

DAVID McCORMICK, REPUBLICAN :
NATIONAL COMMITTEE, and :
REPUBLICAN PARTY OF :
PENNSYLVANIA, :

Petitioners :

v. :

ERIE COUNTY BOARD OF :
ELECTIONS, :

Respondent :

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

No. 2024 – 12842

DSCC :
BOB CASEY FOR SENATE, INC. :

Petitioners :

v. :

ERIE COUNTY BOARD OF :
ELECTIONS, :

Respondent :

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

No. 2024-12863

RESPONDENT'S, ERIE COUNTY BOARD OF ELECTIONS',
RESPONSE TO THE APPEALS FILED BY PETITIONERS,
McCORMICK and CASEY

NOW COMES Respondent, Erie County Board of Elections, by and through its
counsel, Talarico & Associates, and files this Response to the Appeals filed by the above-
captioned Petitioners.

FACTS, ISSUES and SUMMARY OF ARGUMENT

1. On November 14, 2024, the Erie County Board of Elections (the Board)
heard multiple challenges to the official vote count which commenced on Friday morning.

November 8, 2024 and concluded on Wednesday morning, November 13, 2024. There were 805 challenges made to the count, made by members and representatives of the Republican and Democratic parties. In the end, the Erie County Board of Elections decided to overrule 704 challenges (in which case the votes would be counted) and to sustain 101 challenges (in which case the votes would not be counted).

2. On Monday, November 18, 2024, David McCormick; Republican National Committee; and the Republican Party of Pennsylvania (hereinafter McCormick) filed an Appeal from the Decision of the Board of Elections claiming that the Board erred by counting provisional ballots which were missing a signature of the Judge of Elections or Minority Inspector. McCormick argues that the Election Code *mandates* the signatures of the Judge of Elections or Minority Inspector to every provisional ballot signed by the voter. See 25 P.S. Section 3050(a.4)(2). And that the failure of the Judge of Elections or Minority Inspector to sign the provisional ballot is a fatal defect, invalidating the individual's constitutional right to vote.

3. McCormick's analysis of 25 P.S. Section 3050(a.4)(2) is misguided, if not deliberately mistaken. Rather, the referenced section reads as follows:

"(2) Prior to voting the provisional ballot, the elector *shall* be required to sign an affidavit stating the following:

I do solemnly swear or affirm that my name I _____,
that my date of birth is _____, and at the time that I
registered I resided at _____ in the municipality
of _____ in _____ County of the Commonwealth
of Pennsylvania and that this is the only ballot that I cast in this
election.

Signature of Voter/Elector

Current Address

Check the Reason for Casting the Provisional Ballot.

Signed by Judge of Elections and minority inspector”

It is the individual elector who “*shall be required to sign an affidavit . . .*” The signatures of the Judge of Elections and Minority Inspector are a clerical formality and another layer of proof that the individual who signed the affidavit is the individual who signed the affidavit. The provision does not state that the Judge of Elections and Minority Inspector “*shall be required to sign an affidavit . . .*,” and it does not state that the signatures of the Judge of Elections and Minority Inspector are mandatory. The legislature could never have intended to disqualify an elector who signed a sworn affidavit and attested to his eligibility to vote, which eligibility was subsequently confirmed by the Board of Elections.

4. The Petitioner, Bob Casey for Senate, Inc., and the Democratic Senate Congressional Committee (hereinafter Casey), claims that the Board of Elections erred in deciding to sustain and “not count” challenges to 98 provisional ballots in which the individual voter failed to sign the affidavit under Subparagraph (2) of Section 3050(a.4)(2) of the Election Code and/or failed to sign the outside envelope of the provisional ballot under Subparagraph (3) of the same section. Casey contends that the election workers had a duty to oversee and instruct the voter with regard to the provisional ballot process and to ensure that the voter signed the affidavit and provisional ballot. By failing to instruct the voter to sign the affidavit and provisional ballot, the election officials unconstitutionally

deprived the electors' of their right to vote and have their vote counted. Further, Casey argues that the Board erred in throwing out the 98 provisional ballots which and after the election officials had determined the individual was eligible to vote, citing the Help America Vote Act, 52 U.S.C. Section 21082(a)(2). While the Election Board can sympathize with Casey's argument, the Election Code specifically states that a provisional ballot shall not be counted if:

