

Harpers Ferry Town Council, ex-officio, acting as the
MUNICIPAL ELECTION TRIBUNAL
OF THE CORPORATION OF HARPERS FERRY

No. 2019-HFTC-01

NANCY SINGLETON CASE, ET AL., CONTESTERS,

v.

HARDWICK SMITH JOHNSON, ET AL., CONTESTEES.

[SEPTEMBER 16, 2019]

KEVIN CARDEN and JAY PREMACK, dissenting.

We find ourselves in a unique situation. In the 156 years since the establishment of the State of West Virginia, no dispute has entered its judicial system which encompasses the exact qualities of this one. We therefore explore uncharted territory that will create precedent and a model for the future. It is incumbent upon the adjudicators of the germane case to make the correct decision based on the law and the indisputable facts that lie before us.

Although the Founding Fathers and other figures of great stature in the history of our nation wrote with great vigor on the democratic principle of deriving just powers from the consent of the governed through enfranchisement, *disenfranchisement* is not a new concept. Indeed, various demographics have fought tirelessly over the last two centuries for the *right* to vote that had previously been denied to them. Today, the Constitutions of the United States and

of the State of West Virginia ensure suffrage for almost all citizens upon the age of majority. Courts have upheld this right throughout the land, all the way up to the highest authority in our judicial system. The Supreme Court of the United States declared that the “political franchise of voting” is “a fundamental political right, because [it is] preservative of all rights.” *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886)). It is thus imperative that enfranchisement be protected and favored over the opposite.

This case is instead about the disenfranchisement and exclusion of registered voters from the municipal election process by a brute majority that has ignored this State’s laws on the consideration of provisional ballots; ignored State law barring self-interested officials from sitting as their own judge and jury; ignored the admonitions of a Circuit Court judge to “do the right thing”; ignored the legal warnings of the West Virginia Ethics Commission regarding their conflicted participation; and, worst of all, ignored the calls of the citizens of Harpers Ferry with their shameful rejection of voters, who they know to be their town neighbors, just to keep their grip on power.

On September 11, 2019, this slim Council majority issued an order rejecting the registered votes of their neighbors under false color of law by adopting, almost word-for-word, the order drafted by their privately-hired lawyers who joined with them at the August 24 “tribunal” – a judicial proceeding which lacked the impartiality that was required to issue a just order and worked to reinforce the fault of the Board of Canvassers. As elected public servants beholden only to the law and our fellow citizens, we must dissent from this craven and unfortunate decision. The consequences of denying enfranchisement to bona fide residents

within the Corporation of Harpers Ferry could be fundamental to the very future of this community.

I.

The majority's "Findings of Fact" are craftily skewed to favor a decision based not on legal judgment, but rather on will. That is unfortunate because it hides crucial details which should have led to a different outcome. We outline a more accurate summary of the facts in this case, refuting the many flagrant prejudices from the majority and providing other important points for consideration, many of which were simply and conveniently omitted.

1. On June 11, 2019, the Corporation of Harpers Ferry, West Virginia ("the Town") held a municipal election for the offices of Mayor, Recorder, and five Town Council seats. Early voting was conducted from May 29 through June 8, 2019.

2. The tally of votes for the nine Town Council candidates as recorded by the election day counting board was as follows: Barbara Humes, 90 votes; Jay Premack, 87 votes; Hardy Johnson, 84 votes; Christian Pechuekonis, 84 votes; Charlotte Thompson, 83 votes; Nancy Singleton Case, 82 votes; Debbie McGee, 81 votes; Midge Flinn Yost, 80 votes; and Leah Howell, 15 votes.

3. On June 17, 2019, the Harpers Ferry Town Council, in its ex-officio capacity as the Board of Canvassers ("the Board"), met to canvass the votes for the June 11 election.

4. At the outset of the Board's meeting, bond for recount was set at \$175.00.

5. One overseas absentee ballot, postmarked before June 11, was received after election day but before the Board met. The Board voted unanimously to accept this ballot.

