

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1161 CD 2020

IN RE: ALLEGHENY COUNTY PROVISIONAL BALLOTS IN THE
2020 GENERAL ELECTION

Appeal of: Nicole Zicarelli

BRIEF FOR APPELLANT NICOLE ZICCARELLI

Appeal from the Allegheny County Court of Common Pleas
Memorandum and Order dated November 18, 2020, GD 20-011793

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I. STATEMENT OF JURISDICTION

The Court has jurisdiction over this election-related appeal pursuant to Section 762(a)(4) of the Judicial Code, 42 Pa.C.S. § 762(a)(4).

II. ORDER IN QUESTION

Appellant Nicole Zicarelli appeals from the Memorandum and Order of the Court of Common Pleas of Allegheny County dated November 18, 2020, denying her Petition for Review and affirming the decision of the Allegheny County Board of Elections to canvass certain disputed ballots (attached as Exhibit A).

III. STATEMENT OF QUESTION PRESENTED

Should the Court reverse the Order of the Allegheny County Court of Common Pleas given that the Election Code requires setting aside provisional ballots that do not contain the necessary affidavits?

Suggested Answer: Yes.

IV. SCOPE AND STANDARD OF REVIEW

This matter calls for the Court to review and determine the meaning of the Election Code. “[S]tatutory interpretation of the Election Code . . . as a question of law, is subject to a de novo standard of review and a plenary scope of review.” *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015).

V. SUMMARY OF ARGUMENT

This case involves the decision of the Allegheny County Board of Elections to canvass provisional ballots that were submitted by voters who either failed to affix the necessary signatures under the Election Code, or whose mail-in ballots were timely received, but ultimately found defective. The Election Code requires that an elector casting a provisional ballot sign both the affidavit prior to voting and—after voting—sign the envelope in which the provisional ballot is enclosed. Further, the Election Code is also clear in its mandate that an elector’s provisional ballot shall not be counted where a mail-in ballot is timely received by the Board of Elections. The Election Code provides no discretion to the Board of Elections to cure a defective mail-in ballots by accepting a provisional ballots, where the defective mail-in ballot is timely received. Because the plain language of the Election Code clearly sets forth these mandatory requirements, with which the Disputed Ballots do not comply, this Court should reverse the trial court.

VI. STATEMENT OF THE CASE

Under Section 3050 of the Election Code voters whose qualifications as an elector cannot be established at their polling location are permitted to cast a provisional ballot. *See generally* 25 P.S. § 3050. However, the Election Code requires electors casting provisional ballots—as well as the individual county boards of elections responsible for counting the provisional ballots—to adhere to certain basic guidelines. Specifically, “prior to voting the provisional ballot,” the elector is required to sign an affidavit affirming his or her qualification to vote in that election. *See* 25 P.S. § 3050(a.4)(2)(providing that “[p]rior to voting the provisional ballot, the elector shall be required to sign an affidavit” setting forth the voter’s qualifications to cast a ballot and affirming that the elector has not yet voted in that election).

Upon completing the provisional ballot, the elector must place it in a secrecy envelope, place the secrecy envelope inside the provisional envelope, and sign the front of the provisional envelope. *See id.* at § 3050(a.4)(3). Once the polls close on election day, the provisional ballots are returned to the county boards of elections, who, in turn, are charged with examining the provisional ballot envelope “to determine if

the individual voting that ballot was entitled to vote at the election district in the election.” *Id.* at § 3050(a.4)(4). During this time, each of the political parties and candidates in the election are permitted to designate one representative, who may “remain in the room in which the determination is being made” and “challenge any determination of the county board of elections with respect to the counting or partial counting of the ballot under this section.” *Id.* at § 3050(a.4). Within seven days of a challenge being lodged, the county board of elections must “fix a time and place for a formal hearing of all such challenges,” and provide notice to all provisional electors whose ballots have been challenged. *Id.* at § 3050(a.4)(4)(i).

In the 2020 General Election, approximately 17,000 provisional ballots were cast in Allegheny County. As required by the aforementioned statutory scheme, the Allegheny County Board of Elections (“Board”) presented these ballots for review, resulting in various challenges to the Board’s preliminary assessment of the provisional ballots. A hearing was scheduled on the challenges for November 17, 2020, prior to which a large number of challenges were withdrawn, resulting in three classes of challenges remaining:

(1) ballots containing an affidavit signed by the voter under 25 P.S. § 3050(a.4)(2), but not a signed provisional ballot envelope under 25 P.S. § 3050(a.4)(3); (2) ballots containing a provisional ballot envelope signed by the voter under 25 P.S. § 3050(a.4)(3), but not an affidavit signed under 25 P.S. § 3050(a.4)(2); or (3) ballots cast by electors whose mail-in or absentee ballots were timely received by the Board, but were deemed defective by the Board (“the Disputed Ballots”).