“(A) either the provisional ballot envelope under Clause (3) or the affidavit under Clause (2) is not signed by the individual;”

25 P.S. Section 3050(5)(ii)(A).

ARGUMENT

A. McCormick

While McCormick argues that provisional ballots, signed by the individual voter, but unsigned by the Judge of Elections and Minority Inspector, “shall” not be counted, there is nothing under the Election Code or any case law which prohibits the counting of a provisional ballot in which the eligible voter has otherwise satisfied all of the conditions associated with the provisional ballot process. Nor does the statutory individual signature requirement under the Code extend to the signatures of the Judge of Elections or Minority Inspector. At best, the signatures are a mere formality which adds another unnecessary layer of proof, another unconstitutional obstacle to an otherwise qualified individual's right to vote.

Generally, Title 25 P.S. Section 3050(5)(i) provides:

“ . . . if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the County Board of Elections shall compare the signature on the provisional ballot envelope with the signature on the elector’s registration form and, if the signatures are determined to be genuine, *shall count the ballot . . .*”

25 P.S. Section 3050(5)(i).

This is all that the Election Code requires, proof that the signature on the provisional ballot envelope matches the signature on the elector’s registration form.

The Voter’s Registration Office determined that the 120 individuals who signed their provisional ballot were registered and deemed entitled to vote at the election district where the ballot was cast. The vote, therefore, must be counted. The statute is clear and unambiguous. In a word, nothing under the Code or the Constitution conditions the validity of a provisional ballot, duly executed by a qualified voter, upon another redundant burden of proof.

Further, Title 25 P.S. Section 3050(5)(ii) specifically outlines those instances in which a provisional vote shall not be counted. A review of the subsection, as laid out in the Board of Election’s response to Casey’s argument below, includes seven (7) instances in which a provisional vote shall not be counted. None of the instances include the absence of the signatures of the Judge of Elections and Minority Inspector on the voter’s affidavit or provisional ballot.

And finally, the Board of Election attaches hereto the Statement issued by the Secretary of the Commonwealth dated November 8, 2024 and directed to the BOE’s Director of Voter Registration, Tonia Fernandez. (See Exhibit A) The statement of the Secretary was issued in response to questions relating to the disposition of provisional

ballots if the voter affidavit was not signed by the Judge of Elections and/or the Minority Inspector. In stating the Department's position on the subject, the Secretary's Statement states:

"... a missing signature of the Judge of Elections and/or the Minority Inspector should not invalidate a provisional ballot if there are no other disqualifying errors. The lack of the signature from the Judge of Elections or the Minority Inspector is not specified in the Election Code as a basis for refusing to count a provisional ballot. See 25 P.S. Section 3050(a.4)(5)(ii)."

Accordingly, the Board of Elections respectfully requests the Court to affirm its decision to count those provisional ballots duly executed by a qualified voter who has otherwise satisfied all of the requirements to vote under the law and the Constitution of the Commonwealth of Pennsylvania.

B. Casey.

Casey contends that the Board of Elections erred in rejecting 98 provisional ballots which were not signed by the individuals casting the ballot. He argues that the election officials responsible for the provisional ballot process, had a duty to instruct and guide the elector through the process and to ensure that the elector signed his/her name on the voter's affidavit and ballot. As state actors who failed to ensure that the elector signed his/her affidavit and ballot, the election officials violated the elector's constitutional right to vote under the First and Fourteenth Amendments to the United States Constitution.