6. Six provisional ballots were cast during the election. The West Virginia Secretary of State's "2019 Best Practices Guide for Municipal Canvass", which the Board referred to during canvassing, recommends at page 6, number 13 that the Board of Canvassers "[r]eview each provisional ballot" before determining whether it should be counted.

7. West Virginia Code § 3-1-41(e) directs that when considering whether provisional ballots should be accepted and counted, a board of canvassers "shall disregard technical errors, omissions or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote."

8. By a vote of 4-2, a majority of the Board summarily refused to review, examine, or consider any of the six provisional ballots cast in the election, based solely on the fact that the six provisional ballot voters' names were not in the Harpers Ferry poll book.¹ Because none of the provisional ballots were considered on their own merits, no other information was examined before the Board made its decision.

9. On June 19, 2019, two candidates for election to the Harpers Ferry Town Council in the Town's 2019 municipal elections, Nancy Singleton Case and Deborah McGee, submitted to the Recorder by email separate petitions for a recount of the ballots for Town Council candidates. Mrs. Case was out of state due to a family medical emergency and was unable to submit payment for bond. Mrs. McGee, through her husband, subsequently delivered a written and signed copy of the petition and a check in the amount of \$175.00 for bond to the Recorder in person, thus fulfilling the statutory requirement to demand the recount be conducted. (Ex. 8;

[Dissent Ex. 1.](#))

¹ The four Board members voting in the majority were Barbara Humes, Hardwick "Hardy" S. Johnson, Jr., Charlotte Thompson, and Marjorie "Midge" Flinn Yost. The voters in the minority were Kevin Carden and Ed Wheelless. Mayor Wayne Bishop did not vote, as is customary when there is no tie.

10. The recount for Town Council members was conducted on June 26, 2019, with no change in the results. Only the ballots that had been previously accepted by the Board of Canvassers were recounted; no provisional ballots were counted at this meeting. The election results were certified on June 28, 2019.

11. Mrs. Case and Mrs. McGee (the “Contesters”), through counsel, filed a proper Notice of Contest on July 8, 2019, pursuant to West Virginia Code § 3-7-6, alleging that five Harpers Ferry citizens were denied the right to vote based upon erroneous records that indicated they were not residents of Harpers Ferry. (Ex. 6.) The citizens who cast provisional ballots are George McCarty, Linda McCarty, Adam Hutton, Leah Howell (who was also a candidate for a Town Council seat), and Jayne Mumaw (the “Provisional Voters”).^{2,3}

12. No provision in West Virginia law, as governed by Article 3, Chapter 7 of West Virginia Code regarding contested elections, requires an election contest to establish standing by way of their participation in the ballot recount that occurred earlier in the election process. West Virginia Code only requires that a recount be conducted before an election contest is filed.

13. The trial for this election contest was conducted on August 24, 2019. The trial was transcribed by a court reporter.

14. The Contesters motioned at the outset of the trial that because the results of the provisional ballots in question could affect the election of certain candidates, Council members Hardy Johnson and Charlotte Thompson should be disqualified from hearing and deciding this

² During the trial in this matter, the Contesters conceded that the provisional ballot of Jayne Mumaw should not be considered because at the time of the June 11, 2019 election, she was not a registered voter within the Corporation of Harpers Ferry. Although Ms. Mumaw was residing in Harpers Ferry part-time in anticipation of a permanent move to the town, at the time of this election she was registered to vote in Berkeley County, West Virginia.

³ A sixth provisional ballot was cast, but that individual was not residing within the municipal limits of Harpers Ferry on election day. Therefore, this provisional ballot was not in consideration.

election contest. (Council member Christian Pechuekonis previously declined to participate in the election contest proceeding.) Mr. Johnson and Mrs. Thompson refused to recuse themselves from the election contest tribunal.

