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Post-Election Litigation in Pennsylvania

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I. INTRODUCTION

As illustrated by the 2000 Presidential election[1] and more recently following the 2001 Democratic primary for mayor of the City of Pittsburgh,[2] close elections invite post-election litigation. This article examines the avenues for post-election litigation provided under the statutory scheme set forth in the Pennsylvania Election Code (the "Code").[3] Although the Pennsylvania Supreme Court has held that the Code's remedial provisions should be liberally construed,[4] in practice, as explained in this article, Pennsylvania courts have strictly applied its jurisdictional and pleading requirements out of a reluctance to interfere with, and to promote, the finality of election results.[5]

A. *Overview of the Administration of Pennsylvania Elections*

The Code provides for three layers of administration and supervision of elections. At the state-wide level, the Code authorizes the Secretary of the Commonwealth to: (a) determine the forms of

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1. *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

2. *In re* 2001 Mayoral Primary City of Pittsburgh, 149 P.L.J. 209 (Comm. Pleas 2001).

3. 25 PA. CONS. STAT. §§ 2601-4051 (1994).

4. Elections Cases, 65 Pa. 20, 31 (1870); *See also In re* Laub 21 A.2d 575, 580 (Pa. Super. Ct. 1941); *In re* Williams, 625 A.2d 1279, 1281 (Pa. Commw. Ct. 1993).

5. Where "voter intent is clear," courts have held that "questions should be resolved in favor of holding that the Election Code has been satisfied." Dayhoff, et al. v. Weaver, 808 A.2d 1002 (Pa. Commw. Ct. 2002) (*citing* Appeal of James, 105 A.2d 64 (Pa. 1954)). As the *Dayhoff* court recognized, "[t]hese principles are difficult to reconcile." *Id.* (holding that the Board of Elections erred in rejecting misspelled write-in ballots).

nomination petitions and papers, expense accounts and all other forms and records; (b) examine and approve or disapprove voting machines; (c) certify to county board of elections for primaries and elections the names of candidates for federal and state-wide offices; (d) receive and determine the sufficiency of nomination petitions, certificates and papers of federal and state-wide candidates and candidates for courts of record; (e) receive reports from the county board of elections as required under the Code; and (f) compute votes received and issue certificates of elections to successful candidates.[6]

At the county level, the Code provides that "there shall be a county board of elections in and for each county of this Commonwealth."[7] Except for Philadelphia County, and "Home Rule" counties, the board of elections generally consists of a county's commissioners.[8] The Code empowers the county boards to undertake a variety of ministerial, supervisory, and quasi-judicial functions regarding county and local elections.[9] Chief among these functions are, as explained below, the boards' duty to tally election results and certify winners of local and county races. At the local level, the Code provides for the election of a district election board, consisting of a judge of election, a majority inspector of election, and a minority inspector of election.[10] The Code provides that each "borough and township, not divided into wards, and each ward of each city, borough and township now existing or hereafter created, shall constitute a separate election district, unless divided into two or more election districts or formed into one election district as hereinafter provided."[11] The Code further provides for, on the petition of five or more electors, the appointment of a representative of each party to act as "overseers" of the election to "secure the parity and fairness" of any primary or election.[12]

6. 25 PA. CONS. STAT. § 2621 (a-g) (1994).
7. § 2541(a) (repealed 1937).
8. § 2641(b).
9. § 2642 (a-o). In terms of administration, the county boards are charged with equipping and staffing polling places, budgeting, maintaining a roll of eligible electors, and announcing election results. *Id.*
10. § 2671.
11. 25 PA. CONS. STAT. § 2701 (1994).
12. § 2684.

II. REVIEW OF THE POST-ELECTION PROCESS

A. *Automatic Post-Election Review of Ballots By County Board of Election*

Any review of post-election procedure must start with the Code's mandate that the county board of elections perform a computation of the ballots and an internal audit of the registration rolls before officially certifying the election results.[13]

1. *Computation and Certification of the Vote by the Board of Elections*

On the third day after the election, at 9:00 a.m., the county board of elections is required to "publicly commence the computation and canvassing of returns."[14] Before this public computation of the vote occurs, however, the board is required to "certify the total registration of each voting district within its jurisdiction."[15] The board must then compare the registration and enrollment figures for each district with the election returns showing the number of persons who voted or the number of ballots cast. If the returns show that more people voted than were registered, the board is required to conduct an investigation and may exclude the results of that voting district from the final computation of votes.[16] Further, in counties where ballots are cast by machine, the board is required to publicly release the "identification numbers of each voting machine used and the numbers registered on the protective counter or device of each machine prior to the opening of the polls and immediately after the close of the same."[17]

Where voting machines have been used, the board must compare the numbers on the unsealed return sheets with the sealed return sheets that have been returned from the voting districts. Both return sheets are then compared with the proof sheets printed from the voting machines.[18] The proof sheets are considered to be primary evidence of the election results and *prima facie* accurate.[19] The board clerks then must read these results "slowly,

13. § 3154(a)-(c).
14. § 3154(a).
15. § 3154(b).
16. 25 PA.CONS. STAT. § 3154(B) (1994).
17. § 3154(c).
18. § 3154(d)(2).
19. *Id.*

audibly, and in an orderly manner," and the numbers are tallied to arrive at the official total.[20]

After the returns for the election are read, computed and found to be correct (or are corrected through the process described above), the boards are directed to publicly announce the totals and sign a preliminary certification of the results.[21] If no petition for recanvassing or for a recount is filed within five days of the announcement, the certification becomes final and a certificate of nomination or election is issued to the prevailing candidate.[22]

