

BEFORE THE MARYLAND STATE BOARD OF ELECTIONS

HELEN KOLBE,

Complainant,

v.

HOWARD COUNTY BOARD OF ELECTIONS,

Respondent.

FINAL DETERMINATION

Statement of the Case

On April 21, 2004, the Complainant filed with Linda H. Lamone, the State Administrator of Elections, an administrative complaint against the Howard County Board of Elections and requested a hearing on the record. She alleged that the Respondent improperly rejected her provisional ballot application. The Complainant requested that the Howard County Board of Elections be directed to accept her provisional ballot application and count her provisional ballot.

A hearing was held on May 19, 2004 at 10:30AM before Nikki B. Trella, the hearing officer designated by the State Administrator, at the offices of the State Board of Elections.¹ The Complainant represented herself, and Mary C. Reese, Esquire, represented the Respondent.

¹ The Complainant and the Respondent both questioned the decision by Linda H. Lamone, State Administrator of Elections, to designate Nikki Trella to be the hearing officer, due to concerns about Ms. Trella's ability to be impartial given the fact that she drafted the February 20, 2004, Memorandum to local election directors concerning last minute instructions for election judges (*see* Respondent Exhibit #4). The memorandum includes an instruction concerning not allowing a voter to cast a provisional ballot because that voter does not want to vote on the Direct Recording Electronic voting unit. Ms. Lamone considered these concerns and concluded that, since the legal authority for the instruction not to issue provisional ballots to protest voters is not being challenged in this case, Ms. Trella can serve as an impartial hearing officer.

This administrative procedure is governed by Chapter 33.01.05 of the Code of Maryland Regulations (COMAR). The purpose of the administrative complaint procedure is to provide a fair hearing and a speedy determination outside of the judicial system for an individual who asserts that an election official has violated the Election Law Article as it relates to provisional ballots or believes that there is or has been a violation of Title III of the Help America Vote Act of 2002.

Issue

The issue is whether the Howard County Board of Elections properly rejected the Complainant's provisional ballot during its canvassing of the 2004 Presidential Primary Election.

Findings of Fact

Having considered the testimony and evidence and having observed the witnesses, I find, by preponderance of the evidence, the following facts:

1. The Complainant, Helen Kolbe, is a registered voter in Howard County and is assigned to Howard County Precinct 5-8 located at Bryant Woods Elementary School.
2. The Complainant went to her assigned polling place on March 2, 2004, and was given the opportunity to vote using the Direct Recording Electronic (DRE) voting unit.

3. The Complainant declined to vote using the DRE voting unit and instead requested a provisional ballot, which was issued to her by the chief election judge, William Fleck.
4. Howard County election officials did not advertise, offer, or encourage provisional voting as an alternative to using a DRE voting unit.
5. The Complainant completed the provisional ballot application, marked the ballot, and deposited the ballot in the provisional voting bag.
6. The Howard County Board of Elections, serving as the Local Board of Canvassers, unanimously agreed to reject the Complainant's provisional ballot, on the grounds that the Complainant was not eligible to receive a provisional ballot, and therefore did not count her ballot.
7. Twenty other voters in Howard County similarly declined to vote using the DRE voting unit and instead requested, received, and cast provisional ballots. The Howard County Board of Elections rejected their provisional ballot applications on the same grounds as it rejected the Complainant's provisional ballot application.
8. Howard County election officials, including election judges and the administrative staff at the local board of elections office, did not warn the Complainant or the other 20 similarly situated voters that they were not eligible to receive a provisional ballot or that their provisional ballot applications would be rejected.
9. The 2004 Presidential Primary Election has been certified by the State Board of Canvassers.

Conclusions of Law

1. Pursuant to § 9-404(b)(2) of the Election Law Article of the Annotated Code of Maryland, an individual is eligible to receive and cast a provisional ballot if “the individual’s name does not appear on the precinct register” or other conditions² not applicable in this case exist. Since the Complainant’s name did appear on the precinct register at the polling place where she voted, the Complainant was not eligible to receive a provisional ballot.
2. A local board may, by a unanimous vote, properly reject a provisional ballot that was cast by a person ineligible to receive the provisional ballot. While not explicitly stated, eligibility to receive and cast a provisional ballot is implicit in the requirements of §11-303(d) that the individual who cast the ballot must be qualified to vote it.

Discussion

The Complainant claims that she was disenfranchised by the fraudulent action of the Respondent. I find, however, that the Complainant was not disenfranchised and that there was no fraud on the part of the Respondent. The Complainant had the opportunity to vote using the DRE voting unit, but chose not to do so based on her conclusion that the DRE voting unit could not be trusted. Had the Complainant gone to the polls and cast her ballot pursuant to the prescribed method, her ballot would have been counted. Instead, she chose a method of casting her ballot that was not lawful.

² Additional reasons for issuing a provisional ballot include: (a) the voter is unable to provide required identification; (b) the precinct register indicates the voter already received an absentee ballot; (c) the voter’s identity is being challenged; or (d) the voter indicates that he or she has moved.