15. Nikki Painter, Chief Deputy Clerk of Elections for the Jefferson County Voter Registration and Election Office (the “Voter Registration Office”), testified that she believed the source of the errors affecting the Provisional Voters’ registration records was the West Virginia Division of Motor Vehicles (the “DMV”).

16. Mrs. Painter testified that she did not contact anyone at the DMV to investigate the source of the voter registration errors. She instead contacted the Secretary of State’s office, since all “Motor Voter” registrations come to Mrs. Painter’s office through the Secretary of State’s office and “they usually handle our DMV issues”. (Tr. at 33:13-16.) In fact, Mrs. Painter said she *cannot* contact the DMV. (*Id.* at 20:17-18.)

17. Mrs. Painter explained during her testimony that she conducted a process of investigation and research with other agencies of the County government to verify the Provisional Voters’ correct addresses. (*Id.* at 28:11-29:19; 38:18-40:5.)

18. George and Linda McCarty registered to vote when they acquired their West Virginia driver’s licenses in July 2018. They were aware that the licenses incorrectly showed “West Washington Street” instead of simply “Washington Street”. However, they were *not* aware that would place them in Precinct 15 (Bolivar) instead of Precinct 14 (Harpers Ferry) in the County’s voter registration records. Even when Mr. and Mrs. McCarty voted early in the November 2018 elections, they did not become aware of this registration error, since early voting is conducted at the Jefferson County Courthouse and not at the local precinct. (*Id.* at 41:2-42:21; 67:17-68:1.) Mr. and Mrs. McCarty became aware that they were registered in the wrong

precinct only when they voted early in the Harpers Ferry municipal elections on June 8, 2019 at the Harpers Ferry Town Hall. (*Id.* at 48:12-49:16; 53:14-56:2; 68:2-10.)

19. Adam Hutton registered to vote when he acquired his West Virginia driver's license in April 2019. Mr. Hutton testified that he used "900 West Washington Street" when he registered because that is the address assigned by the U.S. Postal Service. (*Id.* at 77:1-7.)

Mr. Hutton became aware he was registered in the wrong precinct when he went to vote in the Harpers Ferry municipal elections. (*Id.* at 77:17-78:9; 80:6-22.)

20. Leah Howell was a candidate for Town Council member in the 2019 Harpers Ferry municipal elections. Ms. Howell filed her sworn and notarized Municipal Candidate's Certificate of Announcement with the Corporation of Harpers Ferry on January 25, 2019 with her address listed as "887 Washington Street" in Harpers Ferry. ([Dissent Ex. 2.](#))

Because Ms. Howell was incorrectly listed in Precinct 15 at the time she voted (Ex. 4, p. 1), she was required to cast a provisional ballot. Mrs. Painter testified that Ms. Howell was found to have been a Harpers Ferry resident at the time of the vote, and that the official County voting records were changed to properly reflect that. (Tr. at 29:13-19.) Ms. Howell's voter registration record shows that her correct address was subsequently verified. (Ex. 4, p. 4.)

21. All four of these Harpers Ferry residents – George McCarty, Linda McCarty, Adam Hutton, and Leah Howell – were mistakenly classified by the Voter Registration Office as residents of Bolivar, West Virginia because of information received from the DMV which designated each of them as living on "West Washington Street", despite the fact that each was in fact a resident of Harpers Ferry, based on their house numbers. (Tr. at 21:7-11; 22:6-7; 39:8-11; Ex. 5.)

22. Based on Mrs. Painter's research, the voter registration records for all the Provisional Voters has been corrected. (Ex. 1, 2, 3, and 4.)

23. According to Mrs. Painter, the County would consider the omissions of these voters through no fault of their own from the Harpers Ferry poll book to be a technical error. (Tr. at 22:13-24.) Mrs. Painter based that opinion on experience with prior elections. (*Id.* at 23:1-24:9.)