While the Election Board sympathizes with those electors who failed to execute the provisional ballot, the duties and authority of the Judge of Elections do not extend to

ensuring an errorless review of every single provisional ballot, as the Judge of Elections is tasked with many duties throughout the course of election day. Most clerical errors are remediable because they do not affect the elector's qualifications or intentions. But failing to sign the provisional ballot is the same as expressing one's intention "not to vote." Moreover, the Board of Elections is not in a position to consider, much less determine, the facts and circumstances surrounding the poll worker's interaction with the elector. Casey presumes that the poll workers "induced voters to use an invalid voting procedure" and caused the voter "to cast a faulty provisional ballot . . . " But there aren't any facts of record to assume as much.

Casey cites the *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) case for the legal proposition that voters who relied on the instructions of election officials in casting improper ballots, violated "the constitutional rights of the voters." In *NEOCH*, however, the election officials were following an Ohio law which required poll workers to "determine whether an individual is eligible to vote in a specific precinct, and direct them to the precinct in which 'the individual appears to be eligible to vote.'" (State Bf. at 12 [quoting O.R.C. Section 3505.181(C)(1)]) The state of Ohio created a system in which state actors (poll workers) were "given the ultimate responsibility of directing voters to the right location to vote." It should also be noted that Ohio had established a proliferation of multi-precinct polling locations which increased the likelihood of poll worker error causing right-place/wrong-precinct ballots.

The Ohio statute provides:

"If an individual declares that the individual is eligible to vote in

a jurisdiction other than the jurisdiction in which the individual desires to vote, or if, upon review of the precinct voting location guide using the residential street address provided by the individual, an election official at the polling place at which the individual desires to vote determines that the individual is not eligible to vote in that jurisdiction, *the election official shall direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote, explain that the individual may cast a provisional ballot at the current location, but the ballot will not be counted if it is cast in the wrong precinct, and provide the telephone number of the board of elections in case the individual has additional questions.*"

O.R.C. Section 3505.181(C)(1) (emphasis added)

Thus, the NEOCH court based its decision upon the duties of the poll worker as outlined under the Ohio statute. No such law or language exists under the Pennsylvania Election Code. See 25 P.S. Section 3050, et seq. The case is factually and legally distinguishable from the instant case, is from another jurisdiction, is not controlling and is inapposite. Finally, there are only six (6) instances listed under the Election Code in which a provisional ballot may be challenged and not counted. Under Title 25 P.S. Section 3050(5)(ii) of the Election Code:

"(ii) a provisional ballot shall not be counted if:

(A) either the provisional ballot envelope under Clause (3) or the affidavit under Clause (2) is not signed by the individual;"

Pursuant to the above-referenced statutory provision, the Board of Elections sustained the challenges to 98 provisional ballots which were not signed by the individual electors. This is the law in the Commonwealth of Pennsylvania.

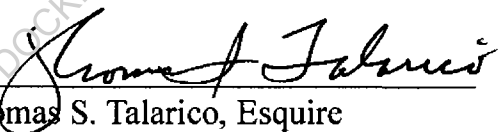
If Casey desired to challenge the decision of the Board of Elections, he and his campaign would first have to challenge the constitutionality of the applicable provision

under the Election Code. Since Casey has not challenged the constitutionality of the applicable provision under the Election Code, it is not before the Court, and the Court must rule in accordance with the law.

In conclusion, based upon the clear and unambiguous language of the Election Code, the Board of Elections properly rejected and did not count those provisional ballots which were not signed by the individual electors.

