

Aug 31 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Court Judge

Appellant Case No.: 2023-000888

Case No. 2023-CP-26-01112

Michael Isom.....Appellant,

v.

Town of Atlantic Beach Municipal
Election Commission.....Respondent.

APPELLANT’S FINAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN FINDING THERE EXISTED SUFFICIENT EVIDENCE IN THE RECORD TO UPHOLD THE DECISION OF THE MUNICIPAL ELECTION COMMISSION

STATEMENT OF THE CASE

On June 2, 2023, Michael Isom brought this action before the Court asserting error of election confirmation against the Town of Atlantic Beach Municipal Election Commission (MEC).

The Town of Atlantic Beach held a Special Election on January 17, 2023, as set forth in a Public Notice to fill a vacant position. No candidate received a majority vote from the Special Election, so the MEC held a runoff on January 31, 2023. A provisional ballot and canvassing hearing were held on February 2, 2023. Michael Isom filed a protest of the election and as a result of the protest, a hearing was held on February 6, 2023. The Town of Atlantic Beach MEC alleged Candidate John W. David met the qualifications of a candidate or voter in the Town of Atlantic Beach at the date of the election. At the February 6 hearing, the February 2, 2023, runoff results were confirmed by the MEC.

On February 23, 2023, Michael Isom filed a Notice of Appeal from the February 13, 2023, Order and Report of the Town of Atlantic Beach MEC. Isom filed attachments and a Memorandum of Law on April 21, 2023. The Town of Atlantic Beach MEC filed an Opposition Brief on Appeal on April 18, 2023. The Town of Atlantic Beach's Order and Report was affirmed on May 12, 2023.

On June 2, 2023, Isom served the Notice of Appeal on Town of Atlantic Beach MEC.

STATEMENT OF FACTS

The Town of Atlantic Beach (the “Town”) held a Special Election on January 17, 2023, and subsequent Run-off Election on January 31, 2023. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶5). (R. p. 2, ¶5). The Commission held a hearing on the certification of the election on February 4, 2023, in which provisional ballots and challenged ballots, including the ballot of John David, Jr. were decided. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶10). (R. p. 3, ¶10).

At the certification hearing, Josephine Isom challenged the residency of John David, Jr., presenting several documents suggesting that John David, Jr. was not a resident of the Town. (Isom Challenge Hearing Documents). (R. pp. 273-293). The documents presented by Josephine Isom included documentation showing:

- (1) that John David Jr. was claiming a property in Maryland as his principal residence;
- (2) that a vehicle alleged to be owned by John David, Jr. had a Maryland vehicle tag;
- (3) that the property claimed as the residence in the Town was being taxed at the six percent ratio for non-owner-occupied property;
- (4) that the vacation rental history for the property claimed as John David, Jr’s residence was rented for 80 of the 84 days between October 3, 2022, and December 26, 2022 (which includes the candidate qualification date of December 18, 2022), and for an additional 26 days between December 27, 2022, and January 21, 2023 (which includes the date of the special election on January 17, 2023); and

(5) that in the 200 days between the issuance of the Certificate of Occupancy on July 2, 2022, and the election of January 17, 2023, the property claimed as John David, Jr.'s residence was rented for 189 days.

John David, Jr., presented testimony regarding his residency, presented his driver's license, and stated that he had a "tag for his car." None of the documents referenced by John David, Jr. were included as exhibits to the certification hearing transcript. Ms. Isom noted for the record that the dates of issuance for the driver's license and vehicle registration were February 1, 2023, after the candidate qualification date. The Commission voted to accept the ballot of John David, Jr. and ultimately declared John David, Jr. as the official winner. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶29). (R. p. 7, ¶29).