24. Mrs. Painter testified that in her professional opinion and experience, based on West Virginia statutory law, it was her recommendation that the provisional ballots of the four Provisional Voters should be counted in the Harpers Ferry municipal election. (*Id.* at 30:24-31:6.)

25. Attorney for the Contestees, Ryan Donovan, attempted to call the Recorder, Kevin Carden, a member of the governing body and panel of adjudicators, as a witness without his prior knowledge. Mr. Carden declined to take the stand on demand of Contestees' attorneys upon advice from his own municipal counsel, Effie Kallas, who advised that any member of the Tribunal who took the stand would then need to recuse himself from the Tribunal. It would appear that Mr. Donovan did this in an attempt to disqualify Mr. Carden from participating as one of the adjudicators in this case, despite having been previously advised by the Circuit Court not to do so. (*Id.* at 109:1-7.)

II.

26. A conflict of interest exists for Council members Mr. Johnson and Mrs. Thompson to sit as judges in this election contest tribunal. On August 29, 2019, a staff opinion was received from the West Virginia Ethics Commission, which states:

“It is the general opinion of Ethics Commission staff that if there is a reasonable probability that the tribunal’s decision on the election contest could impact whether a council member, who is also a member of the tribunal, may keep his or her City Council seat, then that council member may not participate as a member of the tribunal because he or she has a financial interest in holding the elected position in question.”

[\(Dissent Ex. 3.\)](#)

This staff opinion relied on several Advisory Opinions previously issued by the Ethics Commission, including AO 2010-08, AO 2014-10, and AO 2019-07. (Dissent Ex. [4](#), [5](#), and [6](#).)

27. The “2019 Best Practices Guide for Municipal Canvass” that was referred to by the Board of Canvassers on June 27, 2019 is, at best, a set of guidelines and recommendations designed to assist a board of canvassers in its proceedings. In all cases, West Virginia law is the ultimate authority concerning elections.

28. In four of the past seven Harpers Ferry municipal elections, provisional ballots were cast by residents who were not listed in the Town’s poll book but who were known by the Board of Canvassers at each of those elections to be residents within the corporate limits of Harpers Ferry, including two provisional ballots cast in 2013 for which the motion to accept those ballots was made by one of the Contestees in this election contest, Charlotte Thompson. (Tr. at 121:15-22; Dissent Ex. [7](#) and [8](#).)

29. While a board of canvassers may not consider extrinsic evidence during canvassing or a recount of election returns, such evidence “is properly cognizable in an election contest proceeding.” See Syl., pt. 7, *Maynard v. Hammond*, 139 W. Va. 230, 79 S.E.2d 295 (1953). The majority in this election contest tribunal failed to consider proper extrinsic evidence and other information during its decision-making process beyond the political.

30. Jefferson County Precinct 14 is contiguous with the municipal limits of the Corporation of Harpers Ferry. ([Dissent Ex. 9.](#)) Jefferson County Precinct 15 is contiguous with

the municipal limits of the Corporation of Bolivar. ([Dissent Ex. 10.](#)) The two municipalities adjoin one another. U.S. Alternate Route 340 (“Alt-340”) is the main thoroughfare through both towns.

31. There is no “Bolivar, West Virginia” post office. All addresses in Bolivar, as well as Harpers Ferry, are served by the Harpers Ferry post office.

32. The U.S. Postal Service (the “Postal Service”) assigns the name “West Washington Street” to *all* of Alt-340, except the easternmost portion (residence numbers below 270), where it is called High Street. ([Dissent Ex. 11.](#))

33. The Jefferson County GIS / Addressing Office assigns addresses for the County’s Emergency 911 system. This Office assigns the name “Washington Street” to all of Alt-340 within the Corporation of Harpers Ferry and “West Washington Street” to all of Alt-340 within Bolivar.

