

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY CIVIL DIVISION

SEAN HEYNIGER,

CASE NO.: 502009CA007349 AG

Plaintiff(s),

vs.

PALM BEACH COUNTY CANVASSING BOARD;
THE TOWN OF PALM BEACH CANVASSING
BOARD; JACK McDONALD; and the PALM
BEACH COUNTY SUPERVISOR OF ELECTIONS,

Defendant(s).

GERRY GOLDSMITH,

CASE NO. 502009CA007372 AG

Plaintiff,

vs.

JACK McDONALD, candidate for election to
Mayor of the Town of Palm Beach, THE PALM
BEACH COUNTY CANVASSING BOARD, THE
TOWN OF PALM BEACH, and SUSAN BUCHER,
as Palm Beach County Supervisor of Elections,

Defendants.

FINAL JUDGMENT UPON CONSOLIDATED COMPLAINTS FOR ELECTION
CONTEST AND OTHER RELIEF

THIS CAUSE came before the Court for final hearing on March 19, 2009 and March 25, 2009 upon the Plaintiffs, GERRY GOLDSMITH ("GOLDSMITH") and SEAN HEYNIGER ("HEYNIGER")'s consolidated Complaints for election contest and other relief pursuant to Florida Statutes Section 102.168. The Court has received evidence and testimony, reviewed the memoranda of all parties, and has heard argument of counsel.

FACTS

This Court recognizes that this decision will not be the final word in this dispute. Therefore, in order that there be full appellate review, it is

imperative that this Court set forth in detail the facts determined from the evidence and testimony received. After resolving the conflicts in the evidence and after evaluating the credibility of witnesses, the Court makes the following findings of fact:

On February 17, 2009, a run-off election was held between the Plaintiff GOLDSMITH and the Defendant JACK McDONALD ("McDONALD") for the position of the Mayor of the Town of Palm Beach. Subsequent to the election, the results were canvassed by the canvassing board convened by the Town. Because of the closeness of the election, a machine recount and manual recount was mandated by Florida Statutes. Ultimately, the canvassing board reported that McDONALD won the election by one vote. However, in doing so, nine absentee ballots contested by GOLDSMITH were not counted, since they were stamped as being received at the Supervisor of Elections Office at 240 South Military Trail, West Palm Beach, Florida on February 18, 2009 at 10:00 a.m. and, therefore, were not "received" by the Supervisor of Elections by 7:00 p.m. February 17, 2009 as per Florida Statutes Section 101.67(2).¹ That statute provides in pertinent part:

All marked absent electors to be counted must be received by the supervisor by 7 p.m. the day of the election. All ballots received thereafter shall be marked with the time and date of receipt and filed in the supervisor's office. [Emphasis added.]

¹ GOLDSMITH only contests nine of the thirteen ballots retrieved from the post office box on February 18, 2009.

A provisional ballot by HEYNIGER was also rejected by the Town of Palm Beach Canvassing Board, since his name has been deleted from the list of registered voters on June 15, 1990.

The pre-printed absentee ballot return mailing envelope accompanying the absentee ballots distributed by the Supervisor of Elections in this election contained a return address of:

Palm Beach County/Supervisor of Election
P. O. Box 22309
West Palm Beach, Florida 33416-2304.

This post office box is located at the 3200 Summit Boulevard post office, the main post office for Palm Beach County, Florida.

On February 17, 2009, two employees from the Palm Beach County Supervisor of Elections Office, Clarence Patterson and Ed Wolf, traveled to the Summit Boulevard post office to deliver mail and to pick up mail at approximately 10:00 a.m. They opened the Supervisor's post office box and retrieved 79 absentee ballots in addition to other mail. While the parties stipulated in their pretrial stipulation that the box was "full", both Mr. Patterson and Mr. Wolf testified that it was not. More importantly, there was no notice in the box indicating overflow mail. It was the standard practice of the post office where there was more mail than could fit in the box, a notice would be placed in the box and employees of the Supervisor's Office would then retrieve the additional mail from the counter.