Thereafter, Appellant filed a timely protest of the election results. (Election Protest Hearing Transcript, Exhibit B). (R. pp. 228-230). This election protest went before the Commission at the Election Protest Hearing noticed and held on February 6, 2023, at 4:00 p.m. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶12) (R. p. 3, ¶12). Interested parties present at the hearing were Candidates Michael Isom and John David. Candidate Lenny Evans was not present. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, p. 1, unnumbered ¶). (R. p.1)

Prior to the commencement of testimony at the protest hearing and after an Executive Session to receive legal advice, the Commission, on its own motion, entered four exhibits into evidence: Exhibit A included a copy of the agenda for the protest hearing, the protest letter, and proof of service of the protest letter; Exhibit B was a copy of the Town's election ordinance; Exhibit C included a copy of the public notices for the election; and Exhibit D was a copy of the

statement of candidacy for all of the candidates in the election. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶14). (R. p. 4, ¶ 14).

During the protest hearing, Appellant offered Ms. Josephine Isom as a witness. Ms. Isom testified as follows regarding the documents she presented at the Commission hearing (Isom Protest Documents):

MS. ISOM: Those documents were included in your package if I'm not mistaken.

MR. MONTGOMERY: Yes, but that was for certification, Ms. Isom. It was in the documents for certification. This is different today. This is a hearing.

MS. ISOM: Yes, but that document is in your package from the beginning, so I didn't think it was necessary to present it because it went into evidence the first time.

MR. MONTGOMERY: Okay. You may proceed.

(Election Protest Hearing Transcript, p. 7, Lines 23-25 and continuing on p. 8, Lines 1-3). (R. p. 209, Lines 23-25, p. 210, Lines 1-3). Mr. Montgomery did not refute this statement or otherwise object to this assertion by Ms. Isom during the hearing. Given the lack of clarity in the Commission's ruling at the protest hearing, counsel for Respondent conceded at the hearing on the Appeal to the circuit court that the entire record in the case, including the record from the February 4 protest hearing and the February 2 certification hearing, should be reviewed in this matter. (Transcript of Appeal Hearing, p.14, Lines 15-20). (R. p. 270, Lines 15-20).

At the conclusion of the protest hearing, the Commission denied Appellant's protest, thereby affirming John David as the winner. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶31). (R. p. 7, ¶31). The Commission found that John David submitted a statement of candidacy received on November 18, 2022, whereby he affirmed,

among other things, that “I meet, or will meet by the time of the General or Special Election or as otherwise required by law, the qualifications to hold this office. I the undersigned certify that I am a legal resident and a registered voter of the Town of Atlantic Beach, South Carolina.” (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶27) (R. p. 6, ¶27). There was no evidence submitted to support this conclusory statement. Specifically, Candidate John David did not present any evidence at the protest hearing. (Order and Report of the Town of Atlantic Beach Municipal Election Commission, ¶16). (R. p. 4, ¶16). The Circuit Court upheld the Commission’s Decision and Order.

STANDARD OF REVIEW

Normally, when exercising its appellate jurisdiction, the Court “shall review the findings of fact as well as the law.” S.C. Const. Art. V, § 5. The South Carolina Appellate Court Rules grant the State Supreme Court the authority to review any “final judgment from the circuit court pertaining to elections and election procedure.” Rule 203(d)(1)(iv), SCACR; S.C. Code Ann. § 14-8-200(b)(5). This allows the appeal to be presented directly to the South Carolina Supreme Court and bypass the South Carolina Court of Appeals.

In election cases, the Court has authority to correct errors of law; review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. George v. Municipal Election Comm'n of Charleston, 335 S.C. 182, 516 S.E.2d 206 (1999). The Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful. Cole v. Town of Atl. Beach Election Comm'n, 393 S.C. 264, 271-272.

ARGUMENTS

I. THE TRIAL COURT ERRED IN UPHOLDING THE DECISION OF THE MUNICIPAL ELECTION COMMISSION WHEN THE FINDINGS OF FACT OF THE COMMISSION ARE WHOLLY UNSUPPORTED BY THE EVIDENCE.

A. THE CIRCUIT COURT ERRED WHEN IT UPHELD THE DECISION AND ORDER OF THE MUNICIPAL ELECTION COMMISSION ESTABLISHING JOHN DAVID AS A RESIDENT, WHICH IS WHOLLY UNSUPPORTED BY THE FACTS IN THE RECORD.