2. *Three Bases For Post-Election Litigation*

For those candidates who wish to challenge the process described above or the result of the certification, the Election Code provides three bases for post-election litigation: (a) an appeal of a decision of a county's board of elections;[23] (b) the filing of a Petition for Recount or Recanvassing;[24] and (c) the filing of a Petition for Contest.[25] These three bases for relief are distinct: a post-election challenge may involve one or more of these sections of the Code. Each serves to strike a balance between the rights of aggrieved parties and the need to achieve an expeditious resolution of election disputes.

a. An Appeal of a Board of Election's Decision

Section 3157(a) of the Code permits an appellant to appeal an adverse decision of the Board of Elections to the court of common pleas. It provides that "any person" may appeal who is "aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election, or regarding any recount or recanvass thereof."[26] The court of com-

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20. *Id.*

21. 25 PA. CONS. STAT. § 3154(f) (1994).

22. *Id.* Once the election is officially certified, the only way to challenge the result is through a petition for contest pursuant to 25 PA. CONS. STAT. § 3456 (1994). *See In re* Opening of Certain Ballott Boxes, Montour County, 718 A.2d 774, 776 (Pa. 1998) (holding that court of common pleas properly exercised jurisdiction over petition for recount because petition was filed before certification became final); *see also In re* Ballot Boxes & Recount of Ballots Cast in General Election on November 3, 1959, 159 A.2d 905, 906-07 (Pa. 1960) (holding that once certification was final, the "only procedure then for questioning the ultimate result was an election contest").

23. 25 PA. CONS. STAT. § 3157(a)(2).

24. § 3461-62.

25. § 3456.

26. § 3157(b) (1994).

mon pleas' scope of review is narrow because, as the Supreme Court explained in *Appeal of McCracken*, a board's decision will not be reversed but for an abuse of discretion or error of law.[27] The *McCracken* court further explained that "[c]anvassing and computing necessarily embrace acts of discretion" by local boards of election and that the Code "clothes" the boards "with quasi-judicial functions."[28]

Section 3157 imposes a quick timetable on would-be appellants, requiring that an appeal be brought "within two days after such order or decision shall have been made, whether reduced to writing or not to the court of common pleas of the proper county . . . ."[29] An appeal under section 3157(a) pertaining to fraud or error committed in a voting district suspends the final certification of the vote.[30] Moreover, an appeal under section 3157(a) does not preclude the challenger's ability to file a petition for recanvassing or mount a contest under section 3456.

On its face, section 3157(b) appears to prohibit appellate review beyond the court of common pleas, providing that "no appeals shall be allowed or granted from any order or decree of the court of common pleas made in pursuance to th[at] section."[31] In recent years, however, both the Pennsylvania Supreme Court and Commonwealth Courts have avoided this limitation on their jurisdiction under differing rationales. The supreme court has justified accepting appeals under section 3157 "in nature of certiorari" and reviewing appeals on their merits to determine whether a lower court has abused its discretion.[32] By adopting this rationale, the supreme court implicitly denied the legislature's authority to limit

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27. Appeal of McCracken, 88 A.2d 787, 788 (Pa. 1952) (observing that county election boards have "plenary powers in the administration of the election code").

28. *Id.* at 788.

29. *Id. See also* Perles v. Northumberland County Return Bd., 202 A.2d 538, 540 n.5 (Pa. 1964) (affirming dismissal of appeal brought pursuant to Section 3157(a) brought five days after issue of county board's order); *2001 Mayoral Primary City of Pgh*, 149 PLJ at 210 (dismissing appeal of certification brought four days after board's announcement.).

30. 25 PA.CONS.STAT. § 3157(b) (1994).

31. *See e.g., In re* Recanvass of Eleventh Ward Third Dist, 174 A.2d 106 (Pa. 1961) (refusing to evaluate merits of appeal from order of lower court under section 3157); Kelley v. Delaware County Bd. of Elections, 19 Pa. D. & C.3d 492, 495 (1981) (declaring that section 3157 endows trial court with "plenary power" to adjudicate all appeals brought under that section).

32. *In re* Reading Sch. Bd. Election, 634 A.2d 170, 172 (Pa. 1993) (affirming denial of petition for recount where petition lacked three signatures); *In re* General Election of November 6, 1971, 296 A.2d 782 (Pa. 1972); *In re* Recanvassing of Certain Voting Machines for Election of Republican Candidate for County Commissioner, 475 A.2d 1325 (Pa. 1984) (reversing, in part, dismissal of petition for recount).

the Court's ability to monitor or correct decisions made by the lower courts. Taking a different approach, the commonwealth court recently took the position that Section 3157(b) "no longer has force" because it predates the "passage in 1976 of the Judicial Code, which grants this court jurisdiction over appeals in Election Cases."[33]

Section 3157 discourages frivolous appeals by permitting the court of common pleas to assess witness fees or the legal costs of the hearing against the appellant (or upon any opposing party other than the county board).[34]

b. Petition for Recount or for Recanvassing

The prescribed method for challenging the computation of the results of an election is by filing a petition for recanvassing or recount with the court of common pleas.[35] In order to request a recanvassing of an election district, a challenger must file a petition verified by affidavit from three voters from the district at issue.[36] Unless each signature on the affidavit is properly verified, the petition will be dismissed for lack of jurisdiction. As the Pennsylvania Supreme Court explained in its 1998 decision, *Opening of Ballot Boxes, Montour County*, Pennsylvania courts have held for "eighty years" that "a recount petition not verified in accordance with the statutory requirements does not properly invoke the jurisdiction of the common pleas court and should be dismissed."[37]

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33. Dayhoff. v. Weaver, 808 A.2d 1002, n.7 (Pa. Commw. Ct. 2002). The *Dayhoff* court did not consider whether the Judicial Code merely transferred existing jurisdiction from the Superior Court to the Commonwealth Court. In concluding that it had jurisdiction over Section 3157(b) appeals, the Commonwealth Court also relied on Article 5, Section 9 of the Pennsylvania Constitution, which provides that there "shall be a right of appeal from . . . an administrative agency to a court of record or to an appellate court." *Id.* As a Court of Common Pleas is a "court of record," however, it is unclear whether Section 3157(b) necessarily conflicts with Article 5, Section 9.

