

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 22 2016

APPEAL FROM LEE COUNTY

S.C. SUPREME COURT

Case No.: 2015-CP-31-134

Craig Nesbit and John Y. Latimer,

Respondents,

v.


Edward Byrd, Mike Morrow,
Willie Mae Muldrow and Ken Currie

Appellants.

NOTICE OF APPEAL

Edward Byrd, Mike Morrow, Willie Mae Muldrow and Ken Currie appeal the order of The Honorable George C. James, Jr. dated February 16, 2016. Appellants received written notice of entry of this order on February 16, 2016. A copy of this order is attached hereto. Review is sought directly by this Court pursuant to South Carolina Code § 14-8-200(b)(5) and Rule 203(d)(1)(A)(iv) of the South Carolina Appellate Court Rules.

February 18, 2016



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Appellants.

PROOF OF SERVICE

I certify that I have served a copy of the Notice of Appeal upon counsel for Respondents by depositing copies of the same in the United States Mail, postage prepaid, on February 18, 2016, to the following addressee(s):

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STATE OF SOUTH CAROLINA)	IN THE APPELLATE COURT FOR THE
)	THIRD JUDICIAL CIRCUIT
COUNTY OF LEE)	
)	
Edward Byrd, Ken Currie, Mike Morrow)	C/A No.: 2015CP3100134
and Willie Mae Muldrow,)	
)	
Appellants.)	ORDER
)	
v.)	
)	
Craig Nesbit and John Y. Latimer,)	
)	
Respondents.)	

This matter comes before the court as an appeal by Appellants of an order issued by the City of Bishopville Municipal Elections Commission (hereinafter "MEC"). The appeal arises from the timely protest by Respondents of a municipal election held by the City of Bishopville for seats on the City Council on May 12, 2015. Respondents were not elected to council seats based upon the reported results. In response to the timely protest, the MEC held a timely hearing on the protests three (3) days later on May 15, 2015. Witnesses were examined, arguments were made, and a written decision (hereinafter "order") was issued by the MEC on May 19th and filed with the Lee County Clerk of Court on May 22, 2015. In the order, the MEC directed that a new election be held. Appellants, who were elected to council seats based upon the reported results, now appeal the order of the MEC.

STANDARD OF REVIEW

When considering an appeal from a municipal election commission, the circuit court, sitting in an appellate capacity, does not conduct a *de novo* hearing or take

testimony. The circuit court must examine the commission's decision for errors of law, but it must accept the factual findings of the commission unless they are wholly unsupported by the evidence. *Taylor v. Town of Atlantic Beach Election Commission*, 363 S.C. 8, 609 S.E. 2d 500 (2005); *Blair v. City of Manning*, 345 S.C. 141, 546 S.C. 2d 649 (2001); *Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.C. 2d 838 (1997). The rule is well established in this State that courts will not disturb the ruling of an administrative board unless such findings are entirely without support in the evidence. *Smith v. Pratt*, 258 S.C. 504, 189 S.C. 2d 301 (1972); *McKnight v. Smith*, 182, S.C. 378, 189 S.C. 361 (1937).

DISCUSSION

South Carolina Code Ann. § 5-15-120 provides, in pertinent part, that, "immediately upon the closing of the polls at any municipal election, the managers shall count publicly the votes cast." (emphasis added). Article II, §1 of the South Carolina Constitution provides that "[a]ll elections by the people shall be by secret ballot, but the ballots shall not be counted in secret." Central to the case is the Respondents' contention that the door to the building at Ward 2 Precinct was inaccessible after the closing of the polls and while ballots were being counted. The MEC concluded that the ballots were counted in secret.

At the MEC hearing on May 15th, Respondent Craig Nesbit testified that when he attempted to gain entry to the building at Ward 2 Precinct, which is the Fire Department building, sometime after the polls were closed at 7:00 p.m. on May 12, 2015, the door could not be opened and appeared locked. Respondents also presented the testimony of Tyler Wilson, who testified he also attempted to enter the building at Ward 2 Precinct

after the polls were closed and could not gain entry. Tyler specifically testified that when he pulled on the door, “[i]t was totally locked.” (Tr. p. 17). Nesbit also testified that he notified City Election Commission Chairperson Delphine Peterson about the door and that she told him “she went in there and told them [the poll workers] it didn’t need to be locked but [that] it was locked again.” (Tr. p. 17).

MEC member Ms. Peterson stated at the hearing that she went by Ward 2 around “7:30ish” and the door was locked. (Tr. p. 18). MEC member Meociania Wells (incorrectly identified as Weeks in the transcript) also spoke of her knowledge as to the door being locked or the building being inaccessible. While there was no objection at the hearing to the statements made by Ms. Peterson and Ms. Wells, since neither Ms. Peterson nor Ms. Wells was sworn at the time they made these statements, the court has not considered them in reaching its decision.

Testimony was also presented at the MEC hearing that while the door may not have been locked, it was stuck or otherwise malfunctioned as there had been a history of such problems. Specifically, Appellant Willie Mae Muldrow stated that in the past she had experienced difficulty opening the door in question even though she knew the door was unlocked. (Tr. p. 26). Appellant Edward Byrd, who is also a City of Bishopville employee, testified that he had been called out several times to work on the door in question and acknowledged the door is very hard to open. (Tr. p. 28). Whatever the reason for the door not opening, there was competent evidence presented to the MEC that at least two persons were unable to gain access to the building while ballots were being counted and the ballots were thus counted “in secret” in violation of Article II, §1 of the South Carolina Constitution. While Appellants argue there is no evidence in the

record to establish conclusively the door was truly locked, the court finds such proof is not necessary. Whether the door was intentionally locked, inadvertently locked, stuck, malfunctioning, or unable to be opened due to some unknown defect, there is evidence in the record to support the MEC's finding that persons were unable to gain access to the building to watch the ballots being counted, and that the ballots were therefore counted in secret.

