

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF FREDERICK

Thomas P. Reed,

and

Robert Hess,

Plaintiffs,

v.

Virginia Department of Elections, and  
Jamilah D. Lecruise, John O'Bannon, and  
Robert H. Brink, in their official capacity as  
members of the Virginia State Board of  
Elections,

Defendants.

Case No. 20-622

ORIGINAL RECEIVED & FILED  
FREDERICK COUNTY CIRCUIT COURT  
DATE: 10-9-2020 P.M.

COMPLAINT

Comes now the Plaintiff, by Counsel, and moves the Court for declaratory and injunctive relief against the Defendants for the following reasons:

1. Defendants have issued election guidance to county boards of election, including to Plaintiff Reed, that is in direct conflict with Virginia code regarding the acceptance of absentee ballots (the "Conflicting Instructions").

2. Plaintiff Thomas P. Reed is a member of the Frederick County Board of Elections pursuant to powers conferred by Virginia Code §24.2-115.

3. As a member of the Frederick County Board of Elections, Reed exercises various power over the conduct of elections including instructing the officers of election in Frederick

County pursuant to Virginia Code §24.2-115, training election officials regarding the proper conduct of elections and certifying that the training occurred pursuant to Virginia Code §24.2-115.2, preparing an abstract with absentee ballot results for the State Board of Elections pursuant to Virginia Code §24.2-709(C), as well as the extensive obligations in handling, processing and counting absentee ballots pursuant to Virginia Code §24.2-710.

4. Plaintiff Robert Hess is the Chairman of the Winchester Republican Committee and a legal and qualified voter in the City of Winchester. The Winchester Republican Committee is a local party committee of the Republican Party of Virginia, Inc. The Republican Party of Virginia, Inc., is a political party as defined in § 24.2-101 of the Code of Virginia.

5. As the Chairman of a local political party, Plaintiff Hess has the authority to make recommendations to the circuit court for appointments to the local electoral board pursuant to Virginia Code § 24.2-106, to make nominations to the electoral board for appointment of officers of election pursuant to Virginia Code § 24.2-115, to certify its candidates to appear on general election ballots pursuant to Virginia Code § 24.2-511, to authorize representatives to remain in the room in which an election is being conducted, including the central absentee voter precinct pursuant to Virginia Code § 24.2-604.4, to receive notice of and be present for the final testing of voting machines pursuant to Virginia Code § 24.2-633, to appoint representatives to be present for the ascertainment of results at each precinct pursuant to Virginia Code § 24.2-655, and to authorize a representative to be present during the local electoral board's provisional ballot hearing Virginia Code § 24.2-653.01.

6. Hess is affected by the issuance of the Conflicting Instructions, and any guidance from the Defendants that conflicts with state statute, because must train election observers and other representatives authorized by Virginia statute to participate in the electoral process, as well as participate in the selection of election officials who will administer the conduct of elections.

7. The Defendants constitute the three members of the Virginia State Board of Elections and the Department of Elections.

8. This Court has jurisdiction to hear this claim pursuant to Virginia Code § 17.1-513 and § 8.01-184.

9. Venue is proper in this Court under Virginia Code § 8.01-261(1)(a)(1), § 8.01-261(1)(a)(2) and § 8.01-261(1)(a)(3).

**The Conflicting Instructions**

10. In any conflict between Virginia statutory law and guidance issued by the Defendants, Virginia statutory law is superior and guidance issued by the Defendants is void. The State Board of Elections, through the Department of Elections is charged with supervising and coordinating the work of county and city electoral boards. Those local electoral boards in turn “shall follow (a) the election laws and (b) the rules and regulations of the State Board insofar as they do not conflict with Virginia or federal law.” Virginia Code § 24.2-103. Additionally, giving effect to the guidance would violate the anti-suspension clause of the Constitution of Virginia. Va. Const., art. I, § 7.

11. On March 11, 2020, Governor Northam approved House Bill 238, which amended Virginia Code § 24.2-709 of the Code of Virginia to provide for an exception to the existing rule that “Absentee ballots shall be returned to the general registrar before the closing of the polls.” The amendment added a new paragraph (B) codifying that exception:

Notwithstanding the provisions of subsection A, any absentee ballot (i) returned to the general registrar after the closing of the polls on election day but before noon on the third day after the election and (ii) *postmarked on or before the date of the election* shall be counted pursuant to the procedures set forth in this chapter if the voter is found entitled to vote. For purposes of this subsection, a postmark shall include any other official indicia of confirmation of mailing by the United States Postal Service or other postal or delivery service. (emphasis added) Acts of Assembly Ch. 288; codified at 24.2-709(B)

12. The new paragraph B became effective as law on July 1, 2020. The effect of the amendment was that for the first time in Virginia, the postmark on an absentee ballot return envelope became relevant for whether or not an absentee ballot could be counted because prior to the amendment, all absentee ballots had to be returned by election day to be counted.

13. At a meeting on August 4, 2020, the Defendants took up a regulatory action, "Processing Absentee Ballots with Missing or no Postmark" and adopted a motion "that the Board approve the Department's proposal for regulatory action related to processing absentee ballots with missing or no postmarks." August 4 Meeting Minutes (attached as Ex. A) proposing an amendment to 1 Va. Admin. Code 20-70-20. Material Omissions from Absentee Ballots.

