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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

**APPEAL FROM LANCASTER COUNTY
Court of Common Pleas**

Brian Gibbons, Circuit Court Judge

Case No. 2016-CP-29-1418

Jackie Harris. Appellant,

v.

**Lancaster County Election Commission, Lancaster Municipal
Election Commission and Linda Blackmon-Brace. Respondents.**

**FINAL BRIEF OF RESPONDENT
LANCASTER COUNTY ELECTION COMMISSION**

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STATEMENT OF ISSUES ON APPEAL

Did the County Election Commission act within its discretion in allowing Appellant less than three hours to gather exhibits, subpoena witnesses and documents, and prepare for her election protest when it was advised by the State Election Commission that it, in fact, had *no* discretion to do otherwise?

STATEMENT OF FACTS

For purposes of its contentions in this case, Respondent Lancaster County Election Commission ("Commission") emphasizes the facts pertaining to the procedure followed by the Commission when Appellant Jackie Harris ("Harris") contested the results of the election in which Respondent Linda Blackmon-Brace ("Blackmon-Brace") defeated Harris in the race for the Lancaster City Council District 3.

As noted by Harris, under a longstanding agreement with the City of Lancaster, the Commission was responsible for administering the municipal election, and ran it simultaneously with the other governmental elections. (R. p. 7)

Pursuant to section 7-17-20 of the South Carolina Code, the county board of canvassers, the same persons as comprise the Commission, were required to tally votes for President, U.S. Senator, U.S. House of Representatives, South Carolina state legislators, and county seats by noon on Saturday, November 12, 2016. Friday, November 11, 2016, was Veterans Day, a federal holiday.

On November 10, 2016, Harris, having lost the November 8, 2016 City Council election to Blackmon-Brace, filed a timely protest or contest. (*Id.*)

A hearing on the protest was held before the Commission on Friday, November 11, 2016, at 2:30 p.m. (*Id.*) Harris and Blackmon-Brace were given less than three hours notice of the hearing date, the time, and the location. (*Id.*)

Pursuant to section 5-15-130 of the South Carolina Code, the hearing before the Commission was required to be held, and was held, within 48 hours of the filing of the protest. (R. p. 3.) Moreover, pursuant to the same statute, the Commission complied with the requirements that it decide the issues raised, file a report of the decision, and notify the parties of the decision, all within 48 hours of the filing of the protest.

Counsel for the Commission sought the advice of the State Elections Commission and was informed that the Commission was required to strictly adhere to the time constraints in section 5-15-130. (R. p. 189) The Commission expressed its concerns that the rushed process was not fair to the parties or to the Commission itself. (*Id.*) The Commission declined to consider motions Harris made for an extension of time or for a continuance. (R. p. 7)

In contrast with section 5-15-130, which applies to municipal elections, section 7-17-30 allows a protest as to a county election to be filed by noon on the Wednesday following the declaration of the election results, that is, eight days after the election. In addition, pursuant to section 7-17-50, the board must hold the hearing on the protest or contest on the Monday next following the deadline for filing the protest or contest, that is, 13 days after the election. In this case, the Commission was responsible for both the municipal and county elections; so, nonetheless, it had to comply with the requirements in section 5-15-130 that it receive a contest, give notice to the parties, conduct a hearing, decide the issues raised, prepare and file a report of its decision with the clerk of court, and notify the parties of the decision.

The contest has to be filed within 48 hours of the election and then all of the Commission's enumerated duties have to be completed within 48 hours after the notice of the contest was filed. In short, for a county there are almost two weeks given to a Commission to complete this process, but for a municipality there are two days. (R. p. 165) The Commission hearing in this case was held less than 24 hours after Harris filed her protest, with Harris having been given only two and one-half hours notice before the hearing. (R. p. 7)

Because of the time constraints, although Harris introduced nine exhibits in support of her protest, the Commission was not able to identify with specificity the accuracies of the alleged violations of election laws that gave rise to the contest. (R. p. 7), nor did it consider the exhibits prior to ruling. Harris could not subpoena various witnesses to offer testimony. (*Id.*)

The hearing before the Commission lasted about three hours. (*Id.*) The Commission took a 15-minute break, during which time Harris and her counsel were allowed to gather such evidence and information as they could from the Lancaster County Voter Registration office. (R. p. 28)

