

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**NANCY SINGLETON CASE, and  
DEBORAH A. MCGEE,**

*Individual Contestors Below, Petitioners,*

**v.**

**Case No.: 19-P-136**

**HARDWICK SMITH JOHNSON,  
CHARLOTTE WARD THOMPSON,  
CHRISTIAN PECHUEKONIS,  
MARJORIE FLINN YOST,  
BARBARA HUMES, and  
JAY PREMACK,**

*Individual Contestees, Respondents.*

**MOTION FOR PRELIMINARY INJUNCTION  
AND EXPEDITED BRIEFING SCHEDULE**

Petitioners, Nancy Singleton Case and Deborah A. McGee, by and through their counsel, Gregory A. Bailey, Esq., J. Daniel Kirkland, Esq., and the law firm of Arnold & Bailey, PLLC, and pursuant to Rule 65 of the West Virginia Rules of Civil Procedure move this Court for entry of a Preliminary Injunction to prevent the contested governing body of the Corporation of Harpers Ferry, West Virginia from making political appointments to any board, commission, committee, and/or organization that requires a majority of votes from the governing body of Harpers Ferry, West Virginia pending resolution of the election contest currently before this Court on appeal. In support, Petitioner's submit the following:

## **Introduction**

The governing body of Harpers Ferry has noticed its intent to convene emergency meetings on matters related to the removal of certain members of the Board of Zoning Appeals, and reappointment of new members of its choosing. Given that the new Town Council is improperly paneled, any political appointments at this time would serve to prejudice the Petitioners; and moreover, the voters of Harpers Ferry, West Virginia. Under the circumstances set forth in Petitioners' Petition for Appeal, contemporaneously filed with this Petition for Preliminary Injunction, it is apparent that the illegitimate governing body of Harpers Ferry continues to advance its own agenda through political gamesmanship. The rushed political appointments currently sought by the Town Council evidences its bias and political motivations in rejecting the provisional ballots which will change the membership on Town Council when tallied.

Permitting the current Town Council to make political appointments during the pendency of this appeal process will cause Petitioners, and the voters of Harpers Ferry, irreparable harm and violate the important public policy of protecting the will of the voters.

### **Argument in Support of Injunctive Relief**

The facts underlying this election contest are fully set forth in the Petition for Appeal pending before this Court. In short, if the four (4) provisional ballots are appropriately tallied it will change the membership of the Harpers Ferry Town Council. Facing that reality, the majority of the currently-seated governing body is moving hastily to make political appointments to Town land-use committees, commissions, and board of zoning appeals in an effort to implant citizens with like-minded land use views to gain political advantage prior to a ruling on the election challenge.

All four (4) factors governing the issuance of injunctive relief favor entry of a preliminary injunction to prevent this abuse of power. If the governing body of Harpers Ferry is not enjoined from making political appointments during the pendency of this election contest, Petitioners and the citizens of Harpers Ferry will suffer irreparable injury for which there may not be an adequate remedy. Conversely, the governing body of Harpers Ferry will suffer no injury from a delay in appointing to land-use committees and board of zoning appeals political allies of the majority – a majority which will no longer exist after the provisional ballots are tallied. Further, it is very likely that the Petitioner’s election contest claim (which is finally subject to real judicial review) will be successful on the merits. Finally, there is a profound public interest in protecting the will of the electorate. Without an injunction, a governing body that is made up of individuals who were not elected by the citizens of Harpers Ferry will make decisions which could have permanent consequences on the citizens of Harpers Ferry. Accordingly, Petitioners respectfully request that this Court issue a preliminary injunction during the brief period that this election contest is briefed and ruled upon by this Court.

**A. Standard for Issuing Injunctive Relief**

Rule 65 of the West Virginia Rules of Civil Procedure governs injunctions. The West Virginia Supreme Court has set forth the following standard for issuing a preliminary injunction:

The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: “(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.” *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass’n*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990)(quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir.1985); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir.1977).

*State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 352, 472 S.E.2d 792, 798 (1996).

When deciding whether to grant or refuse an injunction, West Virginia courts have applied the following reasoning:

The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

The central core of this decades-old analysis is the “comparative hardship” of the parties. The federal courts have evolved a detailed methodology to guide courts in balancing the hardship of the parties. West Virginia trial courts apply this same four-factor methodology when weighing the granting or refusal of a preliminary injunction:

Under the balance of hardship test the district court must consider, in ‘flexible interplay,’ the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) *the plaintiff’s likelihood of success on the merits*; and (4) the public interest.

*Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017).

**B. The Factors Governing Issuance of Preliminary Injunction Favor Enjoining the Illegitimately-Seated Governing Body from Abusing its Power Prior to a Ruling on the Election Contest.**

This Court is vested with the authority to issue an injunction to prevent the abuse of power perpetrated by a majority of the governing body. *See* Syl. Pt. 4, *Perdue v. Ferguson*, 177 W.Va. 44, 350 S.E.2d 555 (1986) (holding that “[w]here a municipal corporation or the officers thereof act within well-recognized power, or exercise discretionary power, a court is unwarranted in interfering by granting an injunction, *unless fraud is shown, or the power or discretion is being manifestly abused, to the oppression of the citizen.*”) (emphasis added).

**1. The Petitioners are Likely to Suffer Irreparable Harm in the Absence of a Preliminary Injunction.**

Since the election and refusal to count legally cast provisional ballots, an illegitimate and contested governing body has been free to enact policies, procedures, and agendas that potentially contravene the will of Harper's Ferry voting citizens. The governing body has since acted to protect its illegitimately-derived power by refusing to follow clear statutory law and tally four provisional ballots of its citizens. The majority of this governing body has doubled-down by taking steps to make vital appointments to land-use committees, commissions and board of zoning appeals in an effort to preserve its power even if the election results change the balance of power. These appointments will have long lasting impacts on important land-use decisions made in Harpers Ferry. Indeed, the importance of such appointments is underscored by the requirement that they can only be made by a majority vote of the governing body. An illegitimate majority should not be permitted to make such decisions.

Rather than allow this flagrant abuse of power, this Court has the ability to temporarily enjoin the governing body of Harpers Ferry from making any political appointments to further the policies, procedures, and agendas of an illegitimate governing body. In this case, the abuse of power of a majority of Town Council in completely disregarding well founded state law, has resulted in the oppression of the voting citizens of Harpers Ferry. Petitioners and the citizens of the Town will suffer irreparable harm a preliminary injunction enjoining the governing body from making any permanent political appointments is proper.

**2. The Respondent Will Not Suffer Prejudice by a Limited Injunction on Appointments.**

As noted herein, the Petitioners in this matter will suffer irreparable harm if an illegitimate governing body is free to make political appointments during the period that a contested governing body is in place. The current Town Council, however, will be free to maintain day to day activities to resolve any pressing and immediate issues that come before it. Further, this appeal can be expedited to reduce any potential harm that may be suffered from the enactment of a preliminary injunction.

Accordingly, because the Respondents are not likely to suffer irreparable harm a preliminary injunction enjoining the governing body from making any permanent political appointments is proper.

### **3. The Petitioners Likelihood of Success is Great.**

The election contest at issue could not be more clear and involves the validity of four (4) provisional ballots cast by residents and registered voters of Harper's Ferry, West Virginia. What should have been clear was muddied when two (2) members of the Harper's Ferry town council, whose elections are being contested, sat in judgment of the election results. in violation of W.Va. Code § 3-7-6 which provides:

In all cases of contested elections, the county commission shall be the judge of the election, qualifications and returns of their own member 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)<sup>1</sup>

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<sup>1</sup> W.Va. Code § 3-7-6, applies equally to municipal elections as follows: "The provisions of this section apply to all elections, including municipal elections, except that the governing body of the municipality is the judge of any contest of a municipal election."

The majority members wholly failed to follow the election law based upon W.Va. Code § 3-1-41(e) which instructs that technical errors, omissions and oversights are to be ignored and provisional ballots tallied when cast by duly-registered residents. The failure of Charlotte Ward-Thompson and Hardwick Johnson to recuse themselves from judging the election contest in the face of W.Va. Code § 3-7-6, the West Virginia Governmental Ethics Act, W.Va. Code § 6B-1-1, *et seq.*, and an opinion from the West Virginia Ethics Commission telling them they should not participate, there is a great likelihood that Petitioners will prevail on the issues surrounding the contested election proceeding. Because although the improper participation of council members allowed the majority to ignore clear statutory law to temporarily retain power, the law governing provisional ballots and enfranchising voters must prevail on appeal to this Court.

