

In the Circuit Court of Jefferson County, West Virginia

Nancy Singleton Case,)
Deborah A. McGee,)
Plaintiffs,)
)
vs.))
)
Corporation of Harpers Ferry,)
Harwick Smith Johnson,)
Charlotte Ward Thompson,)
Christian Pechuekonis,)
Marjorie Flinn Yost ET AL,)
Defendants)
)

Case No. CC-19-2019-P-136

ORDER REVERSING SEPTEMBER 11 ORDER DECLARING ELECTION RESULTS

This is an appeal from an Order Declaring Election Results by the Harpers Ferry Election Contest Tribunal, wherein the Tribunal refused to count four provisional ballots. Contesters assert that these four voters were duly registered voters in the State of West Virginia and in the municipality of Harpers Ferry, were residents and therefore, their votes should be counted. Upon review of this matter, this Court does reverse the Order of the Harpers Ferry Election Contest Tribunal for the reasons stated below:

BACKGROUND:

This matter comes before the Court on appeal, pursuant to WV Code 3-7-6, of the Order of the Municipal Election Tribunal of the Corporation of Harpers Ferry which was entered on

September 11, 2019. Contesters filed this appeal on September 27, 2019, at which time an Appendix of the Record was attached. An Objection to the contents of the Appendix was filed by the Corporation of Harpers Ferry, challenging documents contained in the proposed Appendix at pp. 13 – 60; this Objection was later joined by Contestees. On October 17, 2019, the Secretary of State filed a Motion for Leave of Court to file a Brief as Amicus Curiae. A response was filed to the Petition for Appeal by Contestees on October 22, 2019. On October 23, 2019, Contestees filed a Response to the Motion for Leave of Court, indicating they had no objection to the filing of the Brief as Amicus Curiae by the Secretary of State. On October 28, 2019, this Court heard oral arguments from counsel for Contesters, counsel for Contestees and counsel for the Secretary of State for West Virginia.

Without objection, all parties agreed that the exhibits attached to the dissenting opinion had not been considered by the Tribunal and should not be included in the record.

ACCORDINGLY, it is Ordered that Appendix 028-060 will not be considered by this Court.

The Tribunal made the following findings of fact which this Court does adopt based upon its review of the record: On June 11, 2019, the Corporation of Harpers Ferry (the “Town”) held a municipal election for the offices of Mayor, Recorder, and five at-large council seats. (Appx. 002, Para. 1) On June 17, 2019, the Board of Canvasser (the “Board”) met to conduct a canvass of election returns. At this meeting, the Board declined to count certain provisional ballots cast by voters whose names were not contained in the Harpers Ferry poll book. Following conclusion of the canvass, the Board formally declared the results of the election. (Appx. 002, Para. 2) The Board conducted a recount on June 26, 2019, and certified the results on June 28, 2019. (Appx. 002, Para 4 and 5) On July 8, Contesters filed their Notice of Intent to Contest. (Appx. 002, Para. 7) On July 18, 2019, Contestees filed a responsive pleading titled

“Contestees’ Notice Pursuant to West Virginia Code 3-7-6”. (Appx. 003, Para. 10.) On August 24, 2019, the Town Council of the Corporation of Harpers Ferry (the “Tribunal”) heard testimony and received evidence in the trial of this election contest. (Appx. 003, Para. 13.)

Although not contained in the record, the Tribunal makes a finding of fact regarding the request for a recount, “The Board met 48 hours later, on June 19, 2019 to certify the election results. At this meeting, Recorder Kevin Carden asserted that two losing candidates had made a recount request. Recorder Carden failed to produce to the Board any written evidence of any recount request at the time despite request to do so by another member of the Board. Nonetheless, based only on Recorder Carden’s representations, the Board delayed certifying the election in order to conduct a recount.” (Appx. 002, Para. 3)

MAKEUP OF TRIBUNAL:

WV Code 3-7-6 states, “In all cases of contested elections, the county commission shall be the judge of the election, qualifications and returns of their own members and of all county and district officers. Provided, that a member of the county commission whose election is being contested may not participate in judging the election, qualifications and returns.” (emphasis added) W. Va. Code § 8-5-17 states, in pertinent part: “All elections ordered and held by a municipality under the provisions of this chapter shall be canvassed by the governing body of such municipality.” The Court in *State ex. rel. Peck v. City of Council of City of Montgomery, Id.* and *Evans v. Charles*, 133 W.Va. 463, 56 S.E.2d 880, has held that “a municipal council has original and exclusive jurisdiction to hear and decide contested elections involving the selection of municipal officers.”