The Commission erred in determining that John David was a resident of the Town when the Commission's determination that John David was a resident of the Town for thirty (30) days prior to the election is wholly unsupported by the record.

Section 5 of Article II of the South Carolina Constitution places a thirty-day residency requirement on municipal electors. Both Section 1 of Article VI of the South Carolina Constitution and Section 5-15-20 of the South Carolina Code require candidates for mayor and city council to meet the qualifications of a municipal elector. Accordingly, the thirty-day residency requirement applies to mayors and council members. To qualify as a candidate for the Town's January election on January 17, 2023, a candidate must show that he was a resident on or before December 18, 2023.

At the Certification Hearing, John David presented testimony regarding his residency and presented his driver's license and stated that he had a "tag for his car." Josephine Isom noted for the record that the dates of issuance for the driver's license and vehicle registration were February 1, 2023, which is after the election. At the Protest Hearing, the Commission, on its own, entered Exhibit D, Statement of Candidacy, into the record. Exhibit D serves as the only support for John David's residency that was considered by the Commission at the protest hearing.

S.C. Code Ann. § 7-1-25 defines the term "domicile" for the purposes of South Carolina election law, as follows:

- (A) A person's residence is his domicile. "Domicile" means a person's fixed home where he has an intention of returning when he is absent. A person has only one domicile.
- (B) For voting purposes, a person has changed his domicile if he 1) has abandoned his prior home and 2) has established a new home, has a present intention to make that place his home, and has no present intention to leave that place.
- (C) For voting purposes, a spouse may establish a separate domicile.
- (D) For voting purposes, factors to consider in determining a person's intention regarding his domicile include, but are not limited to:
 - (1) a voter's address reported on income tax returns;
 - (2) a voter's real estate interests, including the address for which the legal residence tax assessment ratio is claimed pursuant to § 12-43-220(C);
 - (3) a voter's physical mailing address;
 - (4) a voter's address on driver's license or other identification issued by the Department of Motor Vehicles;
 - (5) a voter's address on legal and financial documents;
 - (6) a voter's address utilized for educational purposes, such as public-school assignment and determination of tuition at institutions of higher education;
 - (7) a voter's address on an automobile registration;
 - (8) a voter's address utilized for membership in clubs and organizations;
 - (9) the location of a voter's personal property;
 - (10) residence of a voter's parents, spouse, and children; and
 - (11) whether a voter temporarily relocated due to medical care for the voter or for a member of the voter's immediate family.

Notably, the Statement of Candidacy is not given as an oath, as it is not notarized. The Statement of Candidacy is not self-proving of a candidate's qualifications for office. Rather, the Statement of Candidacy is only a statement of a candidate's intent to run for office. The candidate must present some evidence establishing his qualifications for holding office.

Here, although given the opportunity, there is no evidence in the record that shows that Candidate John David, Jr. provided any of the above-described *indicia* of residence set forth in the election law to support his residency on or before December 18, 2023. Additionally, at the Protest Hearing, John David did not offer any testimony, under oath, to establish his residency.

As such, there is no documentary evidence in the record supporting John David's residency, with the only evidence being his self-serving statements. John David's self-serving and conclusory statement is insufficient to establish residency.

The sparse evidence accepted on behalf of John David fails in comparison to the overwhelming evidence presented by Josephine Isom which shows that:

- (1) that John David Jr. was claiming a property in Maryland as his principal residence;
- (2) that a vehicle alleged to be owned by John David, Jr. had a Maryland vehicle tag;
- (3) that the property claimed as the residence in the Town was being taxed at the six percent ratio for non-owner-occupied property;
- (4) that the vacation rental history for the property claimed as John David, Jr's residence was rented for 80 of the 84 days between October 3, 2022, and December 26, 2022 (which includes the candidate qualification date of December 18, 2022), and for an additional 26 days between December 27, 2022, and January 21, 2023 (which includes the date of the special election on January 17, 2023); and
- (5) that in the 200 days between the issuance of the Certificate of Occupancy on July 2, 2022, and the election of January 17, 2023, the property claimed as John David, Jr's residence was rented for 189 days.

