

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

MICHELLE M. SCHELLBERG, *et al.*,
Petitioners

v.

CENTRE COUNTY BOARD OF
ELECTIONS,
Respondent

No. 2024-CV-1220-CI

Attorney for Petitioners:
Attorneys for Respondent:

Louis T. Glantz, Esquire
Elizabeth A. Dupuis, Esquire/
Michael Libuser, Esquire

OPINION and ORDER

Rater, J.

Presently before the Court are several filings. On May 7, 2024, an “Appeal from the April 23, 2024 Primary Election as May Be Confirmed by the Centre County Board of Elections” (“Appeal”) was filed by Petitioner Michelle M. Schellberg (“Petitioner Schellberg”) and joined by eighteen individuals who identify as “qualified registered voters in Centre County” (collectively, “Petitioners”). On May 8, 2024, the Court entered an Order scheduling a hearing on the Appeal for May 16, 2024. On May 13, 2024, Respondent Centre County Board of Elections (“the Board”) filed a “Motion to Quash Appeal as Untimely and Request for Cancellation or Conversion of May 16, 2024 Hearing,” along with a supporting Brief. On May 14, 2024, the Court entered an Order denying the Request for Cancellation or Conversion of May 16, 2024 Hearing and scheduling hearing on the Motion to Quash Appeal as Untimely for May 16, 2024.

On May 16, 2024, within an hour before the hearing, Petitioners filed a “Brief in Support of Petition” and a “Praeipce to Attach” in which it asked to attach eight “Verifications to the Petition” filed on May 7, 2024. The Court accepts the Verifications as attachments to the Appeal filed on May 7, 2024.

The hearings were held as scheduled on May 16, 2024, but counsel for both parties elected to proceed with oral argument and chose not to present testimony from any witnesses. Counsel for both parties indicated a desire to submit Briefs, and the Court set a deadline of May 21, 2024. Also at the hearing, Petitioners' counsel asked that copies of the subject ballot outer envelopes be made part of the record, with the understanding that signatures and voter identification information would be blackened out. The Court indicated that it did not see a problem with such envelopes being made part of the record and turned to counsel for the Board for input. Counsel for the Board responded that she agreed with submitting such envelopes into the record as discovery. A time deadline for the submission was not discussed; however, the Court assumed they would be submitted by the briefing deadline of May 21, 2024.

On May 20, 2024, the Board filed an "Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes and Supplement to Motion to Quash Appeal Recast as 'Election Contest.'" On May 21, 2024, Petitioners filed "Petitioners' Brief in Response to Respondent, Centre County Board of Elections, Second Motion to Quash and Motion to Prevent Disclosure of Ballot Outer Envelopes." Thereafter on May 21, 2024, the Board filed "Appellee's Omnibus Brief and Answer in Response to Appeal and in Support of Motion to Quash as Untimely."

The Court received a Motion for Leave to file Amicus Brief in Support of Respondent that was filed by the Secretary of the Commonwealth Al Schmidt and the Department of State on May 20, 2024. On May 22, 2022, the Court entered an Order granting said Motion and directing the prothonotary to docket the amicus brief.

Based on the applicable statutory and case law: (a) the Appeal from the April 23, 2024 Primary Election as May Be Confirmed by the Centre County Board of Elections is DISMISSED WITH PREJUDICE; (2) the Motion to Quash Appeal as Untimely is GRANTED; (3) the

Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes is rendered MOOT; and (4) the parties' requests for fees and costs are DENIED.

Factual Background

The 2024 primary election occurred on April 23, 2024 ("the primary election"). In connection with the primary election, the Board's staff flagged 95 mail-in ballots for further review because 57 were missing the last two digits of the year (namely "24"), 13 were missing the day or the month, and 23 reflected the "wrong date altogether" on the ballot outer envelopes ("the envelopes"). (Appeal, ¶ 4; Appeal, Exhibit 1; Omnibus Brief, p. 3). With respect to the other 2 ballots, the Board flagged them, but ultimately concluded that those two "[s]hould have been counted" and were inadvertently flagged. (Appeal, Exhibit 1; Motion to Quash, ¶ 4).

