



STATE OF DELAWARE  
DEPARTMENT OF ELECTIONS  
OFFICE OF THE COMMISSIONER

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March 23, 2009

Mr. Thomas V. McCoy  
P. O. Box 265  
Bethel, DE 19931

Dear Mr. McCoy

Following the appeal hearing held on Thursday, March 19, please read below for the decision.

**IN THE MATTER OF:**

**Appeal of Thomas V. McCoy**

Pursuant to 15 Del. C. section 7552(b), an appeal was filed by Thomas V. McCoy to the Commissioner of Elections seeking a review of a decision by the Board of Elections of the Town of Bethel, Delaware following a hearing at which it considered a complaint from Mr. McCoy concerning pre-election procedures in the Town's election of February 28, 2009. A public hearing was held after proper notice by the Commissioner on Thursday, March 19, 2009. This is the decision of the Commissioner of Elections following that hearing.

**SUMMARY OF THE EVIDENCE**

A letter dated February 27 was delivered by Thomas V. McCoy to the Board of Elections for Bethel containing various complaints "about pre-election procedures." We will attempt to summarize those complaints.

1. The notice of election that was published said that in order to vote a person had to be a citizen of Delaware and a resident of the Town of Bethel. The Town's charter stated that citizens of Bethel could vote, rather than residents and Mr. McCoy felt

this could confuse voters, as “citizen” is different from “resident” and in addition, the term “resident” is not defined.

2. The notice said that voters could vote by absentee ballot, while the Town’s Charter does not expressly authorize absentee voting. Also, if absentee ballots were permitted, the notice provided the wrong date for the return of such ballots.

3. A Ms. Layfield said she was told by someone answering the phone that they would no longer answer her calls regarding the election.

4. Mr. Chadwick had asked for absentee ballots and had been denied the ballots while another citizen had been given a ballot.

5. Someone was allegedly told that the Board had run out of ballots and there was concern that others had been so told as well.

6. Allegedly, two of the three Board members at another civic group’s meeting accused Mr. Chadwick of trying to throw the election. It was questioned whether this constituted improper electioneering and also whether the fact that two members of the Board acting together constituted a quorum of the public body in violation of the Freedom of Information Act.

7. The absentee ballot process was defective. For example, absentee ballots were sent out with the affidavits requesting said ballots and no alpha numeric code appeared for accounting purposes.

8. A notice contained a donkey, a Democratic symbol, which could mislead or intimidate a Republican.

The complaint ended with a statement that the only remedy may be to void the election.

The Board met and considered the complaint. It noted that Mr. McCoy chose not to speak at its meeting. Five persons favoring the complaint spoke. The Board responded to each item of the complaint as follows.

1. The Board felt that a person may be a citizen of a state or a nation but not of a town, and that therefore the Charter’s language was not appropriate and should be changed. The Board felt the best way to conduct a valid election in conformity with the intent of the Charter was to allow residents over the age of 18 to vote. The term “resident” was not actually defined.

2. The Board agrees that absentee voting is not expressly authorized in the Charter but 15 Del. C. section 7571 provided many reasons for absentee voting in municipal elections and the Board believed that this statute itself authorized absentee voting and therefore overrides the Charter in any event. The Board agreed that the wrong date for return of the ballots appeared in the notice, although it disagreed with the date the complainant believed to be accurate.

3. Ms. Layfield testified but did not discuss the allegation that someone told her they would no longer respond to her election questions. The Board refused to act on that allegation as it constituted hearsay. In addition the person whose telephone number was involved denied ever making such a statement herself to Ms. Layfield.

4. It is improper to ask for an actual absentee ballot. Rather, one requests an affidavit and when completed can be turned in to request a ballot. Had Mr. Chadwick asked for affidavits, they would have been provided.

5. No one testified on the issue of someone allegedly being told there were no more ballots and this, therefore, constitutes hearsay. In addition, the Board learned that a person had been told there were no more envelopes available, rather than ballots, and this may have caused confusion.

6. Mr. Chadwick himself testified that no one made statements to him directly about trying to throw the election. There was no allegation as to who made the statement and no testimony in support of the allegation, so the Board took no action on this. In addition, the Board learned that only one Board member appeared at the civic meeting in question.

7. The Board agreed that the absentee ballots did not have an alpha numeric code, as required by statute. Nor did the envelopes contain an oath required by statute. The Board's chairperson did discuss the ballots with a Department of Election official and believed they were told to simply continue with their ballots for this election and make corrections in the future.