The MEC relied upon *McKnight v. Smith*, 182, S.C. 378, 189 S.C. 361 (1937) in determining that a new election must be held. In *McKnight*, our Supreme Court held that a new election must be held where votes were counted in secret, even if the votes counted were otherwise correct. Appellants argue that *McKnight* is distinguishable because the evidence in that case established the door to the room where ballots were being counted was intentionally locked, which is not the case here. While the facts in the instant case are not as egregious as those in *McKnight*, the underlying legal principle is the same and there is no distinction, or at least there is a distinction without a difference. The end result is the same and the MEC's conclusion was based on sufficient evidence: The door could not be opened while votes were being counted and ballots were therefore counted secretly.

South Carolina law is clear that this court cannot reconsider the MEC's findings of facts or consider or hear new facts, but rather is restricted to determining whether there is any evidence in the record to support the MEC's decision. The court finds there is evidence in the record before the MEC that the public was unable to gain access to the Ward 2 building while the ballots were being counted, in addition to the undisputed evidence concerning a history of problems with the door, and therefore sufficient

evidence exists in the record to support the MEC's finding that ballots were counted secretly.

Article II, Section 10 of the South Carolina Constitution provides that the legislature is to provide for the nomination of candidates for election, regulate the time, place, and manner of elections, and provide for the administration of elections, etc. As noted above, the legislature has enacted §5-15-120, which provides that ballots must be counted publicly. When there is a disregard of the statute, the violation cannot be treated as an irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal. *Gecy v. Bagwell*, 372 S.C. 237, 642 S.E. 2d 569, 571 (2007); *George v. Mun. Election Comm'n. of City of Charleston*, 335 S.C. 182, 516 S.C. 2d 206 (1999). The Court will not sanction practices or circumvent the plain purposes of the law and open the door to fraud. *Gecy*, at p. 572; *May v. Wilson*, 199 S.C. 534, 19 S.C. 2d 467 (1942). In addition to the constitutional violation, the Respondents contend that the plain purpose of the statute, the public counting of ballots, was circumvented by the inability of persons to access the building at Ward 2 Precinct while ballots were being counted. While the constitutional violation is enough reason by itself for a new election to be held, the court agrees that the statute has been violated as well.

While Appellants do not dispute access to the Ward 2 building may have been impeded after 7:00 p.m., they argue there is insufficient evidence in the record to support a finding that the building was inaccessible at the exact time ballots were being counted. The court disagrees. The polls closed at 7:00 p.m. The ballots from Ward 2 were delivered to the election commission offices between 8:00 p.m. and 8:30 p.m. (Tr. p. 18). The record reflects there were nine (9) candidates for city council and one

mayoral candidate. In Ward 2, 599 votes were cast and counted, with the vote counts for the respective individual council candidates ranging from 27 to 85. The record contains sufficient evidence from which the MEC could logically and reasonably conclude that votes were being counted during the time period in which Nesbit and Wilson were trying to gain access to the Ward 2 building. Therefore, the record contains evidence to support the conclusion that the ballots were being counted in secret and not publicly.

Appellants also argue that the record does not establish who was actually in the Ward 2 building when ballots were being counted. Appellants contend that if any members of the public were in the room at the time of the ballot count, then no constitutional or statutory violation occurred because not all members of the public were denied access and the law does not necessarily guarantee ALL members of the public access to ballot counting. Appellants also submit Nesbit and Wilson may not have exercised enough diligence in trying to gain access to the building. The court finds that the law only requires a showing that access to the ballot counting room was denied and does not require a showing of specifically to whom it was denied or who may have been granted access. Additionally, the court concludes that Nesbit and Wilson exerted reasonable efforts to gain entry to the Ward 2 building.

Finally, Appellants argue that all reasonable inferences must be drawn in favor of the validity of the election. *Trapp v. S.C. Bd. of State Canvassers*, 273 S.C. 163, 255 S.E.2d 670 (1979). While this is a correct proposition of law, this court still must uphold the MEC's decision if it is supported by the evidence and not controlled by an error law. Here, the facts reasonably support the conclusion that, for whatever reason, access to

the Ward 2 building was denied after the polls closed and before the results were delivered to the Election Commission, and while ballots were being counted.

CONCLUSION

The MEC's factual conclusions are competently supported by evidence in the record, and the MEC's decision was not controlled by an error of law. The MEC correctly applied the language of the Constitution prohibiting the counting of ballots in secret. Since there is evidence in the record to support the MEC's findings and no errors of law occurred, the MEC's Order must be affirmed.

Based on the foregoing, the order of the MEC dated May 19, 2015 is **AFFIRMED**.

IT IS SO ORDERED.

Electronic signature page to follow.



Lee Common Pleas

Case Caption: Edward Byrd VS Craig Nesbit

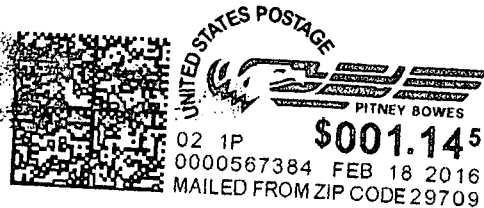
Case Number: 2015CP3100134

Type: Order/Other

SO ORDERED

s/ George C. James, Jr. 2143

Electronically signed on 2016-02-12 13:56:22 page 8 of 8



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