A public meeting of the Board was held on April 25, 2024, at which the Board canvassed the ballots and voted unanimously to accept the ninety-five (95) mail-in ballots. (Appeal, ¶ 4; Board of Elections Minutes of April 25, 2024, attached as Exhibit A to Motion to Quash and submitted at hearing as Petitioners' Exhibit 1).

A subsequent public meeting of the Board was held on April 30, 2024, at which Petitioner Schellberg and Petitioners' counsel appeared and made public comments, asserting that the Board should not have accepted the ballots due to date-related deficiencies on the envelopes. Petitioners' counsel also submitted a memorandum describing statutory and case law which Petitioners assert supports that "[a]bsentee ballots which are undated, incorrectly dated, or unsigned, are invalid under Pennsylvania law which has been affirmed by the Pennsylvania Supreme Court and the Federal Third Circuit." (Appeal, ¶ 11; Appeal, Exhibit 2; Board of Elections Minutes of April 30, 2024, attached as Exhibit B to Motion to Quash and submitted at hearing as Petitioners' Exhibit 1).

Also at the Board meeting on April 30, 2024, the chair of the Board announced the unofficial results for the primary and the Board voted unanimously to pre-certify the unofficial results of the primary to the Department of State, which included the 95 ballots. (Board of Elections Minutes of April 30, 2024, attached as Exhibit B to Motion to Quash and submitted at hearing as Petitioners' Exhibit 1).

The Board was scheduled to certify the results of the primary at a Board meeting on May 7, 2024 at 3:00 p.m. (Board of Elections Agenda, Exhibit C to Motion to Quash). However, at 2:00 p.m. on May 7, 2024, the Petitioners filed the subject Appeal. The Appeal seeks: (1) an Order that the "2024 [primary] election results not be certified;" and (2) an Order that in all future elections the Board shall "reject all mail-in ballots not in compliance with Pennsylvania law specifically 3156 [sic] P.S. §3146(a)..." (Appeal, p. 3). At its 3:00 p.m. meeting, the Board decided to temporarily postpone certifying the election results, explaining that it did so "in light of the Appeal, and out of an abundance of caution." (Motion to Quash, ¶ 16).

Discussion

I. The Court Lacks Jurisdiction to Decide the Appeal Because it is Untimely

Jurisdiction of this Court to resolve an election dispute attaches only if the statutory requirements for filing an election dispute are strictly followed. This was recently discussed by the Pennsylvania Commonwealth Court in *In re Contest of Nov. 7, 2023 Election of Towamencin Township*, No. 1482 C.D. 2023, 2024 WL 1515769, at *4 (Pa. Cmwlth. Apr. 8, 2024) as follows:

The jurisdiction of the courts in election contests is not of common law origin but is founded entirely upon statute, and therefore it cannot be extended beyond the limits defined by Acts of Assembly." *In re Granting Malt Beverage Licenses in Greene Twp., Franklin Cnty.*, 1 A.2d 670, 671 (Pa. 1938). Thus, compliance with any mandatory appeal or filing period is a prerequisite to Common Pleas' ability to grant any relief to Appellants. *Appeal of Orsatti*, 598 A.2d 1341, 1342 (Pa. Cmwlth. 1991). See also *Pa. Dental Ass'n v. Ins. Dep't*, 516 A.2d 647, 654 (Pa. 1986)

(“Periods of time set for filing appeals are jurisdictional.”). “Compliance with statutorily imposed time limitations is especially important in election cases.” *In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 307 (Pa. 1974); *see also In re James*, 944 A.2d 69, 73 (Pa. 2008) (holding statutory period for filing objection petitions under the Code is mandatory). “[T]he fundamental policy reasons behind having such limitations’ is that ‘[t]he continuing and efficient operation of government is dependent upon the prompt resolution of election contests.” *Koter v. Cosgrove*, 844 A.2d 29, 33 (Pa. Cmwlth. 2004)...

Towamencin Township, at *4.

The timeliness of the Appeal depends upon whether the Appeal is an appeal from the Board’s decision to canvass and count the 95 ballots or an election contest claiming the primary was illegal. Upon careful review of the allegations in the Appeal and the arguments raised by Petitioners at the hearing and in written submissions, the Court finds that Petitioners have raised a challenge to the Board’s canvassing and counting decision, not an election contest.