During the hearing, the Board briefly heard argument from counsel and received testimony from the Elections Division Manager, David Voye, on each class of the provisional ballots challenged, as well as one elector who had received notice of the challenge to his provisional ballot. Notably, despite having ample opportunity to present factual testimony and build an evidentiary record, the Board did not present any proof or testimony regarding the facts surrounding the particular defects in the Disputed Ballots. Indeed, in response to questioning from the Board’s Chairman, Mr. Voye stated that he “cannot answer why” the voters failed to affix their signature on both the affidavit and the envelope and went on to state, “I *would say* that the voter signed it, and *maybe* at the direction of the Board members did not sign it twice.” As

for the voters whose mail-in ballot was timely received, Mr. Voye, once again, suggested that some of them may have contacted the Board and could have received faulty instructions. The Board voted to canvass these three classes of provisional ballots.

Appellant Nicole Zicarelli filed with the Allegheny County Court of Common Pleas a Petition for Review of this decision. Zicarelli is the Republican candidate for the 45th Senatorial District (Allegheny and Westmoreland Counties). On November 17, 2020, the trial court conducted a hearing and, on November 18, 2020, the trial court issued an Order denying the Petition for Review and affirming the Board. Appellant Zicarelli appealed to this Court on November 18, 2020.

VII. ARGUMENT

This Court should reverse the trial court because the Disputed Ballots do not comply with the plain language requirements of the Election Code.

A. Section 3050 prohibits counting the Defective Ballots.

To begin, the Board's decision is in plain contravention of Section 3050, which states that a provisional ballot "*shall not be counted*" if "either the provisional ballot envelope . . . or the affidavit . . . is not signed by the individual;" 25 P.S. § 3050(a.4)(5)(ii)(A), or if "the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." *Id.* at § 3050(a.4)(5)(ii)(F) (emphasis added). The Board's decision to count these ballots is about as clear of a violation of its duties as this Court has encountered and, short of a challenge to the statute's constitutionality, it is difficult to conceive of any viable argument that would excuse the Board's failure to comply with its obligations.

In this regard, to the extent the Board intends to renew the assertion that setting aside the Disputed Ballots would disenfranchise voters for the errors committed by the voting officials, that argument

lacks merit. Most fundamentally, the record is devoid of a single piece of evidence that would support the assertion that the electors submitting the Disputed Ballots were provided faulty instructions. Thus, the Board's rank speculation provides no basis for even considering the limited circumstances under which courts have excused strict compliance with the Election Code in light of mistakes made by the Commonwealth.¹

Moreover, even assuming *arguendo*, that the defects in the Disputed Ballots were the result of erroneous instructions by election officials, the Board is nonetheless required to set them aside. In this regard, the Supreme Court's decision in *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223, 1234 n.14 (Pa. 2004), which also involved the Allegheny County Board of Elections, is instructive. Explaining that the limited exception relied

¹ To the extent the Board intends to argue that a provisional ballot should be set aside only where the mail-in ballot is counted, that argument lacks merit in light of the statute's plain language, which instructs the board to set aside a provisional ballot if the mail-in ballot has been "**received**." Had the legislature intended the construct offered by the Board, it could have used other terms, such as "canvassed," or "computed." Therefore, such a consideration is immaterial for purposes of determining the validity of a provisional ballot under Section 3050. Rather, pursuant to the mandatory language of Section 3050, so long as the absentee or mail-in ballot is timely received by the Board, the provisional ballot shall not be counted, regardless of any consideration of whether the absentee or mail-in ballot is considered defective.

upon by the Board is only appropriate where there is a “breakdown” in the system that prevents compliance with the Election Code, the panel rejected the argument that absentee ballots delivered by third parties should be canvassed because county board had issued a directive suggesting that such method of submission was permissible. As aptly relayed by that Court:

The Board of Elections' failure to follow clear substantive provisions of the Election Code does not constitute a breakdown in the court's operations which a court has the power to remedy. Moreover, the position taken by the Board was one which was more likely to invite, rather than remedy, fraud. In addition, that position went to substantive matters—how to cast a reliable vote—and not to a mere procedural matter, such as a filing deadline. Finally, if we were to approve the Board's contra-statutory actions here upon such “equitable” grounds, it would generate a far greater inequity: the uneven treatment of absentee votes throughout the Commonwealth.