34. 25 PA. CONS. STAT. § 3157(b) (1994).

35. *Id.* §§ 3261, 3262. "Recanvassing" applies where votes are cast by machine; a "recount" applies where votes are cast by paper ballot. *Id.*

36. *In re* General Election of Luzerne County, 94 A.2d 565, 566 (Pa. 1953) (denying Petition for Recount where petition lacked three signatures).

37. Opening of Certain Ballott Boxes, Montour County, 718 A.2d at 777 (Pa. 1998) (holding that the Montour County Court of Common Pleas properly dismissed a petition for recount where the petitioner had failed to verify all of the signatures to his petition). *See also Recanvassing of Certain Voting Machines*, 475 A.2d at 1327 (affirming dismissal of recount petitions where the affidavits had not been verified in the presence of a notary public); Giacobello v. Board of Elections of the Borough of Mount Union, Huntingdon County, 322 A.2d 429 (Pa. Commw. Ct. 1974) (affirming dismissal of petition for recount).

The pleading threshold is low; the petitioners must aver only that "an error, although not apparent from the face of the returns, has been committed therein."[38] If the recanvassing reveals fraud or substantial error, the court is required to grant the petitioners an additional five days to request that more machines be recanvassed.[39] Further, if the court finds fraud or error, the court "shall correct, compute and certify to the county board the votes justly . . ."[40] Sections 3261 and 3262 discourage unsubstantiated petitions by requiring that challengers post a bond of $100.00 (or pay $50 cash) per voting district to be recanvassed. If the recanvassing or recount fails to uncover evidence of fraud or substantial error, the challengers forfeit the fees.

The Code provides two seemingly inconsistent time periods for filing a petition for a recount or recanvassing. Section 1702 of the Election Code provides that recanvassing is permitted up to twenty days following a primary or general election:

> "Voting machines may be recanvassed under the provisions of this Section at any time within twenty days after the date of the primary or election at which they were used."[41]

Section 3263(a)(1), however, provides that a petition for recanvassing shall be filed "no later than five (5) days" after the board has completed its computation of the ballots:

> "[a]ny petition to open a ballot box or recanvass the votes on a voting machine pursuant to Sections 1701 and 1702 shall be filed no later than five (5) days after the completion of the computations canvassing of all the returns of the county board...."[42]

The Pennsylvania Supreme Court resolved these seemingly inconsistent time periods in In re *Canvassing of Certain Voting Machines*.[43] That case involved the supreme court's review of an order by the Westmoreland Court of Common Pleas dismissing, in part, a petition to recanvass votes in seventeen electoral districts following a general election for Westmoreland County Commis-

38. 25 PA. CONS. STAT. § 3154(c)(1).
39. § 3263(a)(1).
40. § 3263(a)(2).
41. § 3262(c).
42. § 3263(a)(i).
43. *In re Recanvassing of Certain Voting Machines*, 475 A.2d 1325, 1327 (Pa. 1984).

sioner.[44] In the General Election of November 8, 1983, Robert H. Miller and Lowman S. Henry were the Republican candidates for County Commissioner of Westmoreland County. On November 28, 1983, the county board certified that Miller defeated Henry by three votes. On December 2, 1983, Henry filed a petition to recanvass the voting machines in seventeen voting districts. Miller filed a petition to dismiss the recanvassing petition, alleging that it had not been timely filed since it was filed beyond the twenty day time period prescribed by Code Section 1702(c).[45] In rejecting Miller's claim, the court concluded that:

> the legislature intended, under Section 1702, to give a prospective petitioner twenty days after the date of the election or primary within which to file a petition to recanvass voting machines; but if the computational canvassing took longer than twenty days, for example, under Section 1703 the candidate would have five days after computation in which to file. This is the only interpretation that preserves both sections of the Act.[46]

Thus, under the *In re Recanvassing* decision, a petition for recanvassing may be filed at any time until twenty days following an election, or five days after certification by the county board of elections, whichever time period is longer.

As discussed above, the Board of Elections conducts a routine canvassing of the voting machine results following each election based on a comparison of the sealed and unsealed returns from the voting machines.[47] Unlike the recount of punch card ballots in the 2000 Florida presidential election (where the validity of many of the ballots was open to considerable debate), a recanvass of the machine is aimed strictly at mechanical or mathematical error. Mathematical errors, however, are highly unlikely; the machines are informally canvassed on election night and during the formal, public computation three days later. Thus, as a practical matter, a petition for recanvassing should be limited to those instances where a challenger believes that there has been a mechanical breakdown in one or more voting machines.

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44. *Id.* at 1326.