A substantially similar situation existed in the *Towamencin Township* case. There, the parties disputed the proper characterization of the challenge at issue when the pleading was styled as a “Petition for Election Contest *Or in the alternative*, Petition for Election Contest *Nunc Pro Tunc*.” *Id.* at *5. The petitioners were disputing the Montgomery County Board of Elections’ decision to recanvas and count six mail-in and absentee ballots that lacked a date or contained an incorrect date. *Id.* at *2. The petitioners claimed that their petition was not seeking to challenge the board’s decision to recanvass the disputed mail-in ballots, but was instead seeking to contest the election based on it being illegal. *Id.* at *3. The board argued, and the lower court concluded, that the Petition, in substance, sought to appeal the board’s decisions. *Id.* at *5. Finding that it was the alleged errors of the board that the petitioners claimed caused the illegal election, the Commonwealth Court agreed with the lower court and held that the petition, while styled as an

election contest, was substantially an appeal challenging the board's decisions. *Id.* Accordingly, the petition was untimely and the lower court lacked jurisdiction. *Id.* at *6.

In the present case, the dispute concerning the proper characterization of Petitioners' Appeal must reach the same result reached by the Commonwealth Court in *Towamencin Township*. Petitioners' suggestion that the Appeal is a petition for an election contest challenging the legality of the primary election, rather than an appeal from a decision of the Board, is plainly inapposite. Just as the alleged illegality of the election at issue in *Towamencin Township* was caused by allegedly erroneous decisions of the Montgomery County Board to canvass and count mail-in ballots with no dates or incorrect dates, the illegality alleged here by Petitioners finds its root in the Board's decision to canvass and count ballots with incomplete or incorrect dates. It follows that, like the Petition at issue in *Towamencin Township*, Petitioners' Appeal is substantially an appeal challenging the decisions of the Board, despite any attempt to frame the Appeal as a petition for an election contest.

Election contests are challenges to certain races on the grounds that the race is illegal. The Appeal is not such a challenge. Although as pointed out by Petitioners, the Appeal asserts that the Board's actions were "unlawful," the allegedly unlawful acts complained of are the Board's canvassing and counting decisions. Any way we look at it, the instant action brought by Petitioners is an appeal from a decision of the Board.

The provision of the Pennsylvania Election Code governing appeals from decisions of a county board provides, in relevant part, that:

Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election...**may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not**, to the court [of common pleas of the proper county], setting forth why he feels that an injustice has been done, and praying for such order as will give him relief.

25 P.S. § 3157(a) (emphasis added). Here, the Board voted unanimously to canvass and accept the ninety-five (95) mail-in ballots at the April 25, 2024 public meeting. (Appeal, ¶ 4; Board of Elections Minutes of April 25, 2024, attached as Exhibit A to Motion to Quash and submitted at hearing as Petitioners' Exhibit 1). Thereafter, the April 30, 2024 public meeting was held, at which Petitioner Schellberg and Petitioners' counsel appeared and made public comments and at which the Board voted unanimously to pre-certify the unofficial election results to the Department of State, which included the 95 ballots. (Board of Elections Minutes of April 30, 2024, attached as Exhibit B to Motion to Quash and submitted at hearing as Petitioners' Exhibit 1).

In *Towamencin Township*, the board made a public announcement on November 22, 2023 that it would recanvass disputed mail-in ballots at a meeting to be held five (5) days later. *Id.* at *5. The Commonwealth Court recognized that public announcement as a “decision of the Board” for purposes of commencing the two-day appeal period under 25 P.S. § 3157(a). *Id.* Alternatively, the Court reasoned, the actual recanvassing held on November 27, 2023 could have commenced the appeal period. *Id.* The challenge at issue was found to be untimely, being filed twelve (12) days after the board's public statement that it would recanvass the disputed mail-in ballots and seven (7) days after the actual recanvassing occurred. *Id.*

In the present case, the two-day deadline was arguably April 27, 2024, as the Board canvassed the ballots and voted to accept them on April 25, 2024. At the very latest, the two-day deadline was May 2, 2024, as the Board voted unanimously to pre-certify the unofficial results, which included the disputed ballots, on April 30, 2024. At the hearing, the parties agreed that at the latest, April 30, 2024 is the date from which to calculate the two-day time limit for filing an appeal if Petitioners' Appeal is indeed an appeal governed by 25 P.S. § 3157(a). So, the deadline

for Petitioners' Appeal would have been April 27, 2024 or May 2, 2024 at the latest. The Appeal was not filed until May 7, 2024. As such, it is untimely.

