

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY**

IN RE: PETITION TO CONTEST : JUNE TERM, 2006
NOMINATION OF ANTHONY PAYTON :
AS DEMOCRATIC CANDIDATE FOR :
STATE REPRESENTATIVE IN THE :
179TH LEGISLATIVE DISTRICT : No. 0049

OPINION

Date: September 14, 2006

C. Darnell Jones, II, President Judge

On June 5, 2006, twenty registered Democratic voters and electors residing in the 19th Division of the 23rd Ward in Philadelphia County filed a Petition¹ requesting the Court to re-canvass and recompute the vote of the May 16, 2006 Primary Election for the Democratic Nomination for State Representative in the 179th State Legislative District to include certain write-in votes which had been cast for Emilio Vazquez (“Vazquez”)². A conference was conducted on June 26, 2006 and an evidentiary hearing was held on July 10, 2006. Upon consideration of the pleadings, stipulations and other evidence introduced at the July 10, 2006 hearing and argument of counsel, the Court grants the Petition for re-canvass and recount of the vote for the Democratic Nomination for State Representative in the 179th State Legislative District, and grants the relief set forth hereunder and in the attached order.

¹ A related matter captioned *In Re: Petition to Re-Canvass, Voting Machines and Write-In Votes in the 179th District Legislative District, Philadelphia, PA*, June Term 2006, No. 0140 was withdrawn at the July 10, 2006 hearing. See Notes of Testimony of the July 10, 2006 Hearing (“N.T.”) at 5.

² Vazquez’ name is spelled “Vasquez” in some pleadings and exhibits. We have conformed the name throughout this opinion to “Vazquez”.

PROCEDURAL HISTORY

The Election Code contains specific procedures for the computation and canvassing of the returns. The county election board must commence the canvassing of the returns “at nine o’clock A.M. on the third day following the primary . . . and continue the same until completed. . . . Upon the completion of such computation and canvassing, the board shall tabulate the figures for the entire county and sign, announce and attest the same, as required by this section.” 25 P.S. § 3154 (a). The computation of the vote was completed and announced by the Philadelphia County Board of Elections on May 31, 2006.

The Election Code provides that:

Returns under this subsection shall be considered unofficial for five (5) days. . . . At the expiration of five (5) days after the completion of the computation of votes, in case no petition for a recount or recanvass has been filed . . . the county board shall certify the returns so computed in said county in the manner required by this act, unless upon appeals taken from any decision, the court of common pleas shall have directed any returns to be revised, or unless in case of a recount, errors in the said returns shall have been found, in which case said returns shall be revised, corrected and certified accordingly. . . .

25 P.S. § 3154 (f). The instant petition was filed before the expiration of five (5) days after the completion of the computation of votes. The election board has not yet certified the results of the Primary Election pending disposition of the instant petition.

The Election Code sets forth the process to be followed whenever a request is made to open the ballot boxes, see 25 P.S. § 3261, or for the recanvass of the vote, see 25 P.S. § 3262.

Section 3261 provides that:

The court of common pleas, or a judge thereof . . . shall open the ballot box of such election district used at any general, municipal, special or primary election held therein, and cause the entire vote thereof to be correctly counted . . . ***if three qualified electors of the election district shall file, as hereinafter provided, a petition duly verified by them, alleging that upon information which they consider reliable they believe***

that fraud or error, although not manifest on the general return of votes made therefrom, was committed in the computation of the votes cast for all offices or for any particular office or offices in such election district, or in the marking of the ballots, or otherwise in connection with such ballots. It shall not be necessary for the petitioners to specify in their petition the particular act of fraud or error which they believe to have been committed, nor to offer evidence to substantiate the allegations of their petition. 25 P.S. § 3261 (Emphasis added).