Thus, the Commission's finding that Candidate John David was a resident of the Town was wholly unsupported by the evidence when John David did not present any documentary evidence in support of his residency on or before December 18, 2023. Accordingly, the Commission erred when it determined that John David, Jr. was a resident of the Town of Atlantic Beach without identifying or finding any facts to support its determination. Because the

conclusion that John David, Jr. was a resident of the Town on or before December 18, 2023, is wholly unsupported by evidence as there are no documents in the record, other than John David Jr's self-serving statements, that show residency on or before December 18, 2023, the election must be invalidated, and a new election held as this irregularity is of the sort that renders doubtful the result of the election.

B. THE COMMISSION COMMITTED AN ERROR WHEN IT FAILED TO CONSIDER EVIDENCE PRESENTED ON BEHALF OF APPELLANT.

The Commission erred when it failed to consider documents submitted, including the Protest Letter that was presented at the February 4, 2023, canvassing hearing.

As previously stated, the Appellant presented evidence at the canvassing hearing that John David was not a resident of the Town of Atlantic Beach. The evidence presented in the documents indicated the address claimed by John David was not his legal residence, but rather the address served as John David's vacation rental property. The documents further indicated John David declared his legal residence to be in the State of Maryland.

At the hearing, Josephine Isom testified that the documents presented at the February 4th canvassing hearing were accepted by the Commission and entered into the record. Appellant relied on the statement by Commission Chairman, Joe Montgomery, who presided over the meeting. Specifically, Josephine Isom testified that the documents were included in the Commission's packet, to which Mr. Montgomery responded, "Yes, but that was for certification . . ." Ms. Isom further testified she did not believe it was necessary to present documents, as everything she would have presented had already been placed into evidence. Mr. Montgomery responded to this statement from Ms. Isom by saying, "[o]kay. You may proceed." (R. p. 210, Lines 4-8). Based upon this statement from Mr. Montgomery, Appellant believed the documents

everything she would have presented had already been placed into evidence. Mr. Montgomery responded to this statement from Ms. Isom by saying, “[o]kay. You may proceed.” (R. p. 210, Lines 4-8). Based upon this statement from Mr. Montgomery, Appellant believed the documents submitted at the February 4th canvassing hearing were accepted and would be considered by the Commission prior to a decision being made.

Mr. Montgomery distinguished the canvassing hearing and the protest hearing, he failed to rule on the issue of whether the evidence presented by Appellant’s witness was admissible. As such, Appellant relied on Mr. Montgomery’s tacit acceptance of the documents into the record.

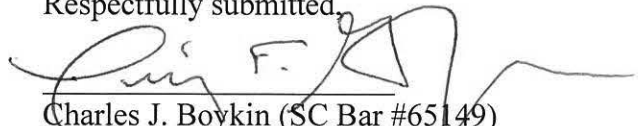
Accordingly, the Commission committed an error of law when it did not consider the evidence presented by Appellant’s witness when the Chairman appeared to accept the documentary evidence presented by the witness, without objection.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

August 31, 2023

Respectfully submitted,



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Town of Atlantic Beach Municipal Election Commission..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **APPELLANT'S FINAL BRIEF** contains no matter which is irrelevant to the appeal.

Dated this 31st day of August 2023.

Boykin & Davis, LLC

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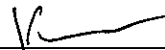
v.

Town of Atlantic Beach Municipal Election Commission..... Respondent.

PROOF OF SERVICE

I certify that I have served the **APPELLANT'S FINAL BRIEF** on the Town of Atlantic Beach Municipal Election Commission by depositing a copy of it in the United States Mail, postage prepaid, on August 31, 2023, addressed to its attorneys of record, Taylor Voegel, and Alicia Thompson, 2411 Oak St. Suite 206, Myrtle Beach, South Carolina 29577.

August 31, 2023

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