45. *Id.*

46. *Id.* at 1327. The court clearly reached the correct result, although the twenty day time limitation in section 1702 could also be read as a limitation on the county board's power to conduct a recanvassing on its own motion. *Id.*

47. 25 PA. CONS. STAT. § 3154.

c. Petition for a Contest of the Election

The third basis for jurisdiction in the court of common pleas for post-election litigation is through a petition for a contest under 25 P.S. § 3456. Unlike a petition for recanvassing or recount, which questions the accuracy of the vote count, an "election contest" is a challenge to the honesty and validity of the election process.[48]

The Code divides election contests into "classes," depending on the office at issue.[49] Section 3291 provides as follows:

> The several classes of nominations at primaries and elections of public offices which may be contested in this Commonwealth are hereby distinguished and designated as follows, to wit:
>
> Class I. Nominations and elections of the Governor and Lieutenant Governor of the Commonwealth.
>
> Class II. Nominations and elections of electors of President and Vice-President of the United States and all officers of this Commonwealth, including Judges of the Courts (except Governor and Lieutenant Governor), who now are or hereafter shall be required to be nominated or elected by the electors of the State at large and nominations for United States Senators.
>
> Class III. Nominations and elections of judges of the several courts.
>
> Class IV. Nominations and elections of Senators and Representatives in the General Assembly and nominations of Representatives in Congress.
>
> Class V. All other officers, whether nominated or elected by the qualified voters of counties, cities, boroughs, townships, wards, school districts, poor districts or any other division of the State.[50]

Different procedural requirements apply, depending upon the class of the election contest. Moreover, the Code provides for different tribunals empowered to hear different class contests. Thus,

48. *In re* Election of Schl. Dir. in Birmingham Twp., 143 A.2d 18, 20 (Pa. 1958).
49. 25 PA. CONS. STAT. § 3291.
50. § 3291.

Class I contests, pertaining to the offices of Governor and Lieutenant Governor, are to be tried and determined by the General Assembly.[51] The procedural rules for first class contests are set forth under sections 3314-3330.

Class II contests, involving presidential electors, state-wide elected officers (including appellate court judges), and nominations of U.S. Senators, are to be heard by the Commonwealth Court of Pennsylvania.[52] A contest petition of the second class must be signed by at least 100 electors.[53]

Class III contests, involving county-wide judicial contests, are heard by the court of common pleas of the county where the person to be elected resides.[54] The tribunal is to be comprised of "the three president judges residing nearest to the courthouse of the county composing the judicial district."[55] A contest petition of the third class must be signed by at least fifty registered electors.[56]

Class IV contests, involving elections of senators and representatives in the state assembly and nominations of representatives in Congress are to be heard by the court of common pleas of the county within which the return candidates resides.[57] The losing party in a contest involving a seat in the General Assembly may appeal from the court of common pleas to the "proper house within ten days after the meeting of the General Assembly, or within ten days after the decision shall have been made in his case . . ."[58] The party on appeal is required to submit his contest petition to the "proper house" along with an affidavit setting forth the grounds for the contest.[59] A "standing committee" on election matters then hears the contest, and submits a report for the consideration of the

51. § 3312.

52. 42 PA. CONS. STAT. § 764(1) (1994) (providing that the Commonwealth Court shall have exclusive jurisdiction of "contested nominations and elections of the second class"). Prior to 1978, second class contests were heard by the Court of Common Pleas of Dauphin County along with the two president judges of the two nearest counties. *See* 25 PA. CONS. STAT. ANN. § 3351 (West 1994) (Historical and Statutory Notes).

53. 25 PA. CONS. STAT. § 3351 (1994).

54. § 3376.

55. *Id.* § 3377.

56. *Id.* (providing that the petition must be presented to the Governor of the Commonwealth).

57. *Id.* § 3401.

58. 25 PA. CONS. STAT. § 3407 (1994).

59. § 3407.

entire body, which "shall be final."[60] Class IV petitions must be signed by at least twenty registered electors.[61]

Contests of the fifth class, involving all other county-wide and local races, are heard by the court of common pleas of the county where the election was held.[62] Class V petitions must be signed by at least twenty registered electors.[63] Petitions for election contests of the second through fifth classes must be filed within twenty days after the primary or general election at issue.[64] A contest "petition shall concisely set forth the cause of the complaint, showing wherein it is claimed that the primary or election is illegal . . . ."[65] The petition must allege that "the illegal acts are so irregular and the election so infected with fraud that the result cannot be ascertained."[66] Unless the petition "avers plainly and distinctly such facts which if sustained by proof would require the court to set aside the result" of the election, the petition should be dismissed.[67]

Failure to comply with the jurisdictional requirements imposed by the Election Code for a Petition to Contest an election requires the dismissal, with prejudice, of that petition.[68] The Election Code mandates that the signators to the petition must have voted in the primary or election.[69] In contests regarding primary elections, the

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60. § 3408.

61. § 3402.

62. § 3431.

63. 25 PA. CONS. STAT. § 3431 (1994).

64. § 3456. Section 3456 provides:

The commencement of proceedings in the case of contests of the second, third, fourth and fifth classes shall be by petition, which shall be made and filed, as herein required, within twenty days after the day of the primary or election, as the case may be. The petition shall concisely set forth the cause of complaint, showing wherein it is claimed that the primary or election is illegal, and after filing may be amended with leave of court, so as to include additional specifications of complaint. After any such amendment, a reasonable time shall be given to the other party to answer. *Id.*

65. § 3456.

66. *In re* Contest of Election, for Office of City Treasurer, 162 A.2d 363, 365 (Pa. 1960) (affirming dismissal of petition containing only "general allegation that 160 voters were illegally assisted" and there was "no mention of how or in what particular the Election Code was violated").

