

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

MONROE COUNTY REPUBLICAN	:	NO. 7228 CV 2022
COMMITTEE, JOSEPHINE FERRO,	:	
THOMAS G. WHITEHEAD, and PETER	:	
BEGLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
MONROE COUNTY BOARD OF	:	
ELECTIONS, JOHN D. CHRISTY,	:	
County Commissioner of Monroe	:	
County, Pennsylvania, SHARON S.	:	
LAVERDURE, County Commissioner of	:	
Monroe County, Pennsylvania,	:	
	:	
Defendants.	:	

FINDINGS OF FACT

1. The Monroe County Republican Committee (MCRC) and the individual plaintiffs commenced this action for declaratory judgment on November 4, 2022 at 11:31 a.m.

2. At the time this action was commenced, the Monroe County Office of Elections and Voter Registration (MCOEVR) had received approximately 15,000 absentee and mail-in ballots for the 2022 general election to be held on Election Day, November 8, 2022.

3. When a mail-in or absentee ballot was received, it was office policy to electronically register the ballot Department of State, Office of Elections in Harrisburg, through the SURE registration system. That registration of the ballot generated an email

to the voter who provided an email address with his or her voter registration, to let the voter know that the ballot had been received.

4. After the ballot was electronically registered, the MCOEVR segregated the absentee ballots and the mail-in ballots and stored them in trays in a locked room in the MCOEVR office.

5. If a mail-in ballot or an absentee ballot had an obvious defect which was detectable by MCOEVR personnel, it was further segregated in a separate tray from those ballots received without obvious defects.

6. Obvious defects included lack of a date on the outside of the ballot envelope, lack of the voter's signature on the outside of the ballot envelope, or a "naked ballot." A naked ballot is a ballot inside the ballot envelope which is not enclosed in a security envelope.

7. These defects were observable from the outside of the ballot envelope; a naked ballot is observable without opening the ballot envelope because of the difference in weight and heft of the ballot envelope.

8. It has always been MCOEVR policy to allow voters who are concerned that they incorrectly completed their mail-in or absentee ballot to come to the MCOEVR office, cancel the first ballot and submit a corrected one to replace it if that was done before 8:00 p.m. on Election Day.

9. MCOEVR personnel at no time would open a ballot or investigate any information contained in a ballot before a ballot opened for pre-canvassing on Election Day or canvassed after Election Day.

10. Some time ago, the Monroe County Election Board scheduled a meeting of the Board in the Commissioners' meeting room to be held on November 2, 2022. The meeting was scheduled in error, because the Election Board did not have a regular public meeting in November before commencing its election duties on Election Day.

11. Some members of the public attended the meeting and the members of the Election Board met with them and allowed them to present commentary, but took no official action and did not deliberate during the meeting.

12. After the meeting, the members of the Board met in Commissioner Moyer's office with their solicitor, to discuss decisions that were rendered by the Pennsylvania Supreme Court on November 1, 2022. One of these was *Ball v. Leigh M. Chapman, in her capacity as Acting Secretary of the Commonwealth*, No. 102 MM 2022 (Pa. November 1, 2022) which directed the Board not to count absentee and mail-in ballots in the November 8, 2022 general election which were contained in undated or incorrectly dated outer envelopes. The other order from the Pennsylvania Supreme Court addressed an appeal from the Pennsylvania Commonwealth Court litigation the County was a party in, *Republican National Committee, et. al. v. Leigh M. Chapman, in her official capacity as acting Secretary of the Commonwealth*, No. 447 M.D. September 29, 2022, (Pa.Cmwth 2022), *affirmed by evenly divided court*, 2022 WL 12327412, (Pa., November 1, 2022).

13. After meeting with their solicitor, the members of the Election Board directed the MCOEVR director, Sara May-Silfee to cancel all of the defective ballots which she had segregated, using the state-wide "Sure" system, which she did. This cancellation

would result in an email being sent to the voter to advise the voter that his or her ballot had been cancelled and that if the voter wished to submit a new ballot he or she had to appear at the MCOEVR office or at the polls to submit a proper ballot.

14. In her testimony, Ms. May-Silfee estimated there were approximately 150 to 175 defective ballots held by her office at that time.

15. If the MCOEVR did not have an email address, the office attempted to contact the voter by telephone to advise the voter that his or her ballot had been cancelled. The MCOEVR hired additional personnel to give notice and an opportunity to cure to the affected voters. The ballots were kept in a locked room controlled by Ms. May-Silfee and were not opened or their contents inspected by any person in order to carry out this directive.

16. The MCOEVR carried out the Board's directive by the morning of November 4, 2022.

DISCUSSION

The Plaintiffs, who will be referred to as MCRC for purposes of brevity, filed a complaint seeking a declaratory judgment at 11:31 a.m. on November 4, 2022 and filed a Motion for Preliminary Injunction Without Prior Notice and Hearing at 11:33 a.m. in the Prothonotary's office. The motion was directed to chambers at approximately noon by the Court Administrator's office.

