24 hours, or 72 hours before certification, produce the following to either prove or refute identification of "qualified electors" against the Pennsylvania SURE voter registration database and other Department of State databases.
6. The outside envelope images of each mail in ballot that was run through the BlueCrest mail sorter, and the envelope count maintained by the sorter for the period of October 7th to present, via readable, exported electronic file on SSD media.
7. The complete system logs for the BlueCrest sorter for the period of October 7th to present via readable, exported electronic file to determine when pre-canvassing occurred prior to public observation, also provided via readable, exported electronic file on SSD media.
8. (Note: These are defined and designed functions for the BlueCrest sorter and easily performed by a system administrator that can be easily performed in less than an hour)
9. within 24 hours, observer and volunteer sign in logs for the Wharf Building for November 4th, 2022, to present

10. produce vDrive Cast Vote Record (CVR) and ballot images all machines that scanned or otherwise tabulated or counted ballots for the 165th District, at a minimum, and the County as a whole (which can be easily and readily produced from the vDrives as a designed and defined function of the Hart Verity Election Management System (EMS) in less than a day by a single system administrator)

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Respectfully submitted:



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