34. Despite the slightly modified name, no residence or structure numbers overlap or repeat along Alt-340. Residences and other buildings all the way through Number 1000 are entirely within the Corporation of Harpers Ferry. (As an example, Harpers Ferry Town Hall is located at 1000 Washington Street according to the County, but 1000 West Washington Street according to the U.S. Postal Service.) Numbers 1053 and higher are all within the Corporation of Bolivar, whereas Numbers 1007 through 1050 may be in either municipality, with even numbers lying within Harpers Ferry and odd numbers lying within Bolivar. (Dissent Ex. [12](#), [13](#), and [14](#).)

35. Even online mapping services are inconsistent, with some showing “Washington Street” in Harpers Ferry and others showing “West Washington Street”. (Dissent Ex. [15](#), [16](#), and [17](#).)

36. As a unit of the County government, the Jefferson County Voter Registration and Election Office abides by the GIS / Addressing Office assignments.

37. When applicants solicit a driver's license with the DMV, at least two documents must be submitted as proof of residency, such as a utility bill or a "Letter from the US Post Office that shows a new, physical, WV address assigned by the Post Office for the applicant." ([Dissent Ex. 18.](#)) Each of these proofs of residency – including a valid "WV Voter's Registration card", which also requires its own proofs of residency, such as a utility bill – would establish that an applicant is a verified resident based on his or her *mailing address*.

38. Because the Postal Service assigns this mailing address, and all residences along Alt-340 are assigned a "West Washington Street" address, those applicants within the corporate limits of Harpers Ferry who register to vote as part of the driver's license application and issuance process are erroneously electronically transferred into the Voter Registration rolls as residents of Bolivar.

39. The incorrect registrations of the Provisional Voters as residents of Bolivar, instead of residents of Harpers Ferry, lies ultimately in a *technical* error due to conflicting address assignments between the Postal Service and the GIS / Addressing Office, through no fault of the voters in question or any other individual.

40. Despite the assignment to "West Washington Street" by the Postal Service, the residence numbers for the four Provisional Voters prove that they were "bona fide resident[s]" of the Corporation of Harpers Ferry on election day, June 11, 2019, and at least 30 days prior. *See* W. Va. Code § 3-1-3; W. Va. Const., art. IV, § 1; *State ex rel. Ellis v. County Court of Cabell County*, 153 W. Va. 45, 51.

41. The Provisional Voters were duly registered to vote in Jefferson County and, based on their residence numbers, in the Corporation of Harpers Ferry.

42. Since this addressing discrepancy has come to light, the Voter Registration Office has introduced measures to prevent the misregistration of Washington Street residents in Harpers Ferry as residents of Bolivar.

III.

43. The precise details of this election contest case are unique thus far in West Virginia. No applicable case law exists in the jurisprudence of this State addressing technical errors in a voter's registration due simply to a conflict in the naming of a road or street and not a fault of the voter or a clerical error committed by the Voter Registration Office.

44. At first glance, this election contest case may seem substantially similar to both *Dotson v. Gilbert*, 129 W. Va. 130 (1946), and *Galloway v. Common Council of Kenova*, 133 W. Va. 446 (1949). On further inspection, the situation we are faced with here is quite different.

45. In *Dotson*, the individuals who cast rejected provisional ballots were clearly not registered to vote. The Provisional Voters in this election contest were registered to vote.

46. In *Galloway*, individuals were registered within their correct precinct for participation in state and county elections but were not registered to vote in municipal elections *within the same precinct* due to a *clerical error* at the office of the county clerk. How this clerical error was able to occur becomes glaringly clear upon reading the applicable statutes in effect in 1949:

“The registration records to be used in county-state elections shall be kept in a separate file and arranged according to precinct, street and sequence of house, apartment or room numbers, where possible. A duplicate set of these registration records shall be made and kept in a separate file, and shall be

arranged in alphabetical order. Such file shall herein be referred to as the ‘alphabet file’. The registration records to be used in municipal elections shall be kept in a separate file and arranged, where possible, according to precinct, street, and sequence of house, apartment or room numbers.