14. The amendment from August 4, 2020 added paragraph 11 to section C, the list of immaterial omissions. The list of immaterial omission are errors that would not render a ballot invalid. Specifically, the amendment's language was "The ballot is received by the general registrar's office by noon on the third day after the election pursuant to § 24.2-709 of the Code of Virginia, **but does not have a postmark, or the postmark is missing or illegible.**" Board Memo (attached as Exh. B).

15. The effect of the amendment from August 4, 2020, was to instruct county electoral boards and the public, including Plaintiffs Reed and Hess, that absentee ballots were to be counted that do not comply with Virginia Code § 24.2-709(B).

16. The existence of a postmark on or before the date of election is an explicit statutory condition precedent for the acceptance of any absentee ballot in Virginia. Defendants have no authority to issue guidance in conflict with explicit state statute on the very matter at issue.

17. On August 13, 2020, the Department of Elections issued Conflicting Instructions that are contrary to Virginia Code. Namely, the Defendants sent out an "Official ELECT Advisory." (ELECT is the short hand reference employees of the Department use for the

agency). The August 13, 2020 advisory went to general registrars and local electoral boards, including to Plaintiff Reed, with the subject “New Regulations Adopted by State Board of Elections.” The August 13 Advisory listed, *inter alia*, an amendment to the Material Omission from Absentee Ballots regulation, noting “The effect of the amendment is if a General Registrar receives an absentee ballot in the mail after Election Day but before noon on Friday that does not have a postmark, or the postmark is missing or illegible, **the ballot can be counted. The missing or illegible postmark is not a material omission.**” Memo (attached as Ex. C)(emphasis added).

18. The August 13 advisory was wrong and in plain conflict with Virginia Code Virginia Code § 24.2-709(B).

19. The August 13 memo went further and listed as an action item: “If your office receives an absentee ballot in the mail after Election Day but before 12:00 p.m. noon on the Friday after the election, and the postmark is missing or illegible on the mailed ballot envelope, the ballot can still be counted **if there is no other reason to reject the ballot.** This does not apply for ballots that are delivered by the voter to the General Registrar’s office. Ballots delivered by the voter must still be received by the General Registrar by the time the polls close on Election Day.” Id.

20. The action item example, namely that a ballot that did not comply with Virginia Code § 24.2-709(B) can still be counted nullifies an explicit statute passed by the Virginia General Assembly and signed by the Governor of Virginia. Contrary to the action item, the lack of a postmark is the reason to reject the ballot.

21. The Conflicting Instructions harm the Plaintiff Reed because they command him to disregard Virginia statute and to accept absentee ballots that lack any indication that they were cast in accordance with Virginia law, namely on or before election day. Plaintiff Reed is also

harmful in that the Conflicting Instructions also command him to train and teach election officials to conduct the election contrary to Virginia law.

22. The Conflicting Instructions harm the Plaintiff Hess because they impair his ability to train observers and authorized individuals in the proper procedures for conducting an election in Virginia. The Conflicting Instructions sow confusion and uncertainty in the process of organizing and mobilizing his volunteers and assisting affiliated candidates.

23. Virginia has a long tradition for respecting the rule of law and the supremacy of the authority of the Virginia General Assembly over administrative actors. "Under fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals for the rule of law." *Cochran v. Fairfax County Bd. Of Zoning*, 594 S.E.2d 571 at 577, 267 Va. 756 (2004). *Thompson v. Smith*, 155 Va. 367, 379, 154 S.E. 579, 584 (1930); *Bell v. Dorey Electric Company*, 248 Va. 378, 380, 448 S.E.2d 622, 623 (1994); *York v. City of Danville*, 207 Va. 665, 672, 152 S.E.2d 259, 264 (1967); *Assaid v. City of Roanoke*, 179 Va. 47, 50, 18 S.E.2d 287, 288 (1942).

24. The emergency provisions of Virginia Code §24.2-713 do not apply to the Conflicting Instructions because there is sufficient time for the "distribution and handling of absentee ballot applications and absentee ballots." Moreover, "nothing in [Section 713] shall authorize the counting of any absentee ballot returned after the polls have closed." *Id.*

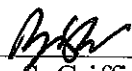
WHEREFORE the Plaintiff moves the Court for declaratory and injunctive relief that:

1. Declares that the Conflicting Instructions issued by Defendants conflict with Virginia statutes including Virginia Code § 24.2-709(B).

2. Enter a Declaratory Judgment that a postmark on or before election day is required to accept an absentee or mail ballot pursuant to Virginia Code § 24.2-709(B).
3. Enter a Declaratory Judgment that data from the Intelligent Mail Barcode (IMb) is an official indicia of mailing by the United States Postal Service and can be used to verify that an absentee ballot was mailed on or before the date of the election in the case of a missing or illegible traditional postmark.
4. Enjoin the Defendants from issuing any instructions in conflict with Virginia Code § 24.2-709(B) in regards absentee or mail ballots requiring a postmark from on or before election day to be counted.



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