Petitioners' suggestion that their counsel's statements and/or submission of a memorandum at the April 30, 2024 meeting constituted the filing of an appeal lacks merit. The statute clearly confirms that the appeal must be filed with the court of common pleas within the two-day deadline. *See* 25 P.S. § 3157(a).

In their Brief, Petitioners suggest that "a two day challenge might follow in the future when, and if, the [Board] officially certifies the results including improperly dated ballots" and that "the door remains open for a future two day challenge as the election board has not yet certified its results with or without the improperly dated ballots." (Petitioners' Brief, p. 6 and 8). Any such challenge was due by May 2, 2024 at the latest, as the two days runs from the decision of the board to canvass the ballots, not from the Board's certification. To avoid any confusion or potential further delays, the Court is dismissing the Appeal with prejudice regarding the filing of any complaints pertaining to the Board's decision to canvass and count the 95 ballots for the 2024 primary election.

As indicated above, compliance with any mandatory appeal or filing period is a prerequisite to a Court of Common Pleas' ability to grant any relief. *Appeal of Orsatti*, 598 A.2d 1341, 1342 (Pa. Cmwlth. 1991). The Commonwealth's well-established case law dictates strict adherence to the statutory requirements for pursuing relief under the Election Code. *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Cmwlth. 2007). The demand for compliance with these statutory mandates is undergirded by the fundamental policy reason that "[t]he continuing and efficient operation of government is dependent on the prompt resolution of election contests." *Koter v. Cosgrove*, 844 A.2d 29, 33 (Pa. Cmwlth. 2004). "The integrity of the election process requires immediate

resolution of disputes that prevent certification.” *Petition of Jones*, 346 A.2d 260, 262-263 (Pa. 1975). The need for immediate resolution of such disputes “is particularly true in Primary Elections where the results must be finalized in sufficient time to enable the election machinery to be readied for the General Election.” *Id.* at 263.

II. Even if Construed as an Election Contest, the Pleading filed by Petitioners is Fatally Deficient, Thereby Rendering the Court without Jurisdiction to Decide an Election Contest

Having concluded that the Appeal is untimely, rendering this Court without jurisdiction to consider its merits, the Court notes that even if Petitioners’ Appeal could be construed as a petition for an election contest, it would be fatally deficient leaving the Court without jurisdiction to decide the matter. The provision of the Pennsylvania Election Code governing an election contest in a fourth class county, such as Centre County, is as follows:

§ 3456. Petition; time of filing; amendment

The commencement of proceedings in the case of contests of the second, third, fourth and fifth classes shall be by petition, which shall be made and filed, as herein required, within twenty days after the day of the primary or election, as the case may be. The petition shall concisely set forth the cause of complaint, showing wherein it is claimed that the primary or election is illegal, and after filing may be amended with leave of court, so as to include additional specifications of complaint. After any such amendment, a reasonable time shall be given to the other party to answer.

25 P.S. § 3456. Section 1757 of the Election Code, 25 P.S. §3457, also requires that for fourth class counties, the petition shall be verified by affidavits of at least five (5) petitioners who are registered electors who voted at the contested primary or election. The affidavit must contain a statement that the affiant believes “the primary or election was illegal and that the return thereof was not correct, and that the petition to contest the same is made in good faith.” Specifically, the statute reads as follows:

In each of the aforesaid second, third, fourth and fifth classes, the petitioners shall be registered electors who voted at the primary or election so contested. In cases of the third

class, each petition shall be verified by the affidavits of at least ten of the petitioners; in the second, fourth and fifth classes, by the affidavit of at least five of the petitioners. Such affidavits shall be taken and subscribed before some person authorized by law to administer oaths, and shall set forth that they believe the facts stated therein are true, that according to the best of their knowledge and belief, the primary or election was illegal and the return thereof not correct, and that the petition to contest the same is made in good faith.

25 P.S. § 3457.

The instant Appeal does not include affidavits that comply with § 3457. The twenty-day deadline to file an election contest was May 13, 2024. As of that date, no statutorily compliant petition had been filed.