Section 3262 provides that:

. . . the court of common pleas, or a judge thereof . . . shall make visible the registering counters of the voting machine or machines used in such election district at any primary or election, and without unlocking the machine against voting, shall recanvass the vote cast therein, *if three qualified electors of the election district shall file a petition*, duly verified by them, *alleging that*, upon information which they consider reliable, *they believe that fraud or error, although not manifest on the general return of votes made therefrom, was committed in the canvassing of the votes cast on such machine or machines. It shall not be necessary for the petitioners to specify in their petition the particular act of fraud or error they believe to have been committed, nor to offer evidence to substantiate the allegations of their petition.* 25 P.S. § 3262 (Emphasis added).

Thus, this Court must determine whether error, as alleged in the petition and at the hearing, was present, and if so, whether such error justifies the opening of the ballots or the recanvassing of the votes.

CASTING WRITE-IN VOTES

The Election Code sets forth the process to be used to cast a write-in vote:

§ 3031.12. Election day procedures and the process of voting

(a) In an election district which uses an electronic voting system in which votes are registered electronically, the following procedures will be applicable for the conduct of the election at the election district:

(3) A voter may, at any primary or other election, vote for any person or persons for any office for which his name does not appear upon the ballot label as a

candidate, by writing the identification of the office and the name of such person in or upon the appropriate receptacle or device provided for that purpose. ...

25 P.S. § 3031.12. The Sample Ballot contains the following instructions:

4. SELECTING A WRITE IN

Find the Write-In box for the Office for which you want to write in a candidate's name. Press the Write In button in the box. Then press the Large Flashing Red button at the top of the machine to open the Write In Window. Write or Stamp your candidates name on the exposed paper in the window. Then pull the black shutter down over the name you have written, closing the window.

*Exhibit Respondent 1 & 2*³. Moreover, the Election Code authorizes any of the Election Board members to provide additional instructions:

§ 3031.11. Instruction of voters

* * *

(b) At the polling place on the day of the election, each voter who desires shall be instructed, by means of appropriate diagrams and a model, in the operation of the voting device before he enters the voting booth. If any voter shall ask for further instructions concerning the manner of voting after entering the voting booth, any election officer may give him audible instructions without entering such booth, but no such election officer shall when giving such instructions in any manner request, suggest or seek to persuade or induce any such voter to vote any particular ticket or for any particular candidate or other person or for or against any particular question.

25 P.S. § 3031.11.

FACTS AND DISCUSSION

A unique factual issue is presented. The parties have stipulated to substantially all of the operative facts in this matter which are thus not in dispute.

The parties stipulated as follows:

1. On May 16, 2006 Primary Elections were held throughout Pennsylvania, including for State Representative seats in the Pennsylvania General Assembly.

³ The parties have not alleged that the Instructions of the Sample Ballot were either inconsistent with Section 3031.11 or that they were confusing.

2. Among the contested State Representative races in the Democratic Primary was a contest for the nomination for the office of State Representative in the 179th Legislative District.

3. Anthony Payton was a Democratic candidate for State Representative for the 179th Legislative District, and was the sole candidate whose name appeared on the voting machines.

4. Emilio Vazquez was a write-in candidate for the Democratic nomination for the office of State Representative in 179th Legislative District.

* * *

7. On May 19, 2006, as required under the Pennsylvania Election Code, the Philadelphia County Board of Election began the computation of the vote.

8. The Board consisted of Edward Schulgen, Edgar Howard and Joseph Duda, and was chaired by Mr. Schulgen on behalf of Margaret Tartaglione.

9. On May 31, 2006 the Board announced the computation of the vote for the Democratic Primary Election which occurred on May 16, 2006.

10. The result of the computation of the vote as announced by the Board of Elections at its public meeting on May 31, 2006 for the Democratic nomination for the office of State Representative for the 179th Legislative District, was that Candidate Tony Payton received 962 total votes.

11. Candidate Emilio Vazquez received a total of 943 votes.

12. As a result of the computation of the vote as announced by the Board, Candidate Payton received 19 more votes than Candidate Vazquez.