67. Pfuhl v. Coppersmith, 253 A.2d 271, 273 (Pa. 1969).

68. *See, e.g., In re* Philadelphia Democratic Mayoralty Primary Election Contest, 11 Pa. D. & C.3d. 381 (1979) (dismissing contest of mayoral primary where petition failed to contain signatures of twenty electors and refusing petition to amend); *see also Birmingham Twp.*, 143 A.2d at 20 (reversing dismissal of election contest where elector omitted middle initial from signature) because, "[although] statutory requirements must be followed, mere technicalities should never thwart the inherent and basic purpose of a proceeding to test the validity of an election.").

69. 25 PA. CONS. STAT. § 3457 (1994); *see also In re*: Kennedy Twp., G.D. No. 01-011229 (Allegheny Cty. 2001) (dismissing contest petition challenging result of Republican primary

petitioners must be of the party whose primary is at issue.[70] In second, fourth, and fifth class contests, at least five of the petitioners must sign an affidavit taken and subscribed before a person authorized by law to administer oaths and they must declare that the facts in their affidavit are true, that according to the best of their knowledge and belief, the primary was illegal and the primary return not correct, and that the petition to contest the primary is made in good faith.[71] In third class contests, at least ten petitioners must sign the affidavit.[72]

Moreover, regardless of the class of contest, at least five of the petitioners must sign and file a bond, within five days after filing their petition, in the sum designated by the state senate or court.[73] The bond shall be filed with two or more individual sureties or a corporate surety that is approved by the court, and conditioned for the payment of all costs that may accrue pursuant to this contested election proceeding, in case the petitioners are adjudged liable for the costs.[74] A failure of the petitioners to file a bond in accordance with the requirements of the state senate or court will result in the dismissal of their petition to contest the election.[75]

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elections where, although signed by twenty-eight electors, only nineteen were registered Republicans and the others were registered Democrats), *aff'd, sub nom., In re* May 15, 2001 Municipal Primary, 785 A.2d 146, 149 (Pa. Commw. Ct. 2001).

70. *May 15, 2001 Municipal Primary*, 785 A.2d at 150, 151; *see also In re* Nominating Petition of *Pasquay*, 525 A.2d 13, 14 (Pa. Commw. Ct. 1987), *aff'd,* 529 A.2d 1076 (Pa. 1987) (non-party member lacked standing to file election contest of primary election).

71. *See May 15, 2001 Municipal Primary*, 785 A.2d at 149.

72. *Id.*

73. 25 PA. CONS. STAT. § 3459 (1994).

74. § 3459.

75. § 3459. *See also* Olshansky v. Montgomery County Election Bd., 412 A.2d 552, 553 (Pa. 1980) (affirming dismissal of election contest where (1)the bond lacked signatures of five electors, (2) the amount of bond was not set by the court, (3) the corporate surety was not approved by the court, and (4) the bond was not conditioned for the payment of all costs which might accrue in the contest). In dissent, Justice Roberts criticized the *Olshansky* decision for its adherence to the "overly technical demand that each provision of the Election Code's bond requirement be strictly followed." *Id.* at 555 (arguing that the court had "made it obvious" in *Birmingham Township,* 143 A.2d at 18, that the "old cases upon which the plurality relies are no longer to be followed in a contest such as this.").

III. ALTHOUGH THE CODE'S REMEDIAL PROVISIONS ARE TO BE LIBERALLY CONSTRUED, PENNSYLVANIA APPLIES A STRICT PLEADING STANDARD TO PETITIONS FOR CONTEST

"[T]he right of suffrage is the most treasured prerogative of citizenship in this nation and this Commonwealth."[76] Given the importance of this right, the Pennsylvania Supreme Court has instructed that "[a]n election is not to be held void for mere irregularities in the conduct of the election, even though the election officers may be subject to punishment for misconduct; the rights of the voters are not to be prejudiced by the errors or wrongful acts of election officers."[77] Indeed, the "invalidation of a public election is a judicial act of the most serious import, and is justified only by circumstances of the most compelling nature."[78] Thus, the Pennsylvania Supreme Court has mandated an exacting pleading standard for petitions for contest:

> It is not sufficient to set forth in general terms, however positive, [the] numerous allegations of fraud and conclusions arising from acts done and performed. [The Petition] must set forth specifically the fraud perpetrated and the facts with precision, upon which petitioners rely, so that respondent may know what he is called upon to meet.[79]

Section 3456 requires that a petition for contest "concisely set forth the cause of the complaint showing wherein it is claimed that the primary or election is *illegal*. . . ."[80] As such, "election con-

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76. *In re* Recount of Ballots Cast in General Election, 325 A.2d 303, 308 (Pa. 1974); *see also In* re Petition to Contest the General Election for Dist. Justice, 670 A.2d 629, 638 (Pa. 1996), *appeal after remand*, 695 A.2d 476 (Pa. Comm. Ct. 1997), *appeal denied*, 729 A.2d 1132 (Pa. 1998) ("the power to throw out a ballot for minor irregularities should be sparingly used").

77. *In re* Contest of Election for Office of City Treasurer, 162 A.2d at 66.

78. Petition to Set Aside Special Election in Thirty-second Senatorial Dist., 15 Pa. D. & C.2d 271, 290 (1956) (en banc).

79. *Id.* at 289.

80. 25 PA. CONS. STAT. § 3456 (1994) (emphasis added). Section 3456 provides as follows:

> The commencement of proceedings in the case of contests of the second, third, fourth and fifth classes shall be by petition, which shall be made and filed, as here*In re*quired, within twenty days after the day of the primary or election, as the case may be. *The petition shall concisely set forth the cause of complaint, showing wherein it is claimed that the primary or election is illegal*, and after filing may be amended with leave of court, so as to include additional specifications of complaint. After any such amendment, a reasonable time shall be given to the other party to answer.