I also find that the Respondent³ erred by allowing the Complainant to receive a provisional ballot and failing to warn the Complainant that her provisional ballot would be rejected. This error on the part of the Respondent clearly contributed to the Complainant's decision to cast her ballot in an unlawful manner and to the subsequent rejection of her ballot. However, the Respondent's error constituted an act of omission and does not approach the level of fraud. There is simply no evidence that the Respondent purposely misled or deceived the Complainant into voting a provisional ballot.

Accordingly, the issue here is whether the non-fraudulent administrative error by the Respondent warrants discarding the certified election results, re-canvassing the election results from Howard County, and re-certifying the entire election.

In *Lamb v. Hammond*, 308 Md. 286, 518 A.2d 1057 (1987), the Maryland Court of Appeals faced a similar question. The case involved the disputed timeliness of 12 absentee ballots. The Court concluded that the written instructions given to the absentee voters were at best ambiguous and at worst misleading. Since these instructions contributed to the rejection of the absentee ballots in question, the appellant argued that, "a voter should not be disenfranchised for technical noncompliance with the statutory requirement where he or she follows the instructions of the election officials" (308 Md. at 309). The Court, rejecting this argument, noted that it had "never sanctioned the counting of ballots that were plainly in violation of a law particularly designed to protect the integrity of the elective process" (308 Md. at 311). To do so, the Court observed, would effectively allow election officials to change the law by giving erroneous, ambiguous, or misleading instructions to the voters. The Court further concluded that

³ The reference to the Respondent in this context includes the election office staff.

it could not command the board of canvassers to enforce the improper instructions rather than the law.

The provisional voting laws⁴ at issue here are not mere technicalities; rather, they are designed to protect the integrity of the elective process and, as such, cannot be ignored or set aside due to an administrative error. Section 9-404(b) of the Election Law Article, which spells out who can receive a provisional ballot, is important for two reasons: first, it ensures that a sufficient supply of provisional ballots will be available for voters who would otherwise not be able to cast a ballot at the polling place; and second, it allows for the orderly administration of the voting process.⁵

In *McNulty v. Board of Supervisors of Elections for Anne Arundel County*, 245 Md. 1, 224 A.2d 844 (1966), the Maryland Court of Appeals reached the same conclusion. In *McNulty*, it was undisputed that the Board of Supervisors made an administrative error by failing to cover the blank spaces on lever voting machines with metal plates. This error resulted in voter confusion and 136 disputed votes in a contest where the margin of victory was 52 votes. In considering the remedy of a special election, the court noted the following:

That the Board made an administrative error, in not seeing to it that there were sufficient metal covers to lock all of the levers over all blank spaces on the voting machines under their supervision, goes without saying. However, **this mishap, in the absence of fraud is not sufficient to warrant a calling of a special election, the reason being, that no voter was actually prevented from voting for the candidate of his choice, if he followed the official election instructions**

⁴ The Complainant did not dispute at the hearing or in any of her submissions that her ballot was cast in violation of § 9-404(b)(2) of the Election Law Article and that the Howard County Board of Canvassers properly rejected it under § 11-303(d) of the Election Law Article.

⁵ Provisional voting is intended as a safeguard for voters who would otherwise not be allowed to cast a ballot. Provisional voting was never intended to be an alternative voting method. It is a time consuming and cumbersome process that, if widely used, would be an overwhelming administrative burden at the polling places.

published in the newspaper prior to the election, the directives on the specimen ballots also published, and the instructions of the Attorney General prominently posted in the polling places, and indeed, if they had followed the instructions on McNulty's own sample ballot. In *Wilkinson v. McGill...*, this Court held that where such a mistake does not interfere with the fair expression of the will of the voters, the result of the election need not be disturbed.

Id. at 9 (emphasis added). Moreover, the *McNulty* court clearly acknowledged that, despite board error, the voters had information and the opportunity to understand the proper way to cast their votes.

The same is true in this case. As stated, the election judges at the Complainant's polling place erroneously gave the Complainant a provisional ballot and clearly failed to warn the Complainant verbally that her provisional ballot would not be counted. However, the Complainant should have been put on notice by the name, "Provisional Ballot," and by the written instructions accompanying the provisional ballot application, that this process did not apply to her and that there were legal requirements that had to be satisfied before the provisional ballot would be counted. Further, the Complainant was clearly attempting to vote provisionally as a protest against the DRE voting units. While the Complainant has a right to protest, she must bear the consequences of not ensuring that her method of protest was consistent with the law.

Order

Based on my determination that the Complainant has not established a violation of Title III of the Help America Vote Act or the Election Law Article as it relates to provisional voting, it is therefore, **ORDERED** that:

1. The Complainant's complaint filed on April 21, 2004, be **DISMISSED**;

2. The Respondent shall credit the voting history records of the Complainant and the twenty other similarly situated voters to indicate that they attempted to vote in the 2004 Primary Election; and
3. The Respondent is directed to provide sufficient instructions to election judges and to post information at County polling places warning voters that a provisional ballot cast by a voter who is otherwise qualified to vote a regular ballot on a DRE voting unit is not allowed and will be rejected.

Nikki B. Trella
Hearing Officer

Appeal Rights

This is a final determination of the State Board of Elections and, under Regulation 33.01.05.08 of the Code of Maryland Regulations, may not be appealed in any State or federal court.