

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 1191 CD 2020

**IN RE: CANVASS OF ABSENTEE AND/OR MAIL-IN BALLOTS OF
NOVEMBER 3, 2020 GENERAL ELECTION; APPEAL OF DONALD J.
TRUMP FOR PRESIDENT, INC.**

BRIEF OF APPELLEE BUCKS COUNTY BOARD OF ELECTIONS

*Appeal from the November 19, 2020 Judgment and Opinion of the Bucks County
Court of Common Pleas at 2020-05786.*

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I. INTRODUCTION

This case concerns the appeal of Donald J. Trump for President, Inc. (the “Campaign”) of the Bucks County Board of Elections’ decisions to count 1,995 absentee and mail-in ballots that were timely cast by eligible Bucks County voters and received by the Bucks County Board of Elections (the “Board”) on or before Election Day at 8:00 p.m. Although the Campaign admits and stipulates that the voters that cast the ballots are qualified, registered electors and that no fraud or impropriety was involved with the casting of these ballots, and that the voters all affixed their signature to their ballot-return envelopes, the Campaign claims that these 1,995 ballots should not be counted because the voters (a) failed to handwrite their name, street address, date, or some combination thereof on the ballot-return envelope or (b) enclosed their ballot in a secrecy envelope that, at some point, became unsealed. The Bucks Court of Common Pleas upheld the Board’s decisions to count these ballots on November 19, 2020. The Campaign filed an appeal to this Court on November 20, 2020. On November 22, 2020, the Board filed an Application for Extraordinary Jurisdiction to the Pennsylvania Supreme Court. Today, the Campaign filed an Application to Expedite this appeal, and at approximately 1:45 p.m. this afternoon, this Honorable Court requested the filing of Briefs no later than 5 p.m. The statutory deadline for the Board to certify the election results to the Secretary of the Commonwealth is today, November 23, 2020.

II. STATEMENT OF STANDARD OF REVIEW

The Election Code clearly delegates the authority to the Board to render “sufficiency determinations” as to ballot declarations in 25 P.S. §3146.8(g)(3) (“If the county board . . . is satisfied that the declaration is sufficient . . .” the board shall commence count, compute and tally the votes.). *See* 25 P.S. §3146.8(g)(3) and (4). The Court of Common Pleas was required to affirm the decisions of the Board of Elections unless it found an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952) (observing that county election boards have “plenary powers in the administration of the election code”); see also *Appeal of Petrucci*, 38 Pa. D & C.2d 675, 677 (C.P. Luzerne Cnty. 1965) (“The court, in reviewing the rulings of the board, may reverse the board of elections only for a mistake of law or for a clear abuse of discretion, including a capricious disregard of the testimony.”). The Bucks County Court of Common Pleas made no finding that the Board had abused its discretion, or an error of law had occurred. This Court should affirm the decisions of the Bucks County Court of Common Pleas.

III. STATEMENT OF QUESTIONS INVOLVED

1. Does the Election Code require county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot’s outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?

Suggested answer: No.

2. Does the Election Code require county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors whose ballots were enclosed but not fully sealed in the secrecy envelope, where no fraud or irregularity has been alleged, and there is no way of knowing when and/or how the envelopes became unsealed?

Suggested answer: No.

IV. STATEMENT OF THE FACTS OF THE CASE

On November 7, 2020, during the course of its publicly advertised canvass meeting, and in the presence of any and all interested Authorized Representatives who were provided an opportunity to present argument, the Board met pursuant to 25 P.S. § 3146.8(g)(3) to determine whether certain declarations on the outer envelopes of certain ballots were “sufficient.” *See* Court’s Exhibit 1, Joint Stipulation of Facts, pg. 4. Authorized Representatives were present at the meeting. *Id.* The Board made findings and decisions with respect to ten different categories of ballots, accepting some categories for canvassing and excluding others, as reflected in the Board’s Written Decision. *Id.* at Exhibit B. The Board did not accept the following:

- 110 outer envelopes that lacked an elector’s signature;
- 13 outer envelopes which reflected a different voter’s name than what was printed on the envelope’s label;
- 708 ballots that were not included within secrecy envelopes; and

- 21 ballots that were included within secrecy envelopes that bore markings thereon that identified the voter, the voter's political affiliation, or candidate preference.