The parties do not dispute that the “The council of a city, town or village to which one,

whose seat is contested, is elected, is the proper tribunal to try such contest, and not the council in office at the time of the election. “ Syl. pt. 1, *Price v. Fitzpatrick*, 85 W.Va. 76, 100 S.E.872, (1919). What is contested is whether WV code 3-7-6 would prohibit Council members Johnson and Thompson from serving on the Tribunal based upon WV Code 3-7-6 which prohibits a member . . . whose election is being contested, from participating in judging the election, qualifications and returns.

The Tribunal concluded that it “has no legal authority to compel any one or more of its members to disqualify themselves from participating in any business that comes before the Town Council. Disqualification is determined and undertaken on an individual basis.” This Court declined to make a ruling on this very issue when the Contesters filed a Writ of Prohibition; at the time, ruling that a Writ of Prohibition was not an applicable remedy available to the Contesters at the time of filing.

At the start of the evidentiary hearing held on August 24, 2019, Contesters renewed their motion to disqualify council members Johnson and Thompson from serving on the Tribunal. The Tribunal denied the request stating only that they had no legal authority to disqualify any of its members. The Tribunal seems to ignore WV Code 3-7-6 which prohibits a member whose election is being contested, from participating in judging the election, qualifications and returns. Contestees previously had argued that because all seats on the council were up for election, and the law requires the Town Council to serve as the Tribunal, that the Rule of Necessity required all Contestees to serve on the Tribunal. The Tribunal makes no conclusions of law as it relates to their decision to deny Contesters’ motion. This Court will not address this specific issue any further as the present makeup of the Tribunal is not relevant to the findings of this Court and conclusions reached on the merits of the case.

STANDARD OF REVIEW

WV Code 3-7-7 permits either the Contester or the Contestee to “appeal to the Circuit Court of the county from the final order or decision of the county court [Municipal Tribunal] in such proceeding, upon the filing of a bond When such appeal is taken to the circuit court, as hereinbefore provided, it shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by the county court, and the circuit court shall decide the contest upon the merits.”

Syl. Pt. 6, *Brooks v. Crum*, 158 W. Va. 882, 216 S.E.2d 220 (1975), the Court stated:

While the appellate court may examine the record in the review of election contests in order to reach an independent conclusion, it merely determines whether the conclusions of law are warranted by the findings of fact, and it will not, as a general rule, disturb findings of fact on conflicting evidence unless such findings are manifestly wrong or against the weight of the evidence.

STANDING OF NANCY SINGLETON CASE

This Court will first address the issue of Contester Nancy Singleton Case’s standing to bring or prosecute this election contest. The Tribunal concluded that Nancy Singleton Case failed to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of the election by the Board of Canvassers. (Appx. 006, Para. 37) The order never makes any findings of fact or conclusions of law regarding Deborah McGee’s standing. Paragraph 30 of the order states that “Contesters Nancy Case and Deborah McGee were called by the Contestees and testified, among other things, about whether they fulfilled the necessary legal prerequisites to bring this election contest. (Appx.

005, Para. 30) The Tribunal's conclusion that Nancy Singleton Case lacks standing was based solely on her failure "to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of election by the Board of Canvassers." (Appx. 006, Para. 37) The Tribunal ignores the testimony of Nancy Singleton Case that she submitted her request for recount by email (Appx. 165, ln. 16-18) and the testimony of Deborah McGee who testified that she saw the email sent by Ms. Case to the Town requesting the Recount. (Appx. 173, ln. 14-15)

The Tribunal also ignores its own finding on this same fact at Paragraph 3 of its Order in which the Tribunal acknowledges that within 48 hours of the Canvass, Mr. Carden had informed the Town Council that two individuals were requesting a Recount.

LAW RELATING TO STANDING

Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Findley v. State Farm Mut. Auto Ins. Co.* 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black's Law Dictionary)

WV Code 3-6-9 addresses recounts and regarding the same states the following:

(f) If a recount has been demanded, the board shall have forty-eight hours in which to send notice to all candidates who filed for the office in which a recount has been demanded of the date, time and place where the board will convene to commence the recount. The notice shall be served under the provisions of subsection (g) of this section. The recount shall be set for no sooner than three days after the serving of the notice: Provided, That after the notice is served, candidates so served shall have an additional twenty-four hours in which to notify the board, in writing, of their intention to preserve their right to demand a recount of precincts not requested to be recounted by the candidate originally requesting a recount of ballots cast: Provided, however, That there shall be only one recount of each precinct, regardless of the number of requests for a recount of any precinct. A demand for the recount of ballots cast at any precinct may be made during the recount proceedings only by the candidate originally requesting the recount and

those candidates who notify the board, pursuant to this subdivision, of their intention to preserve their right to demand a recount of additional precincts.