At approximately 4:30 that same afternoon, Mr. Wolf and Mr. Patterson returned to the post office to deliver mail and also to check the post office box. Although the routine practice at the Summit Boulevard branch would have all mail sorted the night before placed in the post office box by 9:30 a.m., the standard practice of the Supervisor's office for many years was to again check the box at 5:00 p.m. on election dates. However, upon arriving at the post office, Mr. Patterson realized he had forgotten the key to the post office box. After returning to the Supervisor's office, Mr. Patterson, unaccompanied by Mr. Wolf, traveled again to the post office with the key to check the mail. At that time, the mail box was empty. While there was some confusion and inconsistency in the sign out sheets for the vehicle driven to the post office, the Court accepts the testimony of Mr. Patterson that he did, in fact, check the post office box shortly before 5:00 p.m. when he returned to the post office. The travel time from the Supervisor's office to 3200 Summit Boulevard is approximately five minutes. It is undisputed that between 5:00 p.m. and 7:00 p.m. there were no further checks of the post office box by the Supervisor of Elections or anyone else. Likewise, no inquiries were made at the post office for any additional mail after 5:00 p.m. on February 17th.

On February 18, 2009, the day after the election, the Supervisor's staff again checked the post office box at approximately 10:00 a.m. At that time, they retrieved the nine absentee ballots which are in dispute in the present contest. These ballots were determined to be late and were not opened,

canvassed or counted. While GOLDSMITH's election contest requests the canvassing of nine absentee ballots, and he introduced testimony as to three, the record from the Supervisor's office indicates that thirteen absentee ballots were received at the Supervisor's office on February 18, 2009. It is not clear to the Court why GOLDSMITH is not seeking similar treatment for all thirteen absentee ballots. Of those thirteen, ten contain no postmark or location of mailing, two contain postmarks on 2/17/09 and one on 2/14/09.

Donna DeFrances mailed her absentee ballot from her condominium in Palm Beach at approximately 4:15 p.m. on February 12, 2009. On Friday, February 13, 2009, Ariel Penn delivered the absentee ballots of Maria Kluge and John Kluge to the post office box at the corner of Southern Boulevard and Lake Avenue in West Palm Beach, Florida. On Saturday, February 14, 2009, Ann Vandurand delivered her ballot to the U. S. Post Office on North County Road in Palm Beach at approximately 10:00 a.m. On Sunday, February 15, 2009 there was no mail delivery but mail was sorted at the main post office. Monday, February 16, 2009 was a legal holiday and there was again no mail delivery. Tuesday, February 17, 2009 was the date of the election. There is a mail pick up at least once each day from the postal facility in Palm Beach for delivery to the 3200 Summit Boulevard location, excluding Sunday and holidays. The post office schedule for the pick up on Southern Boulevard and Lake Avenue is 8:00 p.m., therefore, any mail deposited in that

box by 8:00 p.m. should be delivered that evening to the 3200 Summit Boulevard location.

The post office facility at 3200 Summit Boulevard is a major mail processing center and is approximately 380,000 square feet, approximately ten football fields in size. Being a major distribution center, a number of "local" zip codes are delivered to this particular facility for processing, including cancellation and place of origin postmarks. All mail from outside the "local" zip code areas should carry a postmark from the place of origin and would be delivered to an intermediary facility, and then to the West Palm Beach facility for sorting and ultimate delivery. Once "local" mail is received at the facility, it goes through a process which separates it into parcels, letters and flats. Absentee ballots are considered to be flats. Such "local" flats are then run through a sorter which cancels and places the place of origin postmark on the mail. All sorting is completed by 1:00 a.m.

However, there is no way to specifically determine when an absentee ballot is delivered to the 3200 Summit Boulevard facility. Typically, any mail placed in the Supervisor's post office box on February 17th would have been received on or before February 16, 2009. Similarly, most likely any mail delivered to the Supervisor's post office box on February 18, 2009 would have been received on or before February 17, 2009 at this facility. However, one cannot state that all mail would have been received by 7:00 p.m. the evening before. Absentee ballots could have been delivered to the post office, since

counters at this facility are open until 9:00 p.m. and/or through a mail box after 7:00 p.m.