Id. at 1234. Finally, citing *Appeal of James*, 105 A.2d 64 (Pa. 1954), which is the very same case the trial court relied upon in support of its holding that the Board was authorized to overlook the facial defect in the Disputed Ballots, the Court concluded:

We recognize that the Board of Elections' instructions may have misled some absentee voters. But so-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and

must therefore be observed—particularly where, as here, they are designed to reduce fraud.

Id. Indeed, the Supreme Court recently reiterated that principle in *In re Scroggin*, 237 A.3d 1006, 1018 (Pa. 2020), where the Court considered a challenge to the nomination papers of a vice-presidential candidate who had obtained signatures from over 8,500 voters but submitted a defective candidate’s affidavit. Although the panel recognized that the Election Code should be liberally construed to support the electors’ “right to elect the candidate of their choice[,]” it held that the nomination should be set aside, as “[i]t is well-settled that the so-called technicalities of the Election Code must be strictly enforced, particularly where ... they are designed to reduce fraud.” *Id.* at 1018.

B. Under the Supreme Court’s interpretation of the Election Code, a provisional ballot without both signatures is invalid and, thus, must be set aside.

Although Section 3050 is mandatory and directs the Board to exclude these ballots renders recourse to case-law interpreting shall unnecessary, to the extent this Court is inclined to review that authority, they militate against the Board’s construct. Because the word “shall” carries an imperative or mandatory meaning,” Section 3050’s requirement that a provisional ballot contain both the signature on the

affidavit and the ballot envelope is presumptively mandatory. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004) (*Appeal of Pierce*); see also *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (“By definition, ‘shall’ is mandatory.”).

To the extent this Court has any doubt regarding the interpretation of this mandatory requirement for both signatures, it should look no further than the Supreme Court’s recent interpretation of a similar provision of the Election Code in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Although the Supreme Court in *Boockvar* analyzed compliance of mail-in rather than provisional ballots, it is nonetheless instructive as to the Supreme Court’s interpretation of mandatory provisions in the Election Code on the whole.

Specifically, examining the mail-in ballot provision’s directive that the elector’s ballot “shall” be enclosed in a secrecy envelope, the Court held that “the secrecy provision language in Section 3150.16(a) is mandatory and the mail-in elector’s failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the

ballot invalid.” *Id.* at 380. Given that parts of statutes relating to “the same persons or things or to the same class of persons or things” are to be read *in pari materia*, *Cozzone ex rel. Cozzone v. W.C.A.B. (Pa Mun./E. Goshen Twp.)*, 73 A.3d 526, 536 (Pa. 2013), *Boockvar*’s interpretation of the term “shall” in the context of mail-in ballots applies with equal force to the requirements of Section 3050 for provisional ballots. Hence, absent a compelling showing of a material distinction between two Sections of the Election Code, the Board’s decision to canvass the disputed ballots is untenable under *Boockvar*’s holding.

Further, the *Boockvar* panel’s detailed rendition of the mandatory-versus-directory dichotomy in the context of the Election Code also undermines the Board’s construct. Specifically, although the *Boockvar* panel acknowledged that it has occasionally construed mandatory language as merely directory, it declined to expand the scope of those decisions. To the contrary, carefully distinguishing its prior decisions in *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004), and *Appeal of Weiskerger*, 290 A.2d 108 (Pa. 1972), the Court clarified that it has treated a mandatory provision as directory only under limited

circumstances. *See Boockvar*, 238 A.3d at 378-79 (“[T]his case is distinguishable from those cases relied upon by the Secretary, which deemed mandatory language merely directory and without consequence.”). Concluding that neither *Bickhart*, nor *Weiskerger* supplied the proper framework, the Court relied on *Appeal of Pierce*—which it characterized as “most analogous to the . . . case” before it—and its holding that “the Election Code’s ‘in-person’ ballot delivery requirement was mandatory, and that votes delivered by third persons must not be counted.” *Boockvar*, 238 A.3d at 379 (internal citations omitted).

Against the foregoing backdrop, Section 3050(a)’s requirement relative to voter declarations, like the secrecy portion of the provision at issue in *Boockvar*, are plainly mandatory, rather than directory.