(g) Any sheriff of the county in which the recount is to occur shall deliver a copy thereof in writing to the candidate in person; or if the candidate is not found, by delivering the copy at the usual place of abode of the candidate and giving information of its purport, to the spouse of the candidate or any other person found there who is a member of his or her family and above the age of sixteen years; or if neither the spouse of the candidate nor any other person be found there and the candidate is not found, by leaving the copy posted at the front door of the place of abode. Any sheriff, thereto required, shall serve a notice within his or her county and make return of the manner and time of service; for a failure so to do, he or she shall forfeit \$20. The return shall be evidence of the manner and time of service.

In the instant case, Nancy Singleton Case requested the recount by contacting Mr. Carden. The Tribunal acknowledged this at Para. 3 of its Order. Nothing in WV Code 3-6-9 sets forth a format for how the request for recount must appear (i.e. in writing, email, or verbal). However, the 2018 Best Practices Guide, issued by the Secretary of State, sets forth the procedure for requesting a recount. The Guide states that the request must be made in writing within 48 hours and accompanied by the required bond. It would appear that Ms. Case's email to Mr. Carden would satisfy the requirement of a written request, however, it does not appear Ms. Case posted the required bond. Ms. Case testified that she did not submit her own bond. She further testified that she believed the bond posted by Ms. McGee would satisfy her requirement to post bond. (Appx. 166 and 167)

ACCORDINGLY, this Court does affirm the Tribunal's decision that Nancy Singleton Case does not have Standing to Contest the election for the reason that she failed to submit the required bond within 48 hours.

THE FOUR PROVISIONAL BALLOTS:

The Tribunal noted at paragraph 17 of its Order that "At the outset of the trial, the Contesters expressly abandoned all election contest claims and allegations except for their claims

that the provisional ballots of [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] (the "Provisional Voters") should be counted. The Tribunal went on to state, "The only issue presented for decision by the Contesters at the trial of this election contest is whether the ballots of the four Provisional Voters that were cast in the recent municipal election should be counted." (Appx. 006, Para. 39)

In the instant case, this Court has reviewed the record filed with the Court as an Appendix (less pp. 23 to 60). The Court then reviewed the Findings of Fact set forth in the Order Declaring Election Results. The Tribunal appeared to focus on the lack of any evidence from the DMV concerning the nature, source or cause of the alleged voter registration errors. The Tribunal failed to credit any of the information provided by Nikki Painter as evidence of whether or not a technical error resulted in her having left the names of these four voters out of the Harpers Ferry Poll Book.

Ms. Painter testified that she was the person responsible for preparing the Harpers Ferry Poll Book. (Appx. 90, lns 15-17) Ms. Painter testified that she reviewed the voter registrations of these four voters. (Appx. 91, lns 14-16) Ms. Painter testified that she pulled their record to see if her office had made a mistake, and was able to see that all four voters registered at the DMV. (Appx. 92, lns 1-3) The record that was sent to the Jefferson County Clerk's Office reported that the address of these four voters was "West Washington Street." (Appx. 92, lns 4-6) Ms. Painter testified that based on the address of all four voters, that those residences should have been contained in the Harpers Ferry Poll Book. (Appx. 93 and 94, lns 9-11, ln 7) Ms. Painter testified that had the names of these four voters been put in the poll book, they would have been allowed to vote without having to cast a provisional ballot. (Appx. 94, lns 8-12) Ms. Painter testified that these four voters

were all properly registered prior to the municipal election on June 11. (Appx. 96, Ins 10-14) Ms. Painter testified that after discovering the problems related to the Harpers Ferry Election, she researched where the street numbers stopped for Harpers Ferry and where they began for Bolivar. (Appx. 100, Ins 23-24) When asked about how the County Clerk's Office would make sure this mistake would not happen again, Ms. Painter testified that she now has the street numbers for what side goes to what municipality. (Appx. 102, Ins 22-23) Ms. Painter testified that she has corrected the information related to both Voter [REDACTED] and Voter [REDACTED] to which now correctly places them in the Harpers Ferry municipality. (Appx. 100 -101) She did not correct Voter [REDACTED] information because they had gone to DMV to get the correct address. (Appx. 99, Ins 12-13) Ms. Painter explained that had she gone by the voters' house numbers, she would have included their names in the Harpers Ferry Poll Book; however, she had looked at the street name which included "West" in front of Washington Street and based on the word "West" had listed them in Bolivar. (Appx. 92, Ins 4-7 and Appx. 93, Ins 7-8) The evidence presented by Ms. Painter was clear and undisputed that Voter G. [REDACTED] Voter L. [REDACTED] Voter [REDACTED] and Voter [REDACTED] were each duly registered voters in the State of West Virginia. It was clearly against the weight of the evidence and manifestly wrong for the Tribunal to have listened to the undisputed testimony of the Chief Deputy Clerk of Elections and not to have reached this conclusion.