The post office box sorting at this facility is a separate process. The operation begins approximately 10:00 p.m. in the evening and ends between 2:00 and 3:00 p.m. in the afternoon. The uptime for the Supervisor's box (the time mail is required to be delivered) is 9:30 a.m. The records from the post office indicate that all mail was either early or on time on both 2/17/09 and 2/18/09 (i.e., was placed in the box on or before 9:30 a.m.). Therefore, all mail delivered to the post office box and sorted the night before would have been delivered on or before 9:30 a.m. on the 17th and 9:30 a.m. the 18th. Standard practice is if there is more mail to be delivered to a post office box than it can hold, the overflow mail is placed in a "case" behind the post office box and a note is placed in the box for the customer. The customer then can retrieve the mail by going to the counter. Therefore, the evidence indicated that since the post office box was emptied at 10:00 a.m. on February 17th, there would have been no further mail delivered to the box that day. While highly unlikely, and not standard practice, it is not impossible that mail could have been placed in a post office box after 3:00 p.m.

The post office had no explanation for why one absentee ballot mailed the same date and same place was delivered before February 17th and one after. Likewise, they had no explanation for why there was an absentee ballot which was postmarked February 14th and not delivered until the 18th. In

addition, they had no explanation for why there were such a large number of absentee ballots with no point of origin canceling, although such a large number of lack of cancellations on the absentee ballots indicate the probability of an anomaly in the sorting process. As stated by the postal employees, mail can be delayed for no apparent reason and sometimes for very apparent reasons.

While there may have been some dispute in the testimony and one could speculate, the Court finds that the thirteen absentee ballots retrieved on the morning of February 18, 2009 were not delivered to the Supervisor's post office box before 7:00 p.m. on February 17, 2009 and certainly the Plaintiff did not carry his burden of establishing this fact. The Court also finds that there is no way to determine with any specificity when a particular absentee ballot may have been actually delivered to the main postal facility, and this Court cannot say with any degree of reasonable certainty if all of the thirteen absentee ballots retrieved February 18th were delivered to the postal facility on or before 7:00 p.m. the evening of the 17th without individual investigations and assumptions.

On February 17, 2009, SEAN HEYNIGER ("HEYNIGER") cast a provisional ballot in the runoff election for mayor of Palm Beach. On February 17, 2009 the Supervisor's records indicated that HEYNIGER was a previous resident of Palm Beach County, Florida and was registered to vote and last voted in Palm Beach County, Florida in 1984. However, HEYNIGER's name was

deleted from the Palm Beach County list of registered voters in 1990 as a result of inactivity.

After the election, the Supervisor and the Town of Palm Beach Canvassing Board reviewed the only record available showing that HEYNIGER's name had been deleted from the list of registered voters and, therefore, rejected his provisional ballot. Also, on February 17, 2009, HEYNIGER's name did not appear on the statewide voter registration system.

On January 22, 2008, HEYNIGER attempted to vote in the presidential primary. At that time he was advised that he was not registered and, therefore, cast a provisional ballot. The parties stipulated that on his provisional ballot, voter's certificate and affirmation dated January 22, 2008, HEYNIGER stated that he had registered at the Florida Department of Highway Safety and Motor Vehicles. At that time HEYNIGER also testified that he received a voter registration application and turned it in at the precinct. However, the Supervisor of Elections does not make available registration forms at the precinct's polling places because of the confusion it creates with voters. In any event, the Supervisor received no such voter registration.

At the general election on November 4, 2008, HEYNIGER also attempted to vote and was advised that he was not registered. On that date he had a 21 minute telephone call with the Supervisor's office regarding his eligibility to vote. He testified that the reason had to do with the duplicate registration and was allegedly advised over the phone that it would be "cleared

up". However, the Supervisor's office cannot make such representations and if such representations were made they were incorrect.

HEYNIGER renewed his driver's license at HSMV on May 16, 2009 and again on April 25, 2006. He also obtained a replacement license on December 24, 2006 and the receipt contains a notation "I am currently registered to vote." This notation, however, could only come solely from HEYNIGER's own representations. HSMV has no way of knowing or confirming whether or not a person actually appears in the registration system and has no ability to check the system to determine if, in fact, a person is registered. In any event, HSMV has no record of any registration by HEYNIGER and no such registration was ever received by the Supervisor's office.

HEYNIGER provided no written evidence supporting his eligibility to vote to the Supervisor or the canvassing board. While HEYNIGER may have had a subjective good faith belief that he was registered, he was not, and there was not any evidence of fraud, gross negligence or intentional misconduct or wrongdoing on behalf of the Supervisor's office.