“Each applicant shall fill only one registration form, except in those cases where separate record for municipal elections is required, in which case those registrants who are required to be listed in separate municipal record lists shall fill two forms...

In the event any municipal registration record is lost, destroyed, defaced, or worn in any way as to warrant replacement, it shall be the duty of the clerk of the county court to prepare a duplicate of such record and it shall be the duty of the municipality to pay for such replacement.”

Galloway, supra, at 450-451.

47. Under the laws of this State in effect at the time of *Galloway*, two separate and distinct lists existed: one for county-state elections and one for municipal elections, during an age when all records were kept on paper and were commonly subject to clerical errors. The misregistration of the Provisional Voters in this election contest was not due to a *clerical* error.

48. The Supreme Court’s decision in *State ex rel. Willhide v. King*, 126 W. Va. 785 (1944), is not relevant here either. The provisional ballot voters in that case changed residences from one precinct to another and updated their voter registration records within the prohibited period preceding election day. For that reason, they did not appear in the poll book for their new precincts. The fault lay in the actions of the voters themselves. The Provisional Voters in this election contest did not move or change their residences.

49. The majority opinion never provides evidence that the Provisional Voters did not live in Harpers Ferry at the time they registered or voted. In fact, it has been well-established and is uncontroverted that they were verified residents at the addresses to which they were registered on election day, June 11, 2019, and for at least 30 days prior.

50. The Supreme Court of the United States declared long ago that the exercise of the power of the ballot box cannot be suppressed simply because the officials who wield the ultimate decision whether or not to permit a citizen to vote suspect a certain outcome:

“‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. The exercise of rights so vital to the maintenance of democratic institutions ... cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.”

Carrington v. Rash, 380 U.S. 89, 94 (1965) (partially quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

51. The Supreme Court of West Virginia has expressed, in its own opinions and citing others’, that courts and tribunals must be

“ever mindful of the paramount principle that election laws are to be construed in favor of enfranchisement, not disenfranchisement. *See State ex rel. Sowards v. County Comm’n of Lincoln County*, 196 W. Va. 739, 750, 474 S.E.2d 919, 930 (1996). *See Afran v. County of Somerset*, 244 N.J. 229, 232, 581 A.2d 1359, 1361 (1990) (“[E]lection laws must be liberally construed to effectuate the overriding public policy in favor of the enfranchisement of voters.”); see also *James Appeal*, 377 Pa. 405, ___ 105 A.2d 64, 65 (1954) (“In construing election laws, while courts must strictly enforce all provisions to prevent fraud, an overriding concern must be to be flexible in order to favor the right to vote.”).

State ex rel. Bowling v. Greenbrier Cnty. Comm., 212 W. Va. 647, 649 (2002).

52. The Supreme Court of West Virginia further established a “reasonableness standard” and “principle of law favoring enfranchisement” in the counting of challenged ballots and emphasized that a board of canvassers must “disregard technical errors, omissions or oversights, if it can be *reasonably ascertained* that the challenged voter was entitled to vote.” (Emphasis in original.) *Id.* at 653. The majority in this election contest failed to apply reason in its decision to oppose enfranchisement, disregarding irrefutable proof that the Provisional Voters were entitled to vote.

CONCLUSION

No doubt should exist that the four Provisional Voters in the case before us were clearly entitled to vote as bona fide citizens and residents of the Corporation of Harpers Ferry, all of whom were disenfranchised as a result of a bureaucratic technical error existing between various agencies at the federal, state, county, and ultimately, municipal levels of government. The only impediment to these four individuals' legal right to express their opinions through the ballot box is a mockery of justice at the hands of four other individuals.

We strongly dissent and would hope that upon an appeal to the Circuit Court, justice will prevail where it has heretofore failed through conflict of interest and political gaming, that it would restore honor and dignity, and henceforth will guarantee equal protection under the law to all citizens of Harpers Ferry.

Kevin Carden

Jay Premack