The Tribunal mistakenly focused on a need to hear from a DMV representative as to the cause of having included the word "West" in these voters' addresses. The Tribunal ignored the totality of the circumstances, that all four voters registered to vote while at the DMV and all three of the four voters testified that DMV added the word "West" to their

address. There was no evidence presented to contradict the testimony of Ms. Painter or the three voters who testified.

The Tribunal erred when it concluded that because [REDACTED] did not testify, that there was no competent evidence concerning Ms. [REDACTED] residency or the nature or source of error affecting her voter registration. The Tribunal ignored the testimony of Ms. Painter who testified that Ms. [REDACTED] was duly registered to vote and had done so at the DMV. (Appx. 92, Appx 101-102) This Court finds that Ms. Painter's testimony that Voter [REDACTED] did register to vote through the DMV, in addition to the fact that she appeared in Harpers Ferry on June 11, 2019, to vote and had been certified by the Town Council to be included as a candidate in the election for Town Council in the June 11, 2019, election and was certified in the same election as having received votes as a candidate, is sufficient evidence on which the Tribunal could have and should have concluded Voter [REDACTED] was a resident of Harpers Ferry at the time she cast her vote on June 11, 2019. While this Court does find sufficient evidence in the record to conclude that all four voters were residents of Harpers Ferry, this Court does believe that the Tribunal erred in concluding that the Contesters must prove both that the voters were "duly registered" and that they resided in the municipality at the time of the election. In fact, once the Contesters proved that the voters were "duly registered" at the time of the election, they were presumed to be an eligible voter until proven otherwise. That is (presumably) why a person who is "duly registered," and appears to offer his vote, is not asked any continuing questions about residency at the time the vote is cast or required to show any proof of residency.

This Court notes that the Tribunal did not make any specific findings of fact related to the residency of Voters G. [REDACTED] L. [REDACTED] or [REDACTED]. Each of these voters testified that they reside in Harpers Ferry within the municipality and that they intend to reside there in the foreseeable future. Accordingly, this Court will find that these three Voters met all residency requirements to have voted on June 11, 2019.

CONCLUSIONS OF LAW:

Because Harpers Ferry has adopted a permanent voter registration system pursuant to Article 2 of Chapter 3 of the West Virginia Code, the provisions of that article apply to

this election contest. *Harpers Ferry, W.Va., Ordinances Ch. 1, Art. 103, §103.04 (2019)* adopting Permanent Voter Registration law of West Virginia.

Pursuant to the Permanent Voter Registration law, WV Code §3-2-1 (c) states, “A person who is not eligible or not duly registered to vote shall not be permitted to vote at any election in any subdivision of the state, except that such voter may cast a “provisional” or “challenged” ballot as provided in this chapter if the voter’s eligibility or registration is in question and such “provisional” or “challenged” ballot may be counted only if a positive determination of the voter’s eligibility and proper registration can be ascertained.”

WV Code §3-2-4a authorizes and mandates the Secretary of State implement a single, official statewide, centralized, interactive computerized voter registration database of every legally registered voter in the state. WV Code §3-2-4a (a) (5) gives the authorized designee of the clerk of the county commission immediate electronic access to the information contained in the statewide voter registration database. WV Code §3-2-4a (a) (8) states, “The statewide voter registration database shall serve as the official voter registration list for conducting all elections in the state.” WV Code §3-2-4a (g) states, “The Secretary of State and the Commissioner of the Division of Motor Vehicles shall enter into an agreement to match and transfer applicable information in the statewide voter registration database with information in the database of the Division of Motor Vehicles to the extent required to enable each official to verify the accuracy of the information provided on applications for voter registration.”

WV Code §3-2-5 (c) requires that an application for registration shall be under oath and include the following:

- (1) The applicant's legal name, including the first name, middle or premarital name, if any, and last name;
- (2) The month, day and year of the applicant's birth;
- (3) The applicant's residence address including the number and street or route and city and county of residence . . .;
- (4) The applicant's signature, under penalty of perjury as provided in section thirty-six of this article, to the attestation of eligibility to register to vote and to the truth of the information given. . .

WV Constitution Art. 4, §1 states, "The citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside . . . or who has not been a resident of the state and of the county in which he offers to vote, for thirty dates next preceding such offer. . ."