A hearing was held at approximately 1:30 p.m. to address the motion for preliminary injunction and the request for an *ex parte* temporary restraining order against the Board of Elections. MCRC arranged for Ms. May-Silfee to be present and shortly

after the hearing began, Attorney Dunn, the county solicitor, contacted chambers because he had received word that a hearing was being held to address litigation filed against the Election Board. This was brought to the court's attention and after discussion with counsel for MCRC, the hearing was recessed until 3:30 p.m. to allow the Board to be represented.

At 3:30 p.m., the court reconvened on the motion for preliminary injunction and all parties were present. Each side was given the opportunity to present witnesses and exhibits and the court received testimony from Ms. May-Silfee and from Commissioner John Moyer. The parties stipulated that the MCRC plaintiffs had standing to proceed.

MCRC argued that the MCOEVR violated the Election Code by cancelling the allegedly defective ballots and giving voters notice to cure them. MCRC cites the following provision of the Election Code:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, **1 shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.** An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

(b) Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

...(g) (1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be

permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

§ 3146.8. (emphasis supplied).

MCRC contends that the Election Code requires the MCOEVR to accept voters' ballots by hand delivery or by mail, electronically register them through the SURE system and to hold them securely in a locked place, pending pre-canvassing on Election Day. MCRC concedes that if the voter comes to the office and there is an obvious mistake of dating or signing or not using the security envelope, the office may allow the voter to correct the ballot at that time. Otherwise MCRC argues that the Election Code requires the office to keep the ballots locked up until Election Day when they can be pre-canvassed by the Election Board in accordance with the above statute.

The Election Board argues that it is permissible for the MCOEVR to contact voters who have submitted a ballot which is obviously defective so the voter is not disenfranchised. They contend that the Election Code does not prevent the Board from having this policy; they point out that it has always been Board policy to allow a voter to correct a defective ballot before 8:00 p.m. on Election Day. The defective ballot is kept under lock and key; it is segregated and available for inspection and no one is permitted to examine the contents of the ballot envelope.

The question posed here is one that our appellate courts have confronted over recent years. In *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Pennsylvania Supreme Court refused to find that a County *must* contact voters who have submitted an obviously defective ballot before Election Day.

Petitioner submits that when the Boards have knowledge of an incomplete or incorrectly completed ballot as well as the elector's contact information, the Boards should be required to notify the elector using the most expeditious means possible and provide the elector a chance to cure the facial defect up until the UOCAVA deadline of November 10, 2020, discussed supra.

Id. at 372.

The Supreme Court held that it was up to the Legislature, not the courts to determine that Election Boards had a duty to provide notice and an opportunity to cure ballots:

To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a "notice and opportunity to cure" procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government.

Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 374 (Pa. 2020).

This decision did not calm these troubled waters however. The next question that arose was whether Election Boards were *precluded* from providing notice and opportunity to cure ballots as Monroe County has done here. That question was recently addressed in an unpublished opinion of the Pennsylvania Commonwealth Court, *Republican National Committee, et. al. v. Chapman*, No. 447 M.D. 2022, (Pa. Cmwlth. September 29, 2022), *affirmed by evenly divided court*, 2022 WL 12327412, (Pa., November 1, 2022). There the Republican National Committee sought to enjoin Pennsylvania County Boards of Election from providing notice and an opportunity to cure defective ballots. Judge Ceisler of the Commonwealth Court denied the motion for

preliminary injunction. She noted the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa.2004). It is well-settled that, “although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote.” *Id.* Our Supreme Court has also stated that “[o]ur goal must be to enfranchise and not to disenfranchise [the electorate].” *In re Luzerne Cty. Return Bd.*, 290 A.2d 108, 109 (Pa.1972).

Judge Ceisler found that:

Notably, the Supreme Court did not explicitly decide whether County Boards’ implementation of notice and opportunity to cure procedures were **forbidden** under the Election Code, but only whether the Election Code **required** County Boards to implement such procedures. Those are separate and distinct issues. **Therefore, the Court disagrees with Petitioners’ argument that Pennsylvania Democratic Party was the final word on this subject.**

Republican National Committee v. Chapman, 447 M.D. 2022 at 38.

She also noted that the Election Code authorizes Count Boards to instruct their staff in the manner in which they carry out their duties under the Election Code:

§ 2642. Powers and duties of county boards

The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

...(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.

25 P.S. § 2642.

The Commonwealth Court denied the requested preliminary injunction:

Because it is not clear on either the text of the Election Code or the subsequent cases interpreting it, whether notice and cure procedures are permitted and/or prohibited by the Election Code, the Court concludes that Petitioners have failed to show a strong likelihood of success at this early stage of the litigation.