The polar star for guidance in construction of an election contest statute is that the statute should be liberally construed in order that the will of the people in the matter of choosing their public officers may not be defeated by merely technical objections. *State ex rel. Palumbo v. County Court of Kanawha County*, 150 S.E.2d 887, 151 W.Va. 61. (1961). W.Va. Code § 3-1-41(e) provides that:

Provisional ballots may not be counted by the election officials. The county commission shall, on its own motion, at the time of canvassing of the election returns, sit in session to determine the validity of any challenges according to the provisions of this chapter. If the county commission determines that the challenges are unfounded, each provisional ballot of each challenged voter, if otherwise valid, shall be counted and tallied together with the regular ballots cast in the election. The county commission, as the board of canvassers, shall protect the privacy of each provisional ballot cast. *The county commission shall disregard technical errors, omissions or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote.* (emphasis added).

Each and every Provisional Ballot Voter was properly registered to vote in their respective municipalities in which they resided. As the result of a technical error by the DMW, they were each placed in the incorrect voting precinct. It is uncontroverted that each and every Provisional

Ballot Voter were verified residents at the address to which they were registered on election day. It is further uncontroverted that each and every Provisional Ballot Voter was a Harpers Ferry resident at the time, at for at least 30 days prior, of the June 11, 2019, municipal election. As such, they were each respectively entitled to cast a vote, and have that vote counted, in the Harpers Ferry municipal election. Taking into account of all these factors, Nikki Painter, Chief Deputy Clerk of Elections for the Jefferson County Voter Registration and Election Office, testified that in her professional opinion and experience, and based upon clear statutory law, it was her recommendation that the provisional ballots of the four Provisional Voters should have been counted in the Harpers Ferry municipal election. Ms. Painter further testified that the county commission would consider the omissions of the Provisional voters, through no fault of their own, from the Harpers Ferry poll book to be a technical error. Ms. Painter's opinion was based upon her experience with prior elections and State law.

Accordingly, because the Petitioners are likely to prevail on the election contest issues and have the provisional votes tallied, a preliminary injunction enjoining the governing body from making political appointments is necessary and appropriate.

#### **4. The Public Has a Substantial Interest in the Outcome of the Contested Municipal Election.**

The West Virginia Supreme Court declared long ago that fairness, purity and freedom of elections are essential to free government. *Ralston v. Meyer*, 12 S.E. 783 (1891). W.Va. Code 3-1-3 provides that citizens of the state shall be entitled to vote at all elections held within the municipalities in which they respectively reside. An election that does not count all votes of its citizens fails to satisfy the criteria of fairness and is not a free election.

In this matter, the provisional ballots of four (4) residents and registered voters of Harper's Ferry will summarily and improperly rejected without any lawful justification and/or process by

the Board of Canvassers. The citizens of Harper's Ferry, and Jefferson County in its entirety, have a fundamental constitutional right to a fair and impartial election process to choose the officials that will govern their community affairs. That right is being persistently eroded by the bias and impropriety in the manner in which officials exerting their political will over that of the community. The issues related to the provisional ballots are neither complex, nor complicated. Rather, it requires a simple determination of whether or not the person casting the provisional ballots were registered voters living in Harper's Ferry. It is undeniable that they were. Yet, instead of following statutory law and counting the votes of their neighbors, the majority ignored the law and allowed two of its members to improperly participate simply to protect their political majority.

It is undeniable that the citizens of Harper's Ferry have a substantial public interest in a fair and impartial election process and any subsequent contest to that election. The manner in which the tribunal has decided to proceed is fundamentally flawed and violative of the fair election process. Thus, the public has a substantial interest in enforcing the results of the election, but in ensuring important Town decisions are made only by representative that were put into power by the voting citizens of the Harpers Ferry.

Accordingly, based upon the clear and undeniable public interest surrounding this issue a preliminary injunction enjoining the governing body of Harpers Ferry from making any political appointments to land-use committees, commissions, or board of zoning appeals, during the pendency of the accompanying appeal.

### **CONCLUSION**

WHEREFORE, for the reasons contained herein, Petitioner's respectfully request that this Honorable Court enjoin the governing body of Harpers Ferry, West Virginia from making any

political appointments to land-use committees, commissions, or board of zoning appeals during the pendency of the appeal of the underlying election contest appeal.

**NANCY SINGLETON CASE and  
DEBORAH H. McGEE,**  

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**CERTIFICATE OF SERVICE**

I, Gregory A. Bailey, Esq. do hereby certify that I have served a true copy of the foregoing **MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED BRIEFING SCHEDULE** upon the following counsel via email through the WV E-Filing System and U.S.

First Class Postal Service this 1st day of October, 2019:

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