13. The vote total for each Candidate was computed by the Board of Elections as follows:

Payton	Vazquez
947 Machine Votes	0 Machine Votes
1 Alternate Ballot	1 Alternate Ballot
6 Provisional Ballots	10 Provisional Ballots
8 Absentee Ballots	5 Absentee Ballots
0 Write-In Votes	927 Write-In Votes
962 Total	943 Total

14. According to the computation of the votes from the 23rd Ward 19th Division on Machine No. 021031 Candidate Tony Payton received 7 machine votes.

15. No write-in votes were recorded for Emilio Vazquez for the office of State Representative on Machine No. 021031.
16. A total of 20 write-in votes on Machine No. 021031 were tabulated for Emilio Vazquez for Ward Committee Person in the 23rd Ward 19th Division.
17. Machine No. 021032 was also assigned to the 23rd Ward 19th Division.
18. A total of 13 machine votes were recorded for Tony Payton on Machine No. 021032.
19. No write-in votes were recorded for Emilio Vazquez for the office of State Representative on Machine No. 021032.
20. Thirty-two (32) write-in votes were recorded for Emilio Vazquez for Ward Committee Person in the 23rd Ward 19th Division on Machine No. 021032.
21. Emilio Vazquez is not a registered Democratic voter in the 23rd Ward 19th Division.

Exhibit Joint 1.

The parties also stipulated that if the twenty named petitioners were called to testify, “each would testify consistent with the affidavits as set forth in the petition.” N.T. at 6. The affidavits provide as follows:

VERIFICATION

I, [NAME OF PETITIONER], being duly sworn according to law depose and say as follows:

I reside at [PETITIONER’S ADDRESS], within the 23rd Ward, 19th Division, within the 179th Legislative District, and am a duly qualified and registered Democratic voter in the 23rd Ward, 19th Division.

According to the information provided to me, ***the returns from the 179th Legislative District for the office of Democratic Nominee for State Representative in the 179th Legislative District are incorrect and erroneous*** in that they do not include 52 write-in votes cast for Emilio Vazquez for the Democratic Nomination for State Representative in the 179th Legislative District. Each of the 52 write-in votes cast for Emilio Vazquez in the 23rd Ward, 19th Division, was for the Democratic Nomination for State Representative in the 179th Legislative District, and not for Ward Executive Committee from the 23rd Ward, 19th Division.

All of the write-in votes were incorrectly recorded on the voting machines as write-in votes for Emilio Vazquez for Ward Executive Committee and not as a write-in vote for Emilio Vazquez for State Representative in the 179th Legislative District.

I have read the attached Petition to re-canvass, reopen and recount the ballot boxes, voting machines and write-in votes in the 23rd Ward, 19th Division Philadelphia, PA for the Democratic Nomination of State Representative in the 179th Legislative District and find it to be true and correct to the best of my knowledge, information and belief.

[SIGNATURE OF THE PETITIONER]

Signature

Sworn to and subscribed before
me this ___ day of JUNE, 2006
/s/ Lisa Borine
Notary Public

Exhibit Joint 2. (Emphasis added).

A total of 60 voters voted in the 23rd Ward, 19th Division on May 16, 2006. ***Exhibit Petitioner 3.*** A total of 52 of those voters cast write-in votes: 20 on Machine No. 021031, ***Exhibit Petitioner 1,*** and 32 on Machine No. 021032, ***Exhibit Petitioner 2.*** All of the write-in votes were cast for Vazquez for the office of Democratic Committee Person; none were cast for Vazquez for the office of State Representative for the 179th Legislative District. Petitioners claim that an error was made in recording the votes and that, they allege, the votes cast for Vazquez were for the office of State Representative and not for Democratic Committee Person.