At the conclusion of her testimony, Harris stated: "All that—all that I have to offer right this minute without being able to—to do the research that I need, is—is there." (R. p. 91) No member of the Commission disputed the fact that the Commission did not even look at the exhibits that Harris had hurriedly obtained. (R. p. 122) Briefly put, the Commission decided the issues without having sufficient time to organize and review the evidence. (R. p. 176)

Upon the conclusion of the hearing, the Commission voted unanimously that the evidence presented during the hearing was insufficient to prove that the alleged violations would have changed the certified results of the City Council election, a standard the Commission was informed and believed was the required standard based on advice from the State Election Commission. (R. p. 8)

Near the end of the hearing before the Commission, one of its members described the very short notice that had been given as a "disservice." (R. p. 118) Earlier, the same member opposed granting a continuance, "as unfair as it may seem," (R. p. 27) but the Commission explained that it was required to do so and had no discretion in the matter.

With reference to the same issue of the shortage of time, another member stated, "I know nobody's happy with this, okay, I understand. I'm not happy sitting here with this." (R. p. 123) That member also stated that the rushed procedure followed by the Commission was not fair to either of the parties, as candidates in an election, (R. p. 120) but that it was his understanding that the Commission was required to rule in such manner.

Harris filed an appeal on December 9, 2016. (R. p. 2) Following a hearing held on February 2, 2017 in the Court of Common Pleas, Sixth Judicial Circuit, before Circuit Judge Brian Gibbons, the court affirmed the decision of the Commission and ordered that Blackmon-Brace be sworn in as a member of the Lancaster City Council. (R. p. 6) The court concluded that a "meaningful hearing" had been held before the Commission and that Harris had been offered procedural due process. (R. p. 5) However, speaking with regard to after-discovered evidence, the court stated, "There is no way under the way the statutes have it set up that the protestor could've found this." (R. p. 194)

ARGUMENT

THE LANCASTER COUNTY ELECTION COMMISSION DID NOT ACT WITHIN ITS DISCRETION IN REFUSING TO GRANT APPELLANT SUFFICIENT TIME TO SUBPOENA WITNESSES AND PREPARE FOR HER PROTEST APPEAL OR TO CONSIDER EVIDENCE OF FRAUD THAT DID NOT RISE TO THE LEVEL THAT, IF PROVEN, WOULD HAVE CHANGED THE RESULT OF THE ELECTION BECAUSE THE COMMISSION WAS INFORMED BY THE STATE ELECTION COMMISSION THAT IT HAD *NO* DISCRETION IN EITHER MATTER.

The procedures for contesting the results of a municipal election in South Carolina are mandated by section 5-15-130 of the South Carolina Code:

Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported by the managers by filing a written notice of such contest together with a concise statement of the grounds therefor with the Municipal Election Commission. Within forty-eight hours after the filing of such notice, the Municipal Election Commission shall, after due notice to the parties concerned, conduct a hearing on the contest, decide the issues raised, file its report together with all recorded testimony and exhibits with the clerk of court of the county in which the municipality is situated, notify the parties concerned of the decisions made, and when the decision invalidates the election the council shall order a new election as to the parties concerned.

Neither the mayor nor any member of council shall be eligible to pass on the issues arising in any contest in which he is a party.

S.C. Code Ann. § 5-15-130.

Thus, the Commission was required to receive the contest, give notice to the parties, conduct a hearing, decide the issues raised, prepare and file a report of its decision with the clerk of court, and notify the parties of the decision, all within four days (96 hours) of the election.

Early in the Commission hearing, counsel for Harris made it clear that the very tight time constraints being imposed did not give her or her client sufficient time to obtain witnesses or to conduct an investigation; there was not time to provide more than the allegations in the contest. (R. p. 21) She further objected that the hearing violated her client's due process rights. (R. p. 24.)

Three factors normally determine whether an individual has received the process that the Constitution finds is due: (1) a private interest that will be affected by official action, (2) the risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards, and (3) the State's interest, including the function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail.

By weighing these concerns, courts can determine whether the State has met the fundamental requirement of due process, that is, the opportunity to be heard at a meaningful time and in a meaningful manner. *City of Los Angeles v. David*, 538 U.S. 715 (2003); *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).

In this case, Harris and Blackmon-Brace each had a clear, private interest affected by the actions of the Commission. The procedure was so rushed that there was a high risk of an erroneous deprivation of such interests through the procedures that were used, and even a substituted procedure of allowing one or two weeks for the parties to prepare and present their cases would have been valuable. Notwithstanding the State's interest in prompt resolution of election contests, that interest would not have been injured by giving the parties a modest amount of additional time.