The Board did accept the following for counting, computation, and tallying, pursuant to 25 P.S. § 3146.8(g):

- 1,196 ballots within outer envelopes that bore either no date or a partial handwritten date;
- 644 ballots within outer envelopes that bore either no handwritten name and/or printed address;
- 86 ballots within outer envelopes that bore a partial handwritten address;
- 69 ballots that were completely enclosed within privacy envelopes that were unsealed; and
- 7 ballots that were within privacy envelopes that bore markings which did not identify the voter, a political affiliation or candidate preference.¹

¹ The Campaign withdrew this challenge to the 7 ballots at the hearing on November 17, 2020.

The Board also directed the Board staff to further research 246 outer envelopes that reflected addresses different than what was reflected on the envelope's label.²

On November 9, 2020, the Campaign appealed the Board's November 7, 2020 decisions to the Bucks County Court of Common Pleas. The appeal was assigned to the Honorable Robert O. Baldi. The Campaign does not allege fraud and does not allege that the ballots were untimely. *See* Court's Exhibit 1, Joint Stipulation of Facts, pg. 6-7. Instead, the Campaign claims that counting these ballots would violate the Election Code.

On November 19, 2020, after a hearing on the merits of the Campaign's appeal, the Bucks County Court of Common Pleas affirmed the Board's determination that the ballots at issue should be counted. The Campaign appealed to the Commonwealth Court on November 20, 2020. The Board is required to certify their election results today, November 23, 2020.

V. ARGUMENT

The Pennsylvania Supreme Court, on this very date, issued a decision in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, J-

² As a result of the staff's research, the Board voted to accept 182 of the 246 ballots with "mismatched addresses" on the outer envelope, at a public meeting on November 13, 2020. This decision was based upon the fact that the voters had provided to the Board a secondary mailing address for their mail-in or absentee ballot, upon their application for same. Accordingly, at the hearing for the instant matter on November 17, 2020, the Campaign withdrew its challenge to the 246 ballots within outer envelopes bearing "mismatched" addresses. The trial court erroneously addressed this challenge in its Memorandum Opinion and Order but corrected that error by Court Order of today's date, November 23, 2020. A copy of that Order is attached.

118A-F-2020, at *1 (Pa. Nov. 23, 2020) settling the issue before this Court regarding the need for printed names, addresses, and signatures on the declarations on outer envelopes of mail-in or absentee ballots. For the reasons therein, the trial court rightfully concluded that the Board properly accepted and counted votes of qualified Bucks County electors who, by way of technical deficiencies, did not include a printed name, address, or date on their declarations. *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, J-118A-F-2020, at *1 (Pa. Nov. 23, 2020) (“[T]he Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court’s precedent in doing so.”).

With the above issues settled by the Pennsylvania Supreme Court, the only outstanding issue is whether 69 qualified electors in Bucks County – absent any allegations of fraud or irregularity – should have their votes counted. Appellant would have this Honorable Court overturn the trial court’s sound decision to deny Appellant’s request to disenfranchise voters following minor technical deficiencies with the sealants on the voter’s secrecy envelopes. For the reasons that follow, this Honorable Court should uphold the trial court’s decision and deny Appellant’s request for appellate relief.