Respectfully submitted,

By



Thomas S. Talarico, Esquire

Attorney for the Erie County

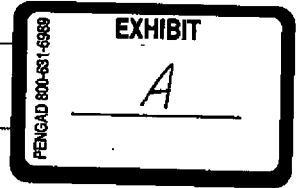
Board of Elections

230 West 6th Street, Suite 202

Erie, Pennsylvania 16507

(814) 459-4472

Supreme Court ID 36256



FW: DOS Email: Provisional Ballot Questions

From Fernandez, Tonia <tfernandez@eriecountypa.gov>
Date Fri 11/8/2024 1:35 PM
To ttalarico nwpalawyers.com <ttalarico@nwpalawyers.com>

From: ST, Elections <RA-Elections@pa.gov>
Sent: Thursday, November 7, 2024 6:38 PM
Subject: DOS Email: Provisional Ballot Questions
Importance: High

CAUTION: This email originated from outside of the County of Erie. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

Sent on behalf of Deputy Secretary Jonathan Marks

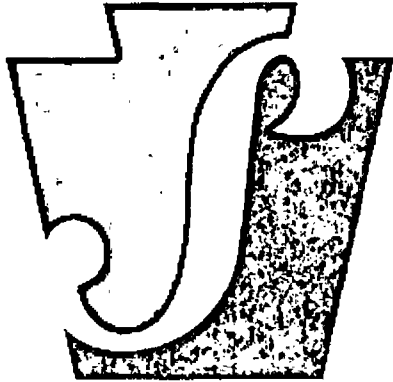
Dear County Election Officials,

The Department has received inquiries from counties as to whether a provisional ballot should be counted if the voter affidavit is not signed by the Judge of Elections and/or the Minority Inspector. It is the Department's position that a missing signature of the Judge of Elections and/or the Minority Inspector should not invalidate a provisional ballot if there are no other disqualifying errors. The lack of a signature from the Judge of Elections or the Minority Inspector is not specified in the Election Code as a basis for refusing to count a provisional ballot. See 25 P.S. § 3050(a.4)(5)(ii). While the affidavit to be signed by the voter contains a space for both officials to sign, and the Department's guidance accordingly includes both officials' signing the affidavit as part of the provisional ballot process, nothing in the Election Code authorizes counties to reject provisional ballots because either or both failed to sign the affidavit. By contrast, the Election Code does provide that if the voter's signature is missing from either the affidavit or the provisional ballot envelope the ballot cannot be counted.

Additionally, we write to remind you about an important post-election deadline, and an issue the Department has observed that requires your attention. We believe some counties' sorting machines may not have properly tagged returned ballots as "PEND-NO ID", and counties should apply that status to ensure that voters can have their voices heard. If you properly approved a mail ballot application where the ID didn't verify, and the application was marked as Approved-ID Not verified, the voter should have received the ballot with notification that ID was needed. If the voter returned that ballot before the deadline, but did not include the required ID, their ballot status reason *must* be manually updated to have a ballot status reason of "PEND-NO ID". If these ballots went through a mail scanner, the scanner would not have updated the ballot status reason. We have observed several counties who have marked applications as Approved with ID Not Verified, but who have no mail ballots as PEND NO ID. As a reminder, voters may expect their ballot to be counted if they provide qualifying ID on or before Tuesday, November 12. This is a right granted to them by statute, and discussed on Page 6 of our [Guidance on Civilian Absentee and Mail-in Ballot Procedures](#).

It is critical that you mark all timely returned ballots, where the voter's ID did not verify on the application, as "PEND-NO ID", so that voters are aware of the steps they must take to ensure their ballot is counted.

As always, we urge you to consult with your Solicitor if you have further questions. Thank you for all your efforts ensuring a free and fair election.



