

**BERKS COUNTY BOARD OF ELECTIONS
SPECIAL MEETING MINUTES
November 27, 2023 – 12:00 P.M.**

Lucine Sihelnik, Chair
Honorable James E. Gavin, Vice Chair
Honorable Jill Gehman Koestel
Anne Norton, Chief Clerk
Christine M. Sadler, County Solicitor – not present
Cody L. Kauffman, First Assistant County Solicitor

CALL TO ORDER: 12:00 P.M.

PUBLIC COMMENT ON AGENDA ITEMS

Zelda Yoder, of Reading, spoke about Agenda Item 1, Undated and Incorrectly Dated Ballots, noting that she was curious to hear how the recent legislation would impact the Board's decision. She said she appreciated how the previous Election Board would review ballots that were questionable and make determinations based on the will of the voter. She reiterated that she does not get asked what day it is when she goes to the polling place to vote in person, so she believes that the fact that someone messed up the date on their mail-in or absentee ballot envelope, or didn't date it at all, is a non-factor. She asked the Board to keep that in mind when making a decision about the counting of undated and incorrectly dated ballots.

APPROVAL OF THE MINUTES

On the motion of Judge Koestel, seconded by Judge Gavin, the Board approved the minutes for the November 15, 2023, Special Election Board meeting as presented.

Agenda Items

1. Undated and Incorrectly Dated Ballots

First Assistant County Solicitor Cody Kauffman informed the Board that Judge Baxter of the Western District of Pennsylvania filed an opinion and order on Tuesday, Nov. 21, 2023, in the Western District litigation regarding undated and incorrectly dated ballots. He noted that the County of Berks was a named defendant in the matter, along with other county boards of elections. Mr. Kauffman said the focal point of the litigation was if the dating requirement for mail-in and absentee ballots violated the materiality provision of the federal Civil Rights Act.

He said that prior to the recent order, the law was set forth by the PA Supreme Court in the Ball v. Chapman matter, ordering county boards of elections to refrain from counting any mail-in and absentee ballots received with an undated or incorrectly dated outer envelope.

Mr. Kauffman highlighted that prior to the Nov. 21, 2023, ruling from the Western District, the Office of Election Services had worked diligently to achieve a fair, secure, and timely certified election and was prepared to certify the results at today's meeting, save for these circumstances that are out of their control.

Mr. Kauffman explained that the ruling from the Western District ordered that the rejection of timely-submitted ballots based solely on the failure of a voter to write a date at all, or to write an incorrect date, violated the materiality provision of the Civil Rights Act of 1964. He added that in Ball v. Chapman, the Pennsylvania Supreme Court was split 3-3 on the federal materiality question.

Mr. Kauffman said he believes an appeal is likely in the litigation, but thus far, no appeals have been filed and there is no stay issued on the order. He said both he and Jeff Bukowski, special counsel to the Election Board, reviewed the order and believe that it should apply to the past election and that the undated and incorrectly dated ballots should be counted. He said not doing so could put the County of Berks at risk of being in violation of Judge Baxer's order and the federal Civil Rights Act.

Mr. Kauffman acknowledged the Election Board is placed in the untenable position of not being able to meet the statutory deadline for certification or being in violation of Judge Baxter's order. He added that other counties have chosen to delay their certifications of the 2023 Municipal Election results to count the undated and incorrectly dated ballots. He said shortly after the ruling, the Department of State issued guidance to disregard any previously issued guidance from the Department that was inconsistent with the direction from the Western District.

Mr. Kauffman said that if it is the will of the Board to count the undated and incorrectly dated ballots, the County would need to delay the certification of the results. He said he recommends the Board move to count the undated and incorrectly dated ballots, stating he believes it is the most legally compliant way forward at the moment.

Judge Gavin stated that since the County of Berks was a named defendant in the Western District litigation, the County is bound by that decision, so he believes the County is therefore required to count the undated and incorrectly dated ballots. Judge Koestel agreed that it was the correct decision and that she believes the County should be counting undated and incorrectly dated ballots.

On the motion of Judge Gavin, seconded by Judge Koestel, the Board moved to canvass and count the undated and incorrectly dated mail-in and absentee ballots for the 2023 Municipal Election, per the Western District's court order, and to delay certification, the cumulation of write-in votes, the breaking of ties and all other certification-related items for the 2023 Municipal Election until such time that the undated and incorrectly dated mail-in and absentee ballots are canvassed and counted.

On the motion of Judge Gavin, seconded by Judge Koestel, the Board tabled agenda items 2, 3, 4 and 5, pending the counting of the undated and incorrectly dated ballots.

Election Director's Report

Ms. Norton noted that Berks was selected to participate in the statewide risk-limiting audit. The election staff completed the RLA audit on Monday, Nov. 20, 2023, and submitted the results to the state on Tuesday, Nov. 21, 2023. Berks had two precincts selected to audit and found no variations. She said the staff also completed the required 2% audit and again found no variations.

Public Comment

None

Adjournment: On the motion of Judge Gavin, seconded by Judge Koestel, the meeting was adjourned at 12:18 p.m.