At the hearing, Petitioners offered the testimony of Ralph A. Lewis (“Lewis”). N.T. at 10 – 36, 80 – 83. Lewis testified that he has been duly elected Committee Person in the 23rd Ward, 19th Division for more than twenty years, that as the Machine Inspector he is also a member of the District’s Election Board, that his wife, Joyce Lewis, is the Judge of Elections and that his daughter, Nikkole Lewis, is also a Committee Person for the 23rd Ward, 19th Division. N.T. at 11- 13, 17, 20 - 21.

Lewis testified that at a Ward meeting prior to the May Primary, his Ward Leader, Daniel Savage, who supported Vazquez for the office of State Representative for the 179th Legislative District, distributed election materials which consisted of the “Official Democratic Ballot,” *Exhibit Petitioner 4*, five rubber stamps containing the name “EMILIO VAZQUEZ”, *Exhibit Petitioner 5*, and black ink pads which were designed to enable voters to vote for Vazquez as the Democratic Nominee for State Representative. N.T. at 12 – 16, 32 – 33. The Official Democratic Ballot Lewis received contained next to the office of “Representative in the General Assembly” a large arrow and to its right the text: “**WRITE IN EMILIO VAZQUEZ**” was highlighted in yellow. The Official Democratic Ballot was distributed by Lewis “to potential Democratic voters that came to the polls on May 16th.” N.T. at 13 - 14, *Exhibit Petitioner 4*. The rubber stamps with Vazquez’ name and black ink pads were placed on a table close to the voting machines and when voters came to the polling place and asked for additional write-in voting instruction, the Judge of Election would provide the rubber stamps and information on how to use them to cast write-in votes for Vazquez. N.T. at 14 – 15, 19 – 21. Lewis himself used the stamp to vote for Vazquez for the office of State Representative. N.T. at 15 – 16, 81.

On cross examination, Lewis testified that he worked for state senator Christine Tartaglione, N.T. at 13, who is the daughter of Margaret Tartaglione, the Chairperson of the City Commissioners (the “Philadelphia County Board of Election”), and that Renee Tartaglione, another daughter of Margaret Tartaglione, is employed as the Chief Deputy City Commissioner and is married to Ward leader Carlos Matos (who was present at the July 10, 2006 hearing). N.T. at 21 – 27⁴. Lewis testified that when the write-in votes in the 23rd Ward, 19th Division were

⁴ Apparently, the implication of this line of questioning was that the write-in campaign in favor of Vazquez as State Representative was orchestrated by Margaret Tartaglione and supported by the Tartaglione siblings as well as Renee Tartaglione’s Ward leader husband, Carlos Matos, and fellow Ward leaders.

counted, all write-in votes for Vazquez were counted for the office of Committee Person, an office for which Vazquez was not eligible to hold because he was not a resident of the 23rd Ward, 19th Division⁵ and that he, Lewis, the current Committee Person whose name was on the Official Ballot, received no votes because all of the votes Vazquez received were votes cast in the ballot position where Lewis' name had been affixed. N.T. at 12- 13, 16, 30 – 32, ***Exhibit Respondent 1 & 2.***

The Pennsylvania Supreme Court has held that the Election Code is a highly remedial statute which should be liberally construed in order to secure a proper computation of the votes cast in an election. *Rome Township Referendum Recount Case*, 397 Pa. 331, 332, 155 A.2d 361, 362 (1959), *Hazleton City Mayoralty Election*, 301 Pa. 14, 151 A. 586 (1930). The Commonwealth Court recently restated the legal principles applicable to disputes involving write-in votes as follows:

The vote may be the central act in our democratic form of government. To advance the goal of free and fair elections, the legislature enacted the Election Code, and it is often said that in the interest of preventing fraud, the terms of the Election Code must be strictly enforced. *E.g., In re Luzerne County Return*, 447 Pa. 418, 290 A.2d 108 (1972). At the same time, **the purpose of the Election Code is to protect, not defeat, a citizen's vote.** Our Supreme Court has directed that technicalities should not make the right to vote insecure, but instead, the statute should be construed to indulge that right. *Appeal of James*, 377 Pa. 405, 105 A.2d 64 (1954). On balance, we believe that they mean that the terms of the Election Code must be satisfied without exception but **where, as a factual matter, voter intent is clear, questions should be resolved in favor of holding that the Election Code has been satisfied.**