Id. § 3456 (emphasis added).

tests are limited to questions of whether or not the will of the qualified electors was correctly shown by the returns made."[81]

A. *Allegations of Mere Clerical or Technical Errors are Insufficient to Plead an Election Contest*

As the Pennsylvania Supreme Court has explained, "where no fraud is shown, mere irregularities in conducting an election, not affecting the result, will not require rejection of the entire vote of the election district."[82] Pennsylvania courts have repeatedly recognized that clerical and technical mistakes by election officials, even if alleged to be numerous, are not enough to overturn an election.[83] The supreme court has determined that "carelessness or even fraud of the election officers" may not serve as a basis "to defeat the election and frustrate the will of the electorate."[84] Furthermore, the court has stated that the word "irregularity," used in the context of election cases, means "the failure to perform some duty or some procedural neglect in the conduct of an election which does not, however, affect the honesty of the ballot . . ."[85]

For example, in *Morganroth Election Contest*, the contestant argued that the election should be overturned due to violations of a variety of sections of the Election Code, including section 417 (requiring poll watchers to stay outside of enclosed polling place), section 530 (failure to furnish barrier or guardrail enclosing the inner portion of the voting room), section 1210 (failure to sign voting certificate), and section 1214(b) (requiring that ballot stubs be processed separately from ballots).[86] The court, however, granted respondent's motion to quash because "[i]t is a principle of universal application that an irregularity which does not deprive a legal voter of his vote (not accompanied with fraud by the party seeking the benefit thereof) will not vitiate the election."[87]

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81. *In re* Petition to Contest the Primary Election of May 19, 1998, 721 A.2d 1156, 1159 (Pa. Commw. Ct. 1998).

82. *In re* Contest of Election of Gollmar, 175 A. 510, 513 (Pa. 1934).

83. *See Petition to Set Aside Special Election.*, 15 Pa. D. & C.2d 271, 290 (1956).

84. *Contest of Election for the Office of City Treasurer*, 162 A.2d at 365.

85. Morganroth Election Contest, 50 Pa. D. & C. 143, 172, (1942) (en banc).

86. *Id.*

87. *Id.* at 172 (quotations omitted).

88. *See, supra* note 82 and accompanying text.

Similarly, in *In re Contest of Election of Gollmar*,[88] the contestant alleged a violation of the laws by twenty-one voting districts in Allegheny County involving thousands of votes and argued that the sheer number of violations required the court to set aside the election.[89] Moreover, many of the violations alleged in *Gollmar* involved ballots cast by ineligible voters. Despite the sheer number of such violations, the Pennsylvania Supreme Court affirmed the dismissal of the petition, holding that overturning the election may not be done "in the absence of specification of fundamental fraud as to the contest involved."[90] The court noted that no "suggestion is made that any of the illegal votes were cast for respondent, and it cannot be presumed."[91]

These courts have reasoned that permitting election contests based on allegations of mere irregularities invites the very problems sought to be avoided:

> [T]o eliminate an entire poll, though no harm has actually been done, merely because public officials did not perform their duty properly, would result in the very wrong sought to be prevented; for if they are unscrupulous (knowing as they always do, where votes antagonistic to their desires will be cast), they can wrongfully fit [sic] up the election room and booths in every district which they desire to be thrown out . . .[92]

Moreover, election boards and their officers are "presumed to have acted properly and in good faith . . . ."[93] Where all that is alleged is the inevitable human clerical errors one would find in any election, a contestant is faced with the problem of explaining how the remedy of a new election would eliminate that human error.

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89. *Gollmar*, 175 A. at 512.

90. *Id.* at 513.

91. *Id. See also* In re Philadelphia Democratic Mayoralty Primary Election Contest, 11 Pa. D. & C.3d 381, 393-96 (1979) (rejecting petition although it catalogued numerous alleged violations of various sections of the Election Code); *Petition to Contest the General Election for Dist. Justice*, 670 A.2d at 638. The type of illegality warranting a petition for contest is illustrated in *In re Cole's Election*, 72 A. 510 (Pa. 1909) where, in a tie election, the Board had failed, either "through fraud, deceit or mistake" to count eleven votes for contestant. *See also In re* General Election of Nov. 4, 1975, 71 Pa. D. & C.2d 68 (1975) (holding that contestant established a *prima facie* case where petition alleged that machine failed to record 71 votes for contestant and that this would have overcome the 46 vote margin of victory).

92. Rockville Twp. Primary Election, 61 Pa. D. & C. 167, 174-75 (1946).

93. *In re* Haverford Twp. Election, 128 A. 499, 501 (Pa. 1925).

At a minimum, therefore, a petition for contest must allege either a complete breakdown of the system[94] or some type of fraud or illegality that can be remedied by the court.[95]

B. *A Petition for Contest Must Allege that the Illegal Votes Accrued to the Benefit of the Successful Candidate*

1. *The mere assertion of illegal votes is not enough*

In order to survive a motion to quash, a Petition for Contest may not merely allege that unregistered or ineligible voters cast illegal votes.[96] Rather, the Petition must allege that the number of illegal votes exceeds the margin of victory and that the illegal votes accrued to the benefit of the successful candidate.[97] In *Philadelphia Democratic Mayoralty Primary Election Contest*, the petitioners alleged, *inter alia*, that "illegal assistance had been rendered to different voters in the voting booth."[98] The court held that this allegation

94. A breakdown in the system making out a *prima facia* case for an election contest was shown in *In re General Election of Nov. 4, 1975*, 71 Pa. D. & C.2d at 68. That case involved a four-person race for county commissioner. Crellin, the losing candidate lost by forty-six votes, and filed a petition of contest. The petition included affidavits from eighty-nine voters setting forth that they voted for Crellin at a voting machine located in Shohola Township. The Petitioners further alleged that the voting machine, which recorded only eighteen votes for Crellin, had "malfunctioned" twice on election day. Despite the fact that the Petitioners did not explain precisely how the machine malfunctioned, the Pike County court refused to dismiss the petition; *see also In re Haverford Twp. Election,* 128 A. at 510 (failure to count 26 votes grounds for contest).