Accordingly, based upon the plain language of Section 3050 of the Election Code, which should be construed as mandatory, consistent with the Supreme Court’s decision in *Boockvar*, a voter must sign **both** the affidavit and ballot envelope when casting a provisional ballot. Further, this requirement for both signatures is evidenced by Section 3050(a.4)(5)(ii), which states that “a provisional ballot shall not be

counted if . . . either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual.” 25 P.S. § 3050(a.4)(5)(ii)(A). Therefore, the trial court erred when it concluded that provisional ballots lacking one of the necessary signatures could be counted.

This is consistent with the Supreme Court’s recent analysis in *Boockvar* of the ability to “cure” non-compliant ballots. To explain, the Petition for Review at issue there demanded (in addition to relief from the secrecy envelope provisions) that county boards of elections, Allegheny’s and Philadelphia’s included, be directed to provide citizens with the opportunity to “cure” so-called “minor” errors on the outer envelope of mail-in ballots. *See id.* at 353, 372-74; *see also* Petition for Review at ¶ 123, *Pennsylvania Democratic Party v. Boockvar*, No. 407 MD 2020 (Pa. Cmwlth.) (“Balancing the impacts of disenfranchising electors for minor inconsistencies, against the (non-existent) governmental interest the harm to the voter is overwhelming; thus, electors should be allowed to cure a facial defect on their Mailing Envelope.”). The Court—unanimously on this particular issue—expressly declined to provide such relief. Instead, it agreed with the

Secretary of the Commonwealth and held that the General Assembly alone had the right to provide a procedure to “cure” purportedly “minor” defects, and in the absence of such a procedure from the legislature, none could be supplied by a court. *See Boockvar*, 238 A.3d at 374; *see also Winston v. Moore*, 91 A. 520 (Pa. 1914) (“The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government.”) (cited favorably in *Boockvar*, 238 A.3d at 373-74).

In concurrence, Justice Wecht took the Court’s majority holding on so-called “minor” defects and projected it even further than a mere question about the right to cure. He observed that where mail-in ballots, once received, suffered from “objective” defects, including “the failure to ‘fill out, date and sign the declaration printed on’ the ballot return envelope,” that there is “no offense to the Free and Equal Elections Clause” when those ballots are rejected. *See id.* at 389 (Wecht, J., concurring). Justice Wecht so concluded because such facial defects were subject to “uniform, neutrally applicable election regulation,” rather than “subjective assessments,” which are susceptible to “inconsistency and arbitrariness[.]” *See id.* As is acutely material here,

he further observed that distinguishing between purported “minor” versus “major” “defects and omissions” was not, at least on the record before that Court, subject to “judicially manageable criteria[.]” *See id.*

There are two critical takeaways from this portion of the *Boockvar* opinion for present purposes.

First, the Supreme Court, the Secretary of the Commonwealth, and the petitioners were in utter agreement that deficiencies on the mailing envelope were “defects” under the Election Code that required a “cure” to remediate them. *See id.* at 377. It does not appear any party argued that in the absence of a cure—and, critically, none was observed in the Election Code nor supplied by the Court—that these defects could be simply ignored. Indeed, it appears the very premise of the dispute in *Boockvar* was that absent judicial intervention, ballots would be rejected based on “minor” defects. With the Court having, rightly, refused to provide that cure (which only the General Assembly can supply), the clear inference is that such “minor” defects render the ballots with which they are affiliated incurable and void. *See In re Scroggin*, 237 A.3d 1006, 1018 (Pa. 2020) (“It is well-settled that the ‘so-

called technicalities of the Election Code’ must be strictly enforced, ‘particularly where . . . they are designed to reduce fraud.’”)

Second, at a minimum, the decision foretells the outcome of this appeal. Indeed, Justice Wecht’s concurrence takes the narrow issue presented by the petitioners there—the right to cure—and projected it forward to the obvious next case: one involving un-cured ballots. His projection, albeit his alone, is that such ballots are invalid. *See Boockvar*, 238 A.3d at 389 (Wecht, J., concurring). His analysis of the matter should be adopted here, since the Election Code’s mandate is clear—provisional ballots shall not be counted where a mail-in ballot is timely received—and there is no judicial right to line-item-veto out those parts of the Election Code that a court might otherwise deem unwise or unimportant. *See id.* at 373 (majority opinion) (citing *Winston*, 91 A. at 522 for the proposition that “[t]he power to regulate elections is legislative”). As Justice Wecht observed, applying a uniform in-or-out, objective analysis to such defects offends neither the Election Code nor the Pennsylvania Constitution. The Court here should adopt the same reasoning and thus require all boards of elections to count those ballots that were objectively complete, as the Election Code

demands, and not count those that were objectively incomplete. Simply put, ballots not validly cast as the Election Code requires should not be made valid by simply ignoring provisions of the statute.