The Campaign admits and stipulates that the Bucks County voters who cast the ballots involved were registered voters, qualified to vote by absentee or mail-in ballot. *See* Court Exhibit 1, Joint Stipulation of Facts, pg. 6. The Campaign admits and stipulates that none of the ballots involved were cast by, or on behalf of, a deceased person. *Id.* The Campaign admits that there is no evidence of any misconduct, fraud or impropriety in connection with the challenged ballots. *Id.*

Rather, the Campaign asserts that these voters, at worst, made technical mistakes in sealing their secrecy envelopes and, therefore, that they should be disenfranchised. But these 69 voters took the following steps to cast their votes: They submitted an application to vote by mail or absentee ballot, therein providing their name, address, driver's license number and/or social security number, and date of birth. N.T. 11/17/20, pg. 65. Their applications were individually reviewed by the Board and approved. *Id.* at 66. The voters then completed the ballots they received in the mail from the Board, and properly placed and enclosed their ballots inside two envelopes. These voters also all affixed their signature to their ballot envelope, on the declaration, declaring that they were "qualified to vote." Court Exhibit 1, Joint Stipulation of Facts, pg. 6. These 69 voters, despite mail delays, successfully returned their ballots to the Board on or before Election Day. Court Exhibit 1, Joint Stipulation of Facts, pg. 7. The Board made no error of law in

determining that the technical omissions made by these 69 voters should not result in disenfranchisement.

As the record reflects and as the trial court concluded below, there is no way of determining when and/or how the sealants of the secrecy envelopes became unsealed. Further, the fact that the ballots were fully enclosed within the secrecy envelope maintained the secrecy of the ballots. There is no evidence nor any allegations that the secrecy of the ballots enclosed here were compromised in any way. In addition, as already noted, there were no allegations of fraud or irregularity in this respect.

On this issue, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020) is instructive. Therein, the Supreme Court recognized the “inescapable conclusion that a mail-in ballot *not enclosed* in the statutorily-mandated secrecy envelope must be disqualified.” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d at 380 (Pa. 2020). In consideration of the Supreme Court’s recognized conclusion, a distinguishable situation exists where the mail-in ballot was fully *enclosed* within the secrecy envelope but where the adhesive sealant – for whatever reason – had become detached.

Here, all of the challenged ballots at issue in this category were fully enclosed within the secrecy envelope, and the privacy of the ballots were maintained. However, the adhesive sealants for these ballots were

detached. Because the Board had no ability to determine whether these envelopes became unsealed through no fault of the electors, the Board decided to accept these ballots. The Board also took into consideration that the privacy of these ballots was not compromised, and that they were still sealed within an outer envelope. Further, in accordance with the recognized conclusion in *Boockvar*, the ballots were fully enclosed within the secrecy envelope and were not bound by authority to be disqualified. Accordingly, the Board properly accepted the ballots fully enclosed but not sealed within their secrecy envelopes.

The procedural mistakes at issue in these cases are similar to the types of minor mistakes that Pennsylvania courts have held should not result in ballots being stricken. See *Shambach v. Bickhart*, 845 A.2d at 798-99 (Pa. 2004); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). Here, the voters successfully maintained the secrecy of their ballot by enclosing their ballot within the inner secrecy envelope. They signed a declaration stating that they were eligible to vote, had not already voted, and had filled out their ballot in secret. They took the necessary steps to mail or deliver their ballot such that it was received by the Board on or before Election Day. The Board verified the proof of identification for each elector regarding the each at-issue ballot and determined that the at-issue declarations were sufficient. The electors at issue may have made errors in the effectiveness of their sealing of the inner privacy envelopes; it is difficult to tell.

Notably, Appellants provided no evidence of fraud or failure to seal. In any event, the fact that the privacy envelope became unsealed had no impact on the secrecy or sanctity of the ballot. As held by this Court, “the power to throw out a ballot for minor irregularities . . . must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.” *See Appeal of James*, 105 A.2d 64, 66 (Pa. 1954).

The voter omissions at issue here, however, are failures to follow directory, rather than mandatory, language in the Election Code and are therefore not grounds for disqualification. And even if the Board could discard ballots under these provisions, it is not at all clear that they must. The Campaign failed to produce any factual evidence that to support their position. The Campaign has further failed to demonstrate how the Board’s decision to count these ballots is “based on a clear error of law.”