Division of Election Administration | Bureau of Elections
PA Department of State
210 North Office Building, Harrisburg, PA 17120
Office: 717-787-5280
dos.pa.gov | vote.pa.gov | [Facebook](https://www.facebook.com/pa/elections) | [Twitter](https://twitter.com/pa/elections)

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No. 2024-12863

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

TALARICO & ASSOCIATES

By



Thomas S. Talarico, Esquire

230 West Sixth Street, Suite 202

Erie, Pennsylvania 16507

(814) 459-4472

Supreme Court ID 36256

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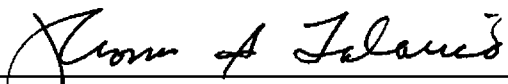
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No. 2024-12863

VERIFICATION

Thomas S. Talarico, Esquire deposes and says that he is attorney for the Respondent, that he is authorized to make this Verification on behalf of the Respondent, that the facts set forth in the foregoing Response are true and correct, not of his own knowledge, but from information supplied to him by the Respondent, that the purpose of this Verification is to expedite the litigation and that a Verification of the Respondent will be supplied if demanded. This statement is made subject to the penalties of 18 Pa.C.S.A. Section 4904 relating to unsworn falsification to authorities.


Thomas S. Talarico, Esquire

Date: 11-20-24

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No. 2024-12863

VERIFICATION

I, Andre Horton, Chairman of the Erie County Board of Elections, hereby verifies that the facts contained in the foregoing Response are true and correct to the best of my knowledge, information and belief. This statement is made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities and is given pursuant to the provisions for verification of pleadings as defined and provided for in Rule 1024 of the Pennsylvania Rules of Civil Procedure.

Date:

Andre Horton, Chairman
Erie County Board of Elections

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CERTIFICATE OF SERVICE

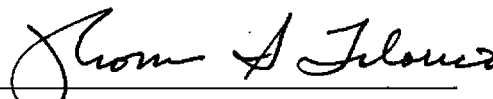
The undersigned counsel hereby certifies that on the 20 day of November, 2024, a copy of the within Brief was duly served on the following, by email or U.S. Mail as follows:

Timothy D. McNair, Esq.
McNair Law Offices, PLLC
821 State Street
Erie, PA 16501-1316

Kathleen A. Gallagher, Esq.
Brian M. Adrian, Esq.
The Gallagher Firm, LLC
436 Seventh Avenue, 30th Floor
Pittsburgh, PA 15219

Respectfully submitted,

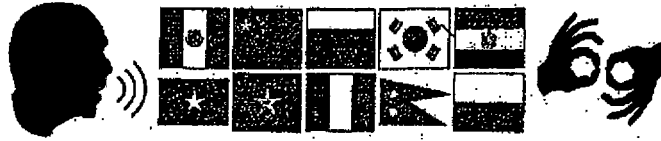
TALARICO & ASSOCIATES

By 

Thomas S. Talarico, Esquire
Attorney for Erie County Board
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(814) 459-4472
Supreme Court ID 36256

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Notice of Language Rights



Language Access Coordinator
Erie County Courthouse, 140 West Sixth Street, Erie, PA, 16501
814-451-6310

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English: You have the right to an interpreter at no cost to you. To request an interpreter, please inform court staff using the contact information provided at the top of this notice.

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Mandarin/Cantonese Simplified Chinese/普通话/粤语简体中文: 您有权获得免费的口译员服务。若需要口译员, 请使用本通知上方提供的联系信息通知法院工作人员。

Mandarin/Cantonese Traditional Chinese/普通話/廣東話繁體中文: 您有權要求免費傳譯服務。如欲要求傳譯服務, 請參閱本通知頂部的聯絡資料, 通知法庭職員。

العربية/Arabic: يحق لك الحصول على مترجم دون دفع أي تكلفة من جانبك. لطلب مترجم، يرجى إعلام موظفي المحكمة باستخدام معلومات الاتصال المقدمة في الجزء العلوي من هذا الإشعار.

Russian/Русский: У вас есть право на бесплатные услуги переводчика. Заявка на переводчика подается в суд по адресу, телефону или эл. почте, указанным выше в заголовке этого уведомления.

Vietnamese/Tiếng Việt: Quý vị có quyền được một thông dịch viên giúp mà không tốn chi phí nào cả, xin hãy báo cho nhân viên tòa án dùng thông tin liên lạc có ở trên đầu thông báo này.