A fair trial in a fair tribunal is a basic requirement of due process, and this applies to administrative agencies that adjudicate as well as to courts. *Garris v. S.C. Reinsurance Facility Governing Bd.*, 333 S.C. 432, 511 S.E.2d 48 (1998). Moreover, due process requires an administrative board, when acting in a quasi-judicial capacity, to consider all the evidence before deciding a particular question. *Id.* at 453, 511 S.E.2d at 59; *Young v. Charleston County Sch. Dist.*, 397 S.C. 303, 725 S.E.2d 107 (2012). In the election contest at issue here, it is beyond dispute that the Commission did not really consider *any* of the evidence put forward by Harris.

In certain circumstances, placing unrealistic time limits on hearings or trial presentations may deprive a party of a meaningful hearing. *ELA v. AAB*, 2016 WY 98, 382 P.3d 45 (Wyo. 2016). Arbitrary time limitations should not be placed on hearings and trials; it is incumbent upon all participants in court proceedings to ensure that the due process rights of all litigants are respected by allowing sufficient time for the presentment of evidence, testimony of witnesses, and

argument. *Spitz v. Iowa Dist. Ct. for Mitchell County*, 881 N.W.2d 456 (Iowa 2016). Litigants are entitled to have sufficient time to make an orderly presentation of their case. *In re Marriage of Salby*, 126 P.3d 291 (Colo. App. 2005). It is beyond dispute that an orderly and full presentation of the parties' cases was not possible under the time limits that were applied to the contest.

A tribunal's discretion must be exercised judiciously and with an eye toward fundamental fairness, in accordance with due process, such that the denial of a motion for a continuance does not have an adverse prejudicial effect on the movant's substantial rights. *Daud v. Abdullahi*, 2015 ME 48, 115 A.3d 77. Denial of a request for more time, as occurred here when Harris sought continuances, constitutes a violation of due process if it arbitrarily and unfairly hinders the defendant's ability to present his case. *Lee v. Winston*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, 470 U.S. 753 (1985); *see also MacDougall v. City of N.Y. Bd. of Elections*, 133 A.D.2d 198, 518 N.Y.S.2d 840 (1987) (court should have permitted applicant seeking invalidation of petition designating candidate in primary election to call as witnesses candidate and candidate's husband, or allowed applicant brief continuance to secure attendance of witnesses by subpoena, before denying application).

In *Lee*, the defendant, whom the state sought to force to undergo surgery for removal of a bullet, was denied due process when he was not given adequate time in state court proceedings to prepare on the issue because of the lack of time to consult an anesthesiologist in order to prepare evidence concerning the dangers posed by that aspect of the proposed operation. The court order required that the hearing on the motion to force the surgery had to occur only two days after the order was issued.

Counsel for the defendant, like counsel for Harris in the instant case, was not able, "despite obviously diligent effort," to prepare adequately for the hearing. 717 F.2d at 897. As the court put it, "[t]wo days is short time to accomplish what in fact was done." *Id.* at 898. The same can be said of the efforts of counsel for Harris in the election contest at issue here, but Harris nonetheless was deprived of her right to be heard in a meaningful manner.

A suit by an unsuccessful county council candidate who sought a recount on the ground that all "crossover votes" should have been invalidated was barred by the fact that the petitioner failed to file a timely protest with the county board of canvassers in accordance with his available statutory remedy. *Smith v. Hendrix*, 265 S.C. 417, 219 S.E.2d 312 (1975). In that case, by statute, the protestor had until the Monday following the election, six days, in which to file a protest. The court held that the period set out by statute for protesting the result of an election was not unreasonable when applied to computer-tabulated elections, and was not violative of the federal or state Due Process Clauses. By contrast, in the instant case, the much shorter time available to the parties and to the Commission to file a contest, investigate the facts, and conduct and complete the contest procedure in a meaningful manner was and is both unreasonable and violative of due process.

In *State v. Board of State Canvassers*, 101 S.C. 513, 86 S.E. 81 (1915), the court held that since no prima facie showing against the validity of an election was made or good reason to excuse the failure was given, the board of canvassers did not abuse its discretion by refusing a contestant a continuance to procure evidence. In the instant case, however, Harris did make a prima facie showing of grounds for the contest and good reason was given for more time in which to gather and present evidence. Moreover, unlike the very short time available to Harris in this case, in the above-cited case, "[the contestant] had a week from the date of the election to the date of the

meeting of the board in which to prepare and present his contest." *Id.*, 86 S.E. at 82.