This Court should deny the Campaign’s appeal because they misconstrue the Election Code’s directions to mail-in and absentee voters as bars to the franchise itself, such that anything short of perfect compliance prevents the Boards from counting the voter’s ballots. *See* 25 P.S. §§ 3146.6(a) 25 P.S. § 3150.16(a). The omissions the Campaign points to do not disqualify a ballot because these directions do not carry the penalty of cancellation for noncompliance. Only “mandatory”

requirements subject a ballot to cancellation, and these 69 ballots offend no mandatory requirements of the Election Code. Pennsylvania courts have consistently held that noncompliance with directions in the Election Code, as opposed to mandates carrying penalties, are not grounds for cancelling a ballot. Generally speaking, “[w]hile both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for noncompliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.” *See JPay, Inc. v. Dep’t of Corr. & Governor’s Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. Ct. 2014) (internal citation omitted). “It has long been part of the jurisprudence of this Commonwealth that the use of ‘shall’ in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory.” *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, J-118A-F-2020, at *1 (Pa. Nov. 23, 2020).

In the Election Code context, in *In re Luzerne Cnty. Return Bd.*, this Court found that an absentee voter’s ballot filled out in red ink did not disqualify the otherwise valid ballot—despite the code providing that “any ballot that is marked in blue, black, or blue-black ink...*shall* be valid and counted.” 290 A.2d at 109 (emphasis added). *See also Bickhart*, 845 A.2d at 803 (holding that although the Election Code provides that an elector may cast a write-in vote for any person not

printed on the ballot, a write-in vote for a candidate whose name, in fact, appears on the ballot is not invalid where there is no evidence of fraud and the voter's intent is clear). Therefore, while these expectations are “directory,” they do not rise to the level of “mandatory” such that failure to comply completely nullifies the act of voting. The Code’s use of the word “shall” does not change the analysis because “shall,” on its own, does not make a statutory phrase mandatory as opposed to directory.

Below, the Campaign argued that the use of the word “shall” in the statute renders all requirements set forth in Election Code mandatory and thusly requiring the disqualification of ballots for the most minor of omissions. This argument fails with even a cursory examination. The Election Code provides that the elector “shall” mark their ballots only in “black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen.” In light of this Court’s holding in *In re Luzerne County*, 290 A.2d 108 (Pa. 1972), it is clear that a failure to strictly follow these directory instructions does not invalidate a ballot. The Election Code also provides that the elector “shall . . . then fold the ballot.” Following the Campaign’s logic, a ballot that was stuffed, rather than folded into its security envelope would be subject to invalidation; likewise with a ballot filled-out in red pen. Instead, this Court should affirm the Court of Common Pleas and find the direction to voters that

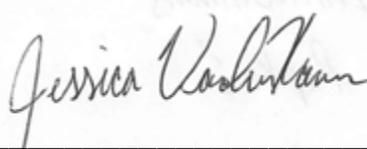
they seal their privacy envelopes is directory, because it does not correspond to a penalty laid out elsewhere in the Code.

VII. CONCLUSION

For the foregoing reasons, the Board respectfully requests this Court to affirm the Bucks County Court of Common Pleas and fully count the 69 ballots enclosed, but not fully sealed, within secrecy envelopes.

Date: November 23, 2020

Respectfully submitted,
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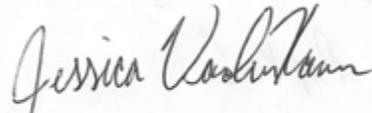
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CERTIFICATIONS

This 23nd day of November, 2020, I certify that:

Certificate of Compliance with Confidential Information Rule. I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Word Count. I certify that this brief contains 3,503 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate I have relied on the word count of the word-processing software system used to prepare this brief.



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