8. Questions had arisen about voter qualifications and the Board placed an addendum containing a page from a brochure on election matters published by the Department of Elections to respond to these issues. That page from the brochure contained a donkey image. The same page contained an elephant image, but that portion of the page was not relevant and therefore was not copied.

Mr. McCoy testified at length at the hearing. He said he felt there were only a few important issues. He wanted the Commissioner to review the absentee ballot process. He wanted clarification of the distinction between a citizen and a resident for voting purposes. Mr. McCoy said he was asking that the absentee votes be rejected, but he was not seeking to void the election results.

John Tarburton, an attorney for the Town of Bethel spoke as well, arguing that the complaint should be dismissed. He noted that the Board had serious questions about whether or not absentee voting was permissible. The Town had previously allowed such votes in prior elections and some citizens wished to vote absentee, and the Board interpreted the statute to allow them in all municipal elections. He agreed that there were deficiencies in some of the processes used. As to the Charter saying a "citizen" of Bethel may vote, he agreed the Charter should be changed and the Board simply ruled that all citizens of the state who resided in Bethel and were over the age of 18 should be permitted to vote. No one attempted to literally define the word "resident."

### FINDINGS OF FACT

The Commissioner finds that absentee ballots were used in this election and that there were certain deficiencies in their use, apart from the question of whether they could be used at all. In addition, the Town election is nonpartisan. The inadvertent appearance of a donkey on a notice addendum which was borrowed from the Department of Elections brochure should have no effect on such an election. There was no intent to mislead or intimidate voters.

## CONCLUSIONS OF LAW

Fifteen Del. C. section 7571 provides: "Any person qualified under the provisions of a municipal charter to vote by absentee ballot ... may vote by absentee ballot." While not entirely free from doubt, the Commissioner believes this statute requires that the person must be qualified to vote absentee under the Charter of the Town before voting absentee. Since the Charter in Bethel does not expressly authorize absentee voting such voting should not have occurred.

## DECISION OF THE COMMISSIONER

We have determined that absentee ballots were not authorized by the Town Charter and therefore should not have been used. They are to now be rejected and shall not be counted in the final vote tally. Because of this ruling, much of the rest of the complaint in this matter, such as the allegation that procedures involved in the absentee voting process were defective, becomes irrelevant and need not be mentioned in this decision.

In regard to the question of the meaning of resident, we believe this is an issue for the Town to deal with in its Charter and is not subject to a decision by this Office at this time. We note that Mr. McCoy stated that he wanted the Charter to be changed and that various council members were present at this hearing. We assume the Town will give careful consideration to whether or not changes in the Charter should be pursued.

We note that this was a nonpartisan election. Candidates do not identify themselves as Democrats or Republicans. The presence of a donkey on the notice had no effect on the voters, in our judgment.

In addition, it is important to realize that we do not live in a perfect world and mistakes can be made, even by well meaning persons. As Mr. Tarburton pointed out, Delaware law expressly provides that elections should not be set aside unless the improper conduct resulted in a person winning the election who would not otherwise have won. (15 Del.C. section 5942). In other words, while certain irregularities can occur in elections, elections will not be set aside unless the irregularities are truly very significant. In this case, most of the irregularities alleged were quite minor even if they actually occurred. We do not rule on all of these at this point, as the parties agreed we need not. Suffice it to say that even if established, these matters were not sufficient to overturn this election.

While we do not have to rule on the alleged absentee vote deficiencies, we want to be clear that should absentee voting become permissible in Bethel, proper procedures must be followed. Most important, the Town must insure that absentee ballots are not simply handed out to voters. Rather, a voter must first complete an affidavit requesting a ballot and then be sent a ballot. It is not permissible to send the affidavit and the ballot together in one package.

At this hearing, when the Commissioner stated that she believed the absentee votes should not have been accepted, the parties agreed that the hearing should then end, since Mr. McCoy was not seeking to void the election. Once the absentee vote issue was resolved, the parties agreed that no additional hearing was necessary on the other issues raised. Mr. McCoy was specifically asked whether he was satisfied and whether he wished to call any additional witnesses. All parties agreed that the hearing should end.

If you have any questions, please contact me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Elaine Manlove".

Elaine Manlove  
State Election Commissioner

Cc: John E. Tarburton, PA  
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Robert W. Willard, Deputy Attorney General

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