Republican National Committee at 41.

The six essential prerequisites that a moving party must demonstrate to obtain a preliminary injunction are as follows: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest. *SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 501–02, (Pa. 2014).

The *Republican National Committee* decision has been affirmed by an evenly divided Pennsylvania Supreme Court. Though both the unpublished decision of the Commonwealth Court and the decision of the evenly divided Pennsylvania Supreme Court in *Republican National Committee* do not present binding precedent, they may be considered for their persuasive value. *Weiley v. Albert Einstein Med. Ctr.*, 51 A.3d 202 (Pa.Super.2012) (where the Supreme Court is divided evenly, its opinion lacks precedential value, although it has persuasive value).

Given that our Supreme Court's policy has been to enfranchise the voter when interpreting ambiguous statutes and considering the Commonwealth Court's recent decision on this very subject, I find that MCRC has not shown a strong likelihood of success at this early stage of the litigation. I also find that granting the injunction at this time one day before the election would cause greater harm than refusing it. This suit was filed four days before the election; it was filed on a Friday, hours after the MCOEVR notified 150 to 175 voters that their ballots were cancelled and after they were offered the chance to cast a vote that would count. The Supreme Court decision on November 1, 2022 in *Ball v. Chapman*, 102 MM 2022 ordered the Election Board "to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes." To interfere with the MCOEVR action at the 11th hour would create additional uncertainty about the affected voters' right or ability to vote.

I find that refusing the injunction would return the parties most closely to the status quo; it has always been the policy of the Monroe County Election Board to allow a voter to come into the office to correct a defective absentee or mail-in ballot. At the hearing, MCRC had no objection to that happening if it occurred when the voter was there to turn in the ballot across the counter. The only difference here is that the MCOEVR emailed or called the voters to advise them of the defect in their ballots. I do not find that there was fraud involved or that there was political partisanship undertaken by MCOEVR staff or the Board. All Board members agreed on this instruction.

I do not find that the MCRC has a clear right to relief in view of the recent Commonwealth Court decision, and I find that at this point after 150 to 175 voters have been advised that their ballot has been cancelled and that they have an opportunity to file a correct one, it would adversely affect the public interest to grant the injunction.

Finally, the MCRC argues that the Board's instruction to the MCOEVR to cancel the ballots of the 175 voters in the SURE system and to email them or call them was a violation of the Sunshine Act, 65 Pa.C.S. §701, *et. seq.* The testimony established that a meeting of the Election Board was scheduled for November 2, 2022. This was done in error because the Election Board does not customarily hold a meeting in the beginning of November. The three board members appeared at the time of the meeting, but notified persons present that it was not a public meeting of the Board. They allowed persons present to address the Board, but the Board took no action and did not discuss policy. After the meeting, the members of the Board and their solicitor met in Commissioner John Moyer's office to discuss the decisions handed down on November 1, 2022 in the *RNC* and *Ball* cases. They decided to direct the MCOEVR to mark the defective, segregated ballots as cancelled and to notify those voters.

Given the restricted time period between the decision of the Pennsylvania Supreme Court on November 1 and the Election Board's decision to notify the voters on November 2, no injunctive relief will be imposed before the parties have an opportunity to brief and argue this point as this case progresses. See 65 Pa.C.S.A. §713 (the court *may* enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached.)

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FORTY-THIRD JUDICIAL DISTRICT
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MONROE COUNTY REPUBLICAN
COMMITTEE, JOSEPHINE FERRO,
THOMAS G. WHITEHEAD, and PETER
BEGLEY,

Plaintiffs,

vs.

MONROE COUNTY BOARD OF
ELECTIONS, JOHN D. CHRISTY,
County Commissioner of Monroe
County, Pennsylvania, SHARON S.
LAVERDURE, County Commissioner of
Monroe County, Pennsylvania,

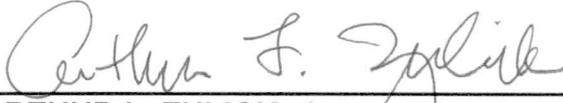
Defendants.

NO. 7228 CV 2022

ORDER

AND NOW, this 7th day of November, 2022, following consideration of the Plaintiffs' Petition for a Preliminary Injunction to prevent notice by the Monroe County Office of Elections and Voter Registration of defective absentee or mail-in ballots and the opportunity to cure in the 2022 general election, **IT IS ORDERED** that the motion is denied.

BY THE COURT:


ARTHUR L. ZULICK, J.

Monroe Prothonotary
NOV 7 '22 AM 10:01

cc: Thomas E. Breth, Esq.
John B. Dunn, Esq.

ALZ2022-035