After the February 17, 2009 election, HEYNIGER did fill out and submit to the Supervisor a registration and was activated as a registered voter on the statewide voter registration system.

Legal Analysis and Conclusion

Simply put, the legal issue presented by GOLDSMITH's election contest is when is an absentee ballot "received" by the Supervisor of Elections

as that term is defined in Florida Statutes Section 101.67(2) when the Supervisor has designated a post office box for return of the ballot. Initially, the Defendants contended "receipt" meant actual receipt by the Supervisor of Elections in her office but later conceded that delivery to the post office box would be sufficient. The Plaintiff McDONALD on the other hand now contends that any ballot delivered and located somewhere within the 380,000 square foot Summit Boulevard post office by 7:00 p.m. on February 17, 2009 has been "received" by the Supervisor. Unfortunately, there is no case decision guiding this Court and the Legislature did not define the term "received" when adopting the statute.

When interpreting a statute, this Court must assume that in using an undefined term, the Legislature intended that one should use its ordinary, everyday, usual and common meaning, and should avoid expansive or tortured construction. *See e.g., Vargas v. Enterprise Leasing Co.*, 933 So.2d 614 (Fla. 4th DCA 2008). Outside the litigation context, it is doubtful anyone would seriously argue that one has received mail merely because that mail is present somewhere in a 380,000 square foot mail facility but not delivered to their post office box.

While GOLDSMITH now suggests "receipt" means delivery to such a postal facility, he suggested a more reasonable approach in his initial bench memorandum to the Court when he stated:

What Goldsmith suggests here is not that the Court take an expansive view of what 'received' means under the statute; instead, the Court take a reasonable view of an undefined term in the statute to have its plain meaning - that delivery to the address suggested by the Supervisor constitutes being received by the Supervisor, even if the ballot is not received at election headquarters or the ultimate canvassing location. [Emphasis supplied.]

This Court could not agree more. The plain meaning of the address suggested by the Supervisor is not receipt at the election headquarters or the ultimate canvassing location nor a 380,000 square foot postal facility, but a specific post office address. The supervisor did not suggest nor can it reasonably be thought that the presence of the absentee ballot at the post office is the same as delivery to the post office box. Nevertheless, GOLDSMITH now attempts to have this expansive construction of Florida Statute Section 101.62(7) and argues the mere presence of the absentee ballot within the post office facility constitutes receipt. Such a construction of the statute would require this Court to rewrite the Florida Election Code and impose obligations upon the Supervisor that do not exist pursuant to statute. Under such a construction the Supervisor would be required to scour for unsorted or undelivered mail at the Summit postal facility the day of an election. This would require the voluntary cooperation of the postal facility, since clearly the Supervisor does not have the authority to conduct such a search. Once an absentee ballot is deposited in the United States mail, and until it is placed in the post office box of the Supervisor of Elections, it is totally outside the control

of the supervisor and totally within the control of the United States Postal Service and, therefore, not received by the Supervisor. Any other construction would be a distortion of the clear language of the statute.

This Court recognizes the importance and primacy of the right to vote in this state and such right should not be nullified merely for the sake of an unyielding adherence to statutory scripture. See e.g., *Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975). See also, *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998), and *Jacobs v. Seminole County Canvassing Board*, 773 So.2d 519 (Fla. 2000). However, the statutory deadline for receipt of absentee ballots is not an insignificant omission or irregularity. Furthermore, and unlike the cases cited by the Plaintiff, this is not a situation where the voters have done all the statute requires of them and are being disenfranchised solely because of a failure of election officials to observe otherwise non-mandatory statutory instructions. When utilizing the privilege of mailing an absentee ballot, a voter must assume the risk associated with mailing, including the risk it will be lost, destroyed or not timely delivered. See e.g., *Mulcahy v. Bergen County Board of Elections*, 383 A. 2d 1214 (N.J. 1978)(finding that absentee ballots received after the election deadline should not be counted even though inclement weather caused the late delivery by the post office).