95. The type of fraud necessary for overturning an election was proven in Petition to Contest the General Election for District Justice in Judicial District 36-3-03 Nunc Pro Tunc Appeal of Joseph Zupsic, 695 A.2d 476, 483-84 (Pa. Commw. Ct. 1997), *appeal denied,* 729 A.2d 1132 (Pa. 1998). In *Appeal of Zupsic*, the trial court found that the Board of Elections had failed to adequately secure the ballot boxes and that someone gained access to the ballot boxes in question and altered forty-five of them in favor of the winning candidate, where the voter's intent had been to vote for the petitioner. *Id.* at 482. On the basis of this evidence, the Commonwealth Court affirmed the trial court's order directing the county board of elections to certify the petitioner as the winner. *Id.* at 478.

96. *See In re Petition to Contest the General Election for Dist. Justice*, 670 A.2d at 638. ("Even the mere casting of fraudulent votes is not sufficient to throw out a return"); *In re* Ayre, 134 A. 477, 478 (Pa. 1926) (affirming dismissal of allegation of illegal assistance in the voting booth where the petitioner failed to allege that the contestant was prejudiced).

97. *See Philadelphia Democratic Mayoralty Primary Election Contest*, 11 Pa. D. & C.3d. at 396 (1979).

98. *Id.* at 396.

failed to state a claim because the claim failed to mention for whom the vote was cast.[99]

Without an allegation that the illegal votes were cast for the successful candidate, a court has no way of determining whether the illegal votes affected the outcome of the election. The need for such an averment is obvious: absent some proof of illegal scheme to garner the illegal votes, it is just as likely that the illegal votes were cast for the challenger as for the successful candidate. As the *Gollmar* court explained, "unless averment is made that illegal votes were counted for respondent and effected [sic] his election, a mere conclusion (not even a reasonable inference) that the result was to increase respondent's vote, unsupported by specification of a single particular, is not enough."[100] No inference may be drawn that the mere existence of illegal votes tainted the outcome of the election.

2. *A Petition for Contest must identify the names of the alleged illegal voters*

In *Gollmar*, the Pennsylvania Supreme Court dismissed a petition for contest where the petition failed to identify by name those who had allegedly cast the illegal votes.[101] The purpose of this exacting pleading standard is to provide the respondent with a full opportunity to prepare a defense to the allegations.[102] Where the gist of the illegality alleged in the Petition is that illegal votes were cast, a petitioner must provide the names (and districts) of the persons who voted so the respondent might prepare a defense to the allegations.[103] Without the names of the illegal voters, neither the respondent, the county board, nor the court can conduct an independent review of the district registers and voting check

99. *Id.*

100. *Id.* at 513 (affirming dismissal of petition alleging illegal votes because the petition failed to declare that the "votes were cast for the successful candidate").

101. *Gollmar*, 175 A. 510.

102. *See Philadelphia Democratic Mayoralty Primary Election Contest*, 11 Pa. D. & C.3d at 394-96.

103. *See Id.* (holding that the petitioners failed to present a valid cause of action because, throughout their complaint, they failed to name any individuals or specify the number of voters claimed to have been affected by the alleged illegalities).

lists to determine whether the allegations of illegal voting are true.[104] As the *Gollmar* court explained:

> [w]hen, as here, the illegality consists of what some persons did or did not do, specification as to the identity of such or some of such persons is essential. It is obviously impossible to meet such charges otherwise. An answer to the petition before us could be nothing but the most general denial, preparation of a substantial defense would be impossible, and no precise and definite issue would ensue. The respondent, prima facie the successful candidate, is not without some rights in the premises.[105]

However, in 1941, seven years after *Gollmar*, the Philadelphia Court of Common Pleas rejected, as *dicta*, *Gollmar's* requirement that a petition identify illegal voters and dismissed a motion to quash a petition.[106] Conversely, a year later, in *Morganroth*, the Northumberland Court of Common Pleas followed *Gollmar* and, in granting a motion to quash, declared that "[i]t was the duty of the petitioners to have ascertained the names of the voters who are alleged to have voted illegally by the election board, which they could have readily discovered upon inquiry." [107]

An additional argument for requiring the identification of illegal votes is that, in order to prevail, the contestant must prove that the illegal votes accrued to the benefit of the successful candidate in the election. In order to challenge this allegation, the respondents must have the names of the illegal voters so that they can subpoena the illegal voters and question them as to how they voted under oath.[108]

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104. *See Morganroth*, 50 Pa. D. & C. at 170, (holding that petitioners' allegations of fraudulent voting were insufficient because they failed to name the electors involved).

105. *Gollmar*, 175 A. at 513-14 (quashing the petition on the grounds that it contained only general averments and failed to identify the alleged illegal voters and for whom they voted).

106. *In re* Contested Election of Office of Register of Wills, 43 Pa. D. & C. 588 (1941).