Nepali/नेपाली: तपाईंको निःशुल्क रूपमा भाषा अनुवादक राख्न पाउने अधिकार छ। अनुवादकको लागि अनुरोध गर्न, यस सूचनाको साथ दिइएको सम्पर्क जानकारी भरेर अदालतका कर्मचारीहरूलाई जानकारी दिनुहोस्।

Korean/한국어: 귀하는 비용에 대한 부담 없이 통역 서비스를 받을 권리가 있습니다. 통역 서비스를 요청하려면 본 통지서의 상단에 기재된 연락처를 통해 법원 직원에게 알리십시오.

Polish/Polski: Ma Pan/Pani prawo do nieodpłatnego skorzystania z usług tłumacza ustnego. Aby zwrócić się o wsparcie ze strony tłumacza ustnego, proszę skontaktować się z pracownikami sądu, korzystając z danych znajdujących się w górnej części niniejszego dokumentu.

Pakistan/پنجابی/Punjabi: تہاڈے کول بغیر ادائیگی کیتیاں اک مترجم حاصل کرن دا حق ہے۔ مترجم دی درخواست کرن لئی، میرپانی کر کے ایس نوٹس دے اوتے فراہم کیتیاں رابطے دیاں معلومات نوں ورتدیاں عدالت دے عملے نوں اطلاع دوو۔

Punjabi/ਪੰਜਾਬੀ/India: ਤੁਹਾਨੂੰ ਇਕ ਦੁਤਾਸੀਆ ਹਾਸਲ ਕਰਨ ਦਾ ਹੱਕ ਹੈ, ਜਿਸ ਦੀ ਤੁਹਾਨੂੰ ਕੋਈ ਲਾਗਤ ਨਹੀਂ ਲੱਗੇਗੀ। ਦੁਤਾਸੀਏ ਲਈ ਬੇਨਤੀ ਕਰਨ ਵਾਸਤੇ, ਕਿਰਪਾ ਕਰ ਕੇ ਅਦਾਲਤ ਦੇ ਅਮਲੇ ਨੂੰ ਜਾਣੂ ਕਰਵਾਓ ਤੇ ਇਸ ਲਈ ਇਸ ਨੋਟਿਸ ਦੇ ਸਿਖਰ ਉੱਤੇ ਦਿੱਤੀ ਸੰਪਰਕ ਜਾਣਕਾਰੀ ਦਾ ਇਸਤੇਮਾਲ ਕਰੋ।

Portuguese/Português: Você tem direito a um intérprete gratuitamente. Para solicitar um intérprete, informe à nossa equipe usando os dados de contato mostrados na parte superior deste aviso.

Somali/Somaali: Waxaad xaq u leedahay in lagu turjumo lacag la'aan ah. Si aad u codsato turjumaanka, fadlan u sheeg maxkamadda shaqaalaha adiga oo isticmaala macluumaadka ciwaanka kor lagu siiyay ee ogeysiiskaan.

Haitian Creole/Kreyòl Ayisyen: Ou gen dwa resevwa sèvis yon entèprèt gratis. Pou mande pou yon entèprèt, tanpri fè manm pèsònèl tribinal la konnen lè ou sèvi avèk enfòmasyon an yo te bay ou nan tèt avi sa a.

French/Français: Vous avez le droit de bénéficier gratuitement de l'assistance d'un interprète. Pour en faire la demande, veuillez en informer le personnel du tribunal à l'aide des coordonnées indiquées en haut de page.

AMERICANS WITH DISABILITIES ACT OF 1990 - The Court of Common Pleas of Erie County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the court, please contact the Court's ADA Coordinator at Erie County Court of Common Pleas, 140 West Sixth Street, Room 205, Erie, PA 16501-1030, Phone-(814) 451-6308, TDD-(814) 451-6237, E-mail: courtadacoordinator@eriecountypa.gov. Requests should be made as soon as possible or at least three business days prior to any hearing or business before the court.

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