WV Code §3-2-6 requires that a voter be registered by the twenty-first day before an election to be eligible to vote in that election.

W. Va. Code § 3-7-8 (1963) (Repl. Vol. 2011) provides:

Though illegal votes be received, or legal votes be rejected, at any place of voting, the returns of the votes taken at such place shall not be set aside for that cause, but it may be shown, by proper evidence before the tribunal authorized by law to hear and determine contested elections, for whom such illegal votes or any of them were cast, or for whom the legal votes which were rejected would have been given, and the returns shall be corrected only to the extent that it is so shown.

Under Conclusions of Law, within its Order, the Tribunal correctly notes that the only issue is whether the ballots of the four Provisional Voters should be counted. The Contesters bear the burden of proof as the party who commenced the contest. (Appx. 6-7, para. 39) The Tribunal proceeds to cite the WV Constitution and WV Code regarding various election laws as listed above. At paragraphs 48 and 49 of the Order (Appx. 008), the Tribunal correctly notes that the voter registration requirements enable election officials to determine whether someone satisfies the constitutional and statutory

qualifications before he or she actually casts a ballot.

While the Tribunal correctly cited statutory and constitutional law within its Order, the Tribunal erred when it relied upon the WV Supreme Court's analysis of "duly registered" voter and "technical error" in the case of *Galloway v. Common Council of City of Kenova*, 133 W.Va. 446 (1949). The *Galloway* decision predates the Permanent Voter Registration System. The Court noted in *Galloway* that there was a separate registration requirement for a voter to be included in the Municipal poll book. In *Galloway*, the voter failed to complete the registration requirements to be included in the Municipal poll book. This separate registration requirement for municipal voter registrations is no longer the law. WV law now has a single voter registration system that covers all elections, state, county and municipal. In 2004 West Virginia implemented its Help America Vote Again ("HAVA") compliant voter registration system, known today as a Singular Voter Registration System ("SVRS"). Voter registration information across the state is entered into this database at the county level. HAVA requires that state and local election officials maintain the list of voters in the database according to the provisions of the National Voter Registration Act of 1993. See also W.Va. Cod and *State ex. Rel. Roter O. Ellis v. County Court of Cabell County*, 153 W.Va. 45, 167 S.E.2d 284 (1969)3-2-4a

Unlike the facts in *Galloway*, where the voter failed to complete the separate voter registration form to be included in the Municipal poll book, in the instant case, these voters' names were left out of the Harpers Ferry Poll Book because of the word "West" added to their street name.

The Tribunal improperly concludes that because the names of these four voters were not in the poll book at the time the votes were cast, that the ballots cannot be counted. (Appx. 010, Para. 57) WV Code §3-1-41 discusses how to handle a provisional ballot. WV Code §3-1-41(e) addresses provisional voter procedures and requires "... The county commission [Town Council] shall disregard technical errors, omissions or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote." The Tribunal wrongly concluded that this type of error was similar to that in *Galloway*.

It is necessary for this Court to look at the totality of the evidence presented on August 24, 2019, both direct and circumstantial evidence to determine (if possible) why

these names were omitted from the Harpers Ferry Poll Book. Upon review of the testimony of Nikki Painter, who testified in this matter as the Chief Deputy Clerk of Elections; the person responsible for maintaining the voter registration database, it is not difficult to determine how or why these names were left out of the Harpers Ferry Poll Book. She also gave clear and uncontroverted testimony that all four of the voters who cast a provisional ballot, were “duly registered” under the laws of the State of West Virginia and as such were eligible voters in the June 11, 2019, election. She did not include these names because she was misled by the word “West” in the street address, rather than relying on the house numbers that were included. The voters provided all required information required under the voter registration laws of the State of West Virginia. This was a technical error whether caused by DMV or a Mapping system. It was an error that could have been corrected had Ms. Painter known to rely upon the house numbers listed in the address.

CONCLUSION

ACCORDINGLY, this Court concludes the names of these four voters were left out of the poll book due to a technical error and that WV Code §3-1-41(e) requires that under these circumstances the Town Council should count the four provisional ballots of Voters L. [REDACTED] G. [REDACTED] [REDACTED] and [REDACTED]. The WV Constitution and WV Code, both require this outcome.

For all the foregoing reasons, this Court does REVERSE the decision of the Harpers Ferry Contest Tribunal Order Declaring Election Results and ORDERS that the Harpers Ferry Town Council count the provisional ballots of L. [REDACTED] G. [REDACTED] [REDACTED] and

██████ and that those votes be included in a recount.

/s/ Debra McLaughlin
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courts.wv.gov/e-file/ for more details.