Thus, it was error for the trial court conclude that an elector's provisional ballot could be counted where the elector's mail-in ballots were timely received.

VIII. CONCLUSION

The mandatory provisions of the Election Code are clear that in order for provisional ballots to be counted: (i) they must contain an affidavit signed by the elector; (ii) they must contain a secrecy envelope signed by the elector; and (iii) there was no mail-in ballot timely received by the Board. Because the Disputed Ballots here do not meet these requirements, this Court should reverse the Court of Common Pleas of Allegheny County.

Respectfully submitted,

Dated: November 19, 2020

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WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 2135. Based on the word count feature of the word processing system used to prepare this brief, this document contains 3457 words, exclusive of the cover page, tables, and the signature block.

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Exhibit A

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

No. GD 20-011793

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

MEMORANDUM AND ORDER OF COURT

Respondent,

Honorable Joseph M. James

and

PENNSYLVANIA DEMOCRATIC PARTY
AND JAMES BREWSTER,

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**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

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and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011793

MEMORANDUM AND ORDER OF COURT

James, J.

November 18, 2020

Petitioner Nicole Zicarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District, filed a Petition for Review of Decision by the Respondent Allegheny County Board of Elections (“the Board”) on November 16, 2020, seeking to set aside

approximately 300 provisional ballots cast by voters in the November 3, 2020 General Election. Voters were required to sign on two lines and on these ballots they only signed one. Petitioner seeks review of the Board's decision to overrule Petitioner's objection to count these ballots. The Court conducted a hearing on November 17, 2020 via Microsoft Teams. The Pennsylvania Democratic Party and James Brewster moved to intervene in the action. Petitioner and the Board did not object and the motion was granted by the Court. Petitioner stated that she was not claiming any voter fraud regarding the challenged ballots. The Board argues that if an error or defect is caused by the misrepresentation or error of the election administration, the voter should not be penalized. Here, voters presented at their polling location and voted with a provisional ballot. Poll workers handed them all of the materials and gave them instructions how to fill out the outer envelope. Many people are unfamiliar with this process and rely on the information given to them at the polling location. Pennsylvania law holds that there is a breakdown in the administrative process when the facts demonstrate that "an administrative board or body is negligent, acts improperly or unintentionally misleads a party." Union Electric Corp. v. Board of Property Assessment, 746 A.2d 581, 584 (Pa. 2000). In construing election laws, while we must strictly enforce all provisions to prevent fraud, the overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. See, James Appeal, 105 A.2d 64 (Pa. 1954), In re Luzerne Cty. Return Bd., 290 A.2d 108, 109 (Pa. 1972). Similarly, in the In re Nomination Petitions of Howells case, 20 A.3d 617, (Pa. Cmwlth. 2011), an incumbent candidate running for magisterial district judge was given erroneous instructions by the Lehigh County Board of Elections about filing his statement of financial

interest. The Commonwealth Court held that given his reliance upon erroneous information provided by the county elections department that fatal error was curable. Finally, in In re Hall Nomination Petition, 362 A.2d 475, 477 (Pa. 1976), a candidate's petition was presented for filing within the deadline established by the Election Code but was not properly filed due to an error by the Election Bureau and not by the candidate himself. Keeping in mind that the Election Code must be liberally construed so as not to deprive an individual of his right to run for office or the voters their right to elect a candidate of their choice, the Court permitted the candidate to file *nunc pro tunc*.

In light of the fact that there is no fraud alleged in this case, these provisional ballots submitted by registered and eligible voters must be counted. They should not be penalized because they were given and relied on incorrect information by the election administration. The Petition for Review is denied and the Board's decision is affirmed.

Joseph M. James

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent,

and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011793

ORDER OF COURT

And NOW, this 18th day of November 2020, upon consideration of the Petition For Review In the Nature Of A Statutory Appeal filed by Nicole Zicarelli, and any responses thereto, it is hereby ORDERED that the Petitioner's appeal is dismissed and the decision of the Board of Elections is affirmed.

BY THE COURT:

Joseph M. James