Dayhoff v. Weaver, 808 A.2d 1002, 1006(Pa.Cmwlth. 2002)(emphasis added). In *Dayhoff*, the principal issue involved the placement of the write-in candidate's name on the ballot. *Dayhoff*, a candidate for the position of Mount Joy Township Supervisor, alleged, *inter alia*, that the court

⁵ Vazquez was a resident of the 40th Ward, 20th Division. ***Exhibit Petitioner 6.***

erred when it counted five ballots as votes for his opponent that had a sticker with the opponent's name in the District Magistrate's block rather than in the Supervisor block. As the Court noted:

At issue here was a paper ballot with certain ambiguities caused by the fact that there were so many candidates and races on the ballot. We reproduce for the clearer explanation of the record, that portion of the ballot relating to the District Magistrate and Supervisor races:

[SEE INDEX IN ORIGINAL]

Reproduced Record 55a (R.R. ___.) It is clear that the voter intended to cast a vote for Harold Kirschner for Supervisor and not for District Magistrate. The voter followed the instructions to blacken the oval and to write the name of the candidate "in the space provided."

However, Dayhoff contends that the Board should not have counted the five votes where a voter affixed a "Harold Kirschner" sticker on the line just above the word "Supervisor." He contends that, in the example above, the Kirschner vote was for District Magistrate. The Board did not agree. In fact, the Board counted every vote for either candidate that was written close to the word "Supervisor." Recognizing that the line provided for writing-in a candidate's name was too small for many voters, the Board was flexible in its application of the instruction to "use the space provided." We agree with the Board's approach.

Dayhoff, *supra*, 808 A.2d at 1006 - 1007 (footnotes omitted). The Commonwealth Court described in detail the placement make up of the ballot in question. As the Court reported:

As the reproduction above demonstrates, the ballot is separated into candidate "blocks" by a series of floating lines. It is difficult to discern one "block" from another. Nevertheless, each "block" contained the title of the office, the name of each candidate and, finally, a line for writing-in a candidate's name. Voters were instructed to "blacken the oval" next to the candidate's name and to write the candidate's name "in the space provided therefor." These instructions did not identify "the space provided" as a "block" or a "box." Further, the instructions did not specify that the "space provided" was the line next to the oval.

Dayhoff, *supra*, 808 A.2d at 1007. The Commonwealth Court thus held that the write-in votes, although not within the "block" for the office of "Supervisor" were properly counted.

This Court is of the opinion that the election board in this case should have similarly counted all of the votes cast for Vazquez for the office of State Representative and not for the

office of Committee Person. Although the respective “boxes” here were not separated by “floating lines”⁶, both the intent of the 52 voters who cast write-in votes for Vazquez and the fact that error was present when the votes were cast can be ascertained from the record before the Court.

The testimony clearly establishes that Vazquez, having been stricken from the official ballot, mounted a well organized write-in campaign. This write-in campaign included the city-wide distribution of “official” ballots with Vazquez’ name printed (and highlighted) in the box for the office of “Representative in the General Assembly” - replacing the name of Anthony Payton, who had been endorsed by the Democratic City Committee. Rubber stamps with Vazquez’ name were similarly distributed city-wide for use by voters at the various Districts. This effort, facilitated by the rubber stamps with Vazquez’ name, resulted in 927 Write-in votes for Vazquez for State Representative— out of a total of 943 votes he received, and 52 votes for Vazquez as Democratic Committee Person.⁷ No allegation was made, and no testimony was presented, that Vazquez received any write-in votes for any office other than the office of State Representative in any Ward or Division other than the 23rd Ward, 19th Division. All other write-in votes cast for Vazquez were cast for him as the Nominee for State Representative. Clearly, something happened in the 23rd Ward, 19th Division to cause all 52 write-in votes to be registered for Vazquez for the office of Democratic Committee Person rather than for State Representative – an office for which Mr. Vazquez was not a candidate.