107. *See Morganroth*, 50 Pa. D. & C. at 167 (*citing Gollmar*, 175 A.2d at 513, for the proposition that it is not too much to require the petitioners to provide the names of the electors that allegedly cast illegal ballots).

108. *See* Appeal of Orsatti, 598 A.2d 1341, 1343-44 (Pa. Commw. Ct. 1991), *appeal denied*, *In re* Opening of Ballot Box, 600 A.2d 956 (Pa. 1991) (holding that a court can compel an individual who casts an illegal vote to disclose for whom he or she voted so that it can be deducted from the legitimate vote total).

C. *A Contestant is Not Permitted to Speculate that the Election Result Would Have Been Different Based on an Extrapolation of Errors Identified through a Review of Selected Districts*

In elections involving large numbers of votes and districts, a contestant may be faced with the challenge of gathering sufficient evidence to meet the specific pleading requirements to support a claim of fraud or illegality before the lapse of the time for filing occurs.[109] Some contestants have sought, albeit unsuccessfully, to overcome this challenge by focusing on selected districts and arguing that the court should extrapolate data collected from that sample to the entire election. The Pennsylvania Supreme Court rejected this strategy in *Pfuhl v. Coppersmith.*[110] In *Pfuhl*, the petitioner sought to amend his petition and "speculate[d] that a pervasive recount of all such previously unrecounted boxes would yield proportionate errors, and result in [contestant's] election."[111] The *Pfuhl* court held that this approach was overly speculative and affirmed the lower court's refusal to permit the amendment, stating: "the court will not grope in the dark, or follow a contestant on a fishing expedition, in the hope of being able to find enough to enable him by the investigation to make out his case."[112]

In rejecting the contestant's "fishing expedition," the *Pfuhl* court reaffirmed the importance of finality in elections and a hesitancy

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109. This was a problem faced by the O'Connor for Mayor campaign, following the May 14, 2001 Primary Election for Mayor of the City of Pittsburgh. In that election, where Mayor Tom Murphy prevailed by a mere 699 votes out of nearly 70,000 cast, the O'Connor campaign had eight representatives review the city voting and registration records, over a two week period following the primary, with the hope that they would amass sufficient evidence to file a petition to contest the election result. The O'Connor campaign had no specific evidence of fraud -- only a hope that through its review of voting records, it might uncover evidence of enough "illegal" votes to cast doubt on the legality of the election. See Timothy McNulty, *O'Connor Expands Search for Flaws, But He Won't Seek Formal Recount in Mayoral Fight*, PITTSBURGH POST GAZETTE, May 30, 2001, *available at* 2001 WL 22196848. After more than two weeks of pouring over voting records, the O'Connor campaign claimed to have discovered 900 "irregularities," but with no evidence that they affected the result of the election, Councilman O'Connor decided not to file a petition for contest and conceded the election. *See* James O'Toole & Timothy McNulty, *O'Connor Concedes, Challenger Won't Take Mayoral Fight to Court,* PITTSBURGH POST-GAZETTE, June 5, 2001, *available at* 2001 WL 22198601.

110. 253 A.2d 271 (Pa. 1969).

111. *Id.* at 274-75 (emphasis omitted).

112. *Id.* at 274. *See also* Democratic Primary of May 16, 1995 for Justice of the Supreme Court of Pennsylvania Petition in Support of the Honorable James A. Munley. No. 267 M.d. 1995, slip op. at 12 (Pa. Commw. Ct. June 26, 1995) (relying upon *Pfuhl In re*jecting statistical evidence purporting to justify statewide recount based upon analysis of counting errors in selected districts).

to overturn an election without some prima facie evidence of fraud or illegality.

D. *In the Interest of Finality, Courts have also Refused to Permit the Amendment of Deficient Petitions for Contest Once the Twenty-Day Deadline For Filing Has Passed*

In *Pfuhl*, the Pennsylvania Supreme Court also denied the contestant's request that he be permitted to amend his petition after the twenty day time period for filing had lapsed. According to the *Pfuhl* court, if a petition for contest fails to comply with the pleading requirements of the Election Code, it is "incapable of amendment, and could not provide the basis for a subsequent amendment."[113] According to the court, if fraud is not pled in the original complaint, any amendment after the filing deadline would constitute "an endeavor to file an election contest petition well beyond the twenty day, post-election period."[114] In addition, once the twenty day deadline under section 3456 has passed, a court is powerless to grant leave to file *nunc pro tunc* unless there has been a breakdown in the operation of court or Election Board.[115]

IV. CONCLUSION

Despite case law holding that the remedial provisions of the Election Code are to be liberally construed, Pennsylvania courts have strictly applied the Code's jurisdictional and pleading requirements. This strict application is a product of the court's general reluctance to interfere with the will of the electorate, as expressed through certified election results, and recognition of the need for finality in elections.

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113. *Pfuhl*, 253 A.2d at 274.

114. *Id. Cf.* New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 564 A.2d 919, 928 (Pa. Super. Ct. 1989) (*en banc*) (holding that an inadequate averment of fraud in an original complaint is incapable of correction following the passing of the limitations period because such an amendment would constitute a new grounds for relief).

115. *See In re Petition to Contest the General Election for Dist. Justice*, 670 A.2d at 635 (granting leave to file *nunc pro tunc* only because evidence showed post-election tampering of ballots under the Board's custody and control); *see also Appeal of Orsatti*, 598 A.2d at 1342 (denying leave to file petition *nunc pro tunc* because "the timeliness of an appeal goes to the jurisdiction of the Court and may not be extended absent fraud or a breakdown *in the court's operation* due to a default of its officers") (emphasis in original).