On May 16, 2024, Petitioners filed a Praecipe to Attach, which does not cure the defect, as the attached Verifications do not comply with the above-described dictates of 25 P.S. § 3457. Specifically, the Verifications do not set forth that according to the affiants' knowledge and belief, the primary was illegal and the return thereof not correct, and that the petition to contest the primary is made in good faith. Pennsylvania case law holds that an improper verification is a jurisdictional defect that cannot be cured. *Rinaldi* at *78. A petition for an election contest that is not verified in accordance with the statutory requirements does not involve the jurisdiction of the common pleas court and should be dismissed. *Id.* at *79, citing *In re Opening of Ballot Boxes, Montour County*, 718 A.2d 774, 777 (Pa. 1998).

The Commonwealth Court has explained Pennsylvania courts' treatment of 25 P.S. § 3456, the provision governing petitions for election contest, as follows:

In examining this provision, courts of common pleas have consistently held that election contests can only be brought under Section 1756 of the Election Code regarding 'matters pertaining to the election process itself, such as the conduct of balloting according to law, the tabulation of the results, and the return thereof...the bare mechanics of accurately and honestly ascertaining and recording the will of the electorate.' *In re Bensalem Township Supervisor Election Contest*, 26 D. & C.2d 433, 435 (Bucks Co. 1961). As such, election contests are limited to questions of 'whether or not the will of the qualified electors was correctly shown by the returns made.' *In re Altshuler Election*, 66 D. & C. 476, 482 (Phila. Co. 1948). Echoing that interpretation, the Court has also held that to be maintainable,

election contests must allege fraud or wrongdoing on the part of election officials or other in casting, computation and return of votes concerning the election being challenged. *See Reese v. County Board of Elections*, 10 Pa.Cmwlth. 448, 308 A.2d 154 (1973).

In re Petition to Contest Primary Election of May 19, 1998, 721 A.2d 1156, 1159 (Pa. Cmwlth. 1998). In the present case, Petitioners have not sufficiently alleged fraud, coercion, intimidation or other conduct on the part of election officials that defeats the will of the electors, as is required to maintain an election contest. For these reasons, this Court is without jurisdiction to entertain the Appeal, even if construed as an election contest.

III. The Motion to Prevent Disclosure of Ballot Outer Envelopes is Moot and the Parties' Request for Fees and Costs is Denied

The Court understands Petitioners' frustration that after agreeing on record to produce the ballots, the Board sought an Order relieving it of an obligation to so produce the ballots. However, as this Court finds that it lacks jurisdiction to decide the matters raised in the Appeal on the merits, the production of the ballots would be inconsequential and unnecessary, as the action must be dismissed without a determination by the Court regarding the validity of the ballots. As such, the Court will issue no order regarding production of the ballots. The Motion to Prevent Disclosure of Ballot Envelopes is rendered moot. Further, both parties' claims for fees and costs are denied.

Conclusion

The substance of Petitioners' Appeal leads this Court to conclude that it is an appeal from a decision of the Board, subject to the two-day filing period described in 25 P.S. § 3157(a). The Appeal, filed after that two-day deadline, is untimely, and therefore this Court is without jurisdiction to consider the merits of the Appeal. Even if the Appeal could be construed as a petition for an election contest, subject to the twenty-day filing period described in 25 P.S. § 3456, it is fatally deficient, thereby leaving the Court without jurisdiction to decide the contest.

Petitioners' desire for the Board to comply with the Pennsylvania Election Code and case law regarding canvassing mail-in ballots is certainly understood by this Court. The Court must require that same compliance with the Pennsylvania Election Code and case law in examining the timeliness and nature of the Appeal filed by Petitioners. In adhering to the mandates of the Pennsylvania Election Code and case law, this Court must dismiss the Appeal.

Accordingly, the following ORDER is entered.

ORDER

NOW THIS 24th day of May, 2024, the Court hereby ORDERS as follows:

1. Petitioners' Appeal from the April 23, 2024 Primary Election as May Be Confirmed by the Centre County Board of Elections is **DISMISSED WITH PREJUDICE**.
2. Respondent's Motion to Quash Appeal as Untimely is **GRANTED**.
3. Respondent's Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes is rendered **MOOT**.
4. Both parties' requests for fees and costs are **DENIED**.

BY THE COURT:



Julia R. Rater, Judge