The Court believes Lewis’ testimony that he voted for Vazquez for the office of State Representative. The Court further finds credible the affidavits of Lewis and the other nineteen

⁶ The Committee Person block was located at the very end of the Ballot, three boxes below that of the office of State Representative. *Exhibit Respondent 1 & 2*.

⁷ As noted above, the other 16 votes were from Provisional Ballots (10), Absentee Ballots (5), and Alternate Ballots (1).

petitioners that their votes were incorrectly recorded for Vazquez for the office of Democratic Committee Person rather than for the office of State Representative. Absent credible fraud allegations and proof of fraud, which were not established, this Court is convinced that error was the cause of the write-in votes incorrectly cast or counted for Vazquez as Committee Person rather than State Representative. Whether the error was caused by the Write In instructions contained on the Sample Ballot, or by the instructions the voters received from other officials which caused them to cast their vote in the wrong box, or through some other means, the testimony and affidavits clearly establish that at the very least, all twenty petitioners intended to vote for Vazquez for State Representative – just like the other 927 write-in voters citywide who cast their votes for Vazquez for State Representative. To count these 52 write-in votes for Vazquez for an office for which he was not a candidate, nor could not hold, in light of the unique fact of the write-in campaign he ran disenfranchises not only these 52 voters, but in essence the entire Legislative District. To hold otherwise would render their votes meaningless. That we cannot do.

The Order of this Court does not take away any votes from Candidate Payton. It simply directs that Candidate Vazquez be credited with the written votes cast in his behalf.

CONCLUSION

For the reasons set forth above, the Philadelphia Election Board is ordered to recanvass the vote for the Nominee of the office of State Representative for the 179th District by counting the 52 votes which were cast for Vazquez in the 23rd Ward, 19th Division as votes for State Representative and not as votes for Committee Person and to certify to the State Election Board the results of the recanvass as required by the Election Code. Although this Court could order the “extraordinary relief” of a special election, in light of the unique issue presented, the fact that only 19 votes separate the winning from the losing candidate, that twenty petitioners have alleged that their votes should have been counted for Vazquez for the position of State Representative, and that the intent of all 52 write-in voters can be ascertained, the expense and delay occasioned by such “special election” are not warranted. *See, Kelley v. Delaware County Board of Elections*, 19 D. & C. 3d 492 (1981).

BY THE COURT:

/s/
C. DARNELL JONES, II
President Judge

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY**

IN RE: PETITION TO CONTEST : JUNE TERM, 2006
NOMINATION OF ANTHONY PAYTON :
AS DEMOCRATIC CANDIDATE FOR :
STATE REPRESENTATIVE IN THE :
179TH LEGISLATIVE DISTRICT : No. 0049

ORDER

AND NOW, this 14th day of September, 2006, upon consideration of the Petition to Contest Nomination of Anthony Payton as Democratic Candidate for State Representative in the 179th Legislative District which was filed on June 5, 2006, the stipulations, testimony and other evidence introduced at the July 10, 2006 hearing, and argument of counsel, for the reasons set forth in the Opinion which follows, the Court grants the Petition for re-canvass and recount of the vote for the Democratic Nomination for State Representative in the 179th State Legislative District, and Orders the Philadelphia Election Board to recanvass the vote for the Nominee of the office of State Representative for the 179th District by counting the 52 votes which were cast for Emilio Vazquez in the 23rd Ward, 19th Division as votes for Emilio Vazquez for State Representative for the 179th State Legislative District and not as votes for Committee Person, and to certify to the State Election Board the results of the recanvass as required by the Election Code.

BY THE COURT:

/s/
C. DARNELL JONES, II
President Judge