One thing that all of these cases have in common is a reference to the clear "discretion" of the tribunal or the Election Commission in making its determinations regarding continuances. In this case at bar, it is clear from the statements made by the Commissioners that they were under the clear impression that they had *no* discretion to grant any continuance, and that, if they had had such discretion, they would have utilized it. Near the end of the hearing before the Commission, one of its members described the very short notice that had been given as a "disservice." (R. p. 118) Earlier, the same member opposed granting a continuance, "as unfair as it may seem," (R. p. 27) but the Commission explained that it was required to do so and had no discretion in the matter.

With reference to the same issue of the shortage of time, another member stated, "I know nobody's happy with this, okay, I understand. I'm not happy sitting here with this." (R. p. 123) That member also stated that the rushed procedure followed by the Commission was not fair to either of the parties, as candidates in an election. (R. p. 120) A model cities election ordinance providing that an election contest must be heard and decided within 10 days after the last day for filing petitions of contest was neither by its terms, nor as applied to a contest by unsuccessful candidates who had timely filed a contest petition but had failed to name an indispensable party, repugnant to due process because of its restriction of the period within which the contest could be heard. *Waupoose v. Kusper*, 8 Ill. App. 3d 668, 290 N.E.2d 903 (1972). The difference between the constitutional 10-day period in *Waupoose* and the 48-hour limit in the instant case, especially given the totality of the Commission's extensive responsibilities, is the difference between affording the parties due process, that is, a meaningful opportunity to be heard, and denying them due process.

An Ohio appellate court has held that state election law provided a meaningful and timely opportunity to be heard and to contest the disqualification of an independent candidate based upon invalid signatures on a nominating petition, and, thus, no due process violation occurred, even though there was no statutory remedy and a resulting need to resort to a mandamus action to contest disqualification. In that case, unlike the instant case, the time afforded to bring a mandamus action, compare the petition with local voter registration rolls, and substantiate a claim of abuse of discretion on the part of local boards of election was adequate. *State ex rel. Auken v. Blackwell*, 2004-Ohio-5355, 2004 WL 2804784 (Ct. App.). The facts of the case at bar also stand in stark contrast with those in *Esco v. Blackmon*, 692 So. 2d 74, 79 (Miss. 1997). There, the due process rights of a defeated candidate in a state legislative election, who voluntarily appeared at the initial hearing in connection with an election contest and received a hearing before the legislature, were not violated in connection with the challenge. The candidate had been given notice of the date of his appearance before the legislative committee and had sufficient time, more than two months, to conduct discovery.

Here, the parties would have been afforded due process, and the Commission would have been able to fulfill its duties, with even as little as a week for preparation and presentation of their cases. Instead, the Commission, under the instructions that it had no discretion in the matter, was compelled to require that the parties accomplish everything within entirely unrealistic and impractical time limits.

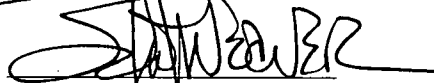
While statutes and rules that are designed to promote the speedy and orderly determination of causes should be complied with, they should not be applied so as to defeat their purpose to aid the administration of justice. *Mack v. Plowden*, 217 S.C. 112, 60 S.E.2d 57 (1950).

The Commission submits that it was informed and believed that, due to the time constraints imposed by section 5-15-130, it did not have the discretion to grant a continuance to afford the parties adequate time to prepare. Furthermore, the Commission submits that it was further informed and believed that it did not have the discretion to consider evidence of fraud unless such evidence rose to the level that, if proven, would have changed the outcome of the election.

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the Circuit Court and remand the matter to Respondent Lancaster County Election Commission with instructions to conduct the election contest in a manner that gives the parties adequate notice and an adequate opportunity to be heard and, further, provides the Commission the opportunity to meet its responsibilities by conducting a full, thorough and fair hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. L. Weaver", written over a horizontal line.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent Lancaster County
Elections Commission complies with Rule 211 (b) SCAVR.



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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondent Lancaster County Elections Commission on all parties by depositing a copy in the United States Mail, prepaid, on July 3, 2017, addressed as follows:

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