In addition, unlike the right to vote, the ability to vote by absentee ballot is a privilege. *In re. The Matter of Protest of Election Returns and Absentee Ballots, November 4, 1997 Election for the City of Miami*, 707 So.2d 1170, 1173

(Fla. 3rd DCA 1998); *Anderson v. Canvassing and Election Board of Gadsen County*, 399 So.2d 1021, 1023 (Fla. 1st DCA 1981). Therefore, Florida voters also have a duty to adhere to the mandatory requirements that the ballot be received by the Supervisor of Elections by 7:00 p.m. For example, in *Papy v. Englander*, 267 So.2d 111 (Fla. 3rd DCA 1972), the Court reversed an order by the lower court which required the Supervisor to accept and count any absentee ballots which were received after but postmarked prior to October 3rd at 7:00 p.m., the date of the election. See also, *Advisory Opinion, Florida Division of Election, delivery of absentee ballot*, OE 86.06 (1983). See also, *Wood v. Diefenbach*, 81 So.2d 777 (Fla. 1955).

Undoubtedly, the better procedure would have been to check the box at 7:00 p.m. on the evening of the election and not at 5:00 p.m., although it plays no part in this Court's decision. In all fairness to the current Supervisor, however, that policy had been put in place by her predecessors and had been in effect for over twenty years without incident. The Court has no doubt based upon the testimony received at the hearing, that this procedure has been changed. More important, however, and regardless of the outcome of this litigation, the term "received" should be clarified by the Florida Legislature to avoid any future confusion. Nevertheless, based upon the facts as outlined above and the authorities cited, the Court finds the Plaintiff GOLDSMITH has failed to meet his burden and, therefore, the canvassing board was correct in rejecting these absentee ballots.

HEYNIGER's election contest must also fail. The uncontroverted record demonstrates that HEYNIGER was not a registered voter on February 17, 2009 and had not been a registered voter in Florida for over 18 years, and was not listed on the statewide voter registration system. Therefore, the canvassing board was correct in rejecting his provisional ballot.

At best, HEYNIGER had a subjective good faith belief that he was registered based upon conversations with representatives of the Supervisor's office. Such subjective beliefs, however, cannot be substituted for actual registration, even if predicated upon misinformation or mistake by election officials. Florida Statutes, Section 102.168 as it pertains to HEYNIGER authorizes election contests based upon "misconduct, fraud, or corruption on the part of any election official or canvassing board member . . .". The evidence presented in this case does not support a finding of fraud, gross negligence, intentional wrongdoing or misconduct on behalf of the Supervisor's office. See *e.g., Jacobs v. Seminole County Canvassing Board*, 773 So.2d 519 (Fla. 2000), *Taylor v. Martin County Canvassing Board*, 773 So.2d 517 (Fla. 2000); *Beckstrom v. Volusia County Canvassing Board*, 707 So.3d 720 (Fla. 1998); *Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975).

Moreover, HEYNIGER never questioned his failure to receive a voter registration card and never responded when notified by the Supervisor's office at the January 28th election that he needed to fill out a voter registration form. Similarly, he never received a voter registration card after the general

election in November of 2008. Therefore, he is now barred from seeking relief because this failure to take any corrective action and to correct his voter registration prior to the election on February 17, 2009. *Cf. State ex. rel. Pooser v. Wester*, 170 So.2d 736 (Fla. 1936).

Based upon the foregoing, it is

CONSIDERED, ORDERED AND ADJUDGED that the Court finds that the thirteen absentee ballots received on February 18, 2009 (including the nine absentee ballots contested by GOLDSMITH) and the one provisional ballot were properly rejected.

DONE AND ORDERED this ⁰⁷ day of April, 2009 at West Palm Beach, Palm Beach County, Florida.



DAVID F. CROW
CIRCUIT COURT JUDGE

Copy furnished:

ERIC CHRISTU, ESQUIRE
Ruden McCloskey, et al., P.A.
222 Lakeview Avenue, Suite 800
West Palm Beach, FL 33401

JOHN R. WHITTLES, ESQUIRE
Richman Greer, P.A.
One Clearlake Centre
250 Australian Avenue South, Suite 1504
West Palm Beach, FL 33401

JENNIFER S. BLOHM, ESQUIRE
Meyer & Brooks, P.A.
P. O. Box 1547
Tallahassee, FL 32302

JOHN T. LAVIA, III, ESQUIRE
Young Van Assenderp, P.A.
225 South Adams St., Suite 200
Tallahassee, FL 32301