

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Petition for Initiative to :
Prevent the Sale and/or Lease of :
Gracedale Filed With Northampton :
County Elections Commission on :
January 18, 2011 :
: No. 269 C.D. 2011
Appeal of: Bernard V. O'Hare III : Submitted: March 18, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

Filed: April 1, 2011

Bernard V. O'Hare III (O'Hare) appeals from the order of the Court of Common Pleas of Northampton County (trial court) denying his objection to the Gracedale Ballot Initiative Petition because he did not meet his burden of proof that the Gracedale Initiative Petition Committee (Committee) failed to obtain signatures from 10% of the qualified voters in Northampton County in the last election as required by Article XI Section 1103(C) of the Northampton County Home Rule Charter. Finding no error in the trial court's opinion, we affirm.

This case involves a dispute over the potential sale of the Gracedale Nursing Home (Gracedale), which is currently owned and operated by Northampton County (County). Over the past several years, Gracedale has operated at a loss – specifically incurring losses of \$4,743,799 in 2009 and \$2,875,297 in 2010 – with the County making operating transfers to Graceland each year in order to make up the difference. Given Gracedale’s financial situation as well as the County’s budgetary shortfalls, the Northampton County Council (Council) began to consider the possible sale of Gracedale. On August 19, 2010, Council passed Resolution 71-2010¹ (Resolution) directing County Executive John Stoffa to pursue a sale of Gracedale to private entities.

¹ County Council Resolution 71-2010 states:

WHEREAS, throughout the recent past, the amount of County contribution required to operate Gracedale has realized wide and varied fluctuations; and

WHEREAS, current economic conditions and budgetary constraints at the Federal, State and County levels make the continued financial viability of Gracedale precarious at best, particularly when combined with changes in Federal legislation that could affect Gracedale admissions and reimbursements.

NOW, THEREFORE, BE IT RESOLVED by the Northampton County Council that it respectfully directs the Northampton County Executive to prepare and publish requests for proposals which would provide for the alternate ownership of Gracedale through the sale or lease of Gracedale.

Northampton County's Home Rule Charter provides for direct citizen participation in County government through initiative and referendum. Specifically, Article XI, Section 1101 states "the registered voters of the county shall have the power by initiative to enact and repeal ordinances, by referendum to suspend and repeal ordinances, and by recall to remove officials from office." Article XI, Section 1102 of the County's Home Rule Charter states that any 12 registered voters can commence the initiative procedure by forming a petition committee. In order to place an initiative or referendum on a ballot, such a petition committee must obtain signatures "by registered voters of the County equal in number to at least 10% of the number of voters registered for the last election held in the county." Article XI, Section 1103(c).

On October 18, 2010, in response to Resolution 71-2010, 12 registered voters within the County created the Committee and commenced a petition drive to place the following proposed ordinance on the May 17, 2011 primary ballot: "The county nursing home, known as Gracedale, shall not be sold and/or leased by the County of Northampton for a period of five years from the date of the approval of this ordinance." On January 18, 2011, the Committee submitted 507 signature petitions to the Northampton County Election Commission (Commission) purportedly containing the signatures of 23,391 registered voters. The Commission initially rejected the Committee's petition on January 25, 2011.

That same day,² County registered elector O'Hare and Council Member Ronald Angle (together, Objectors) filed a joint petition contesting certain signatures and petitions contained in the Committee's submission, alleging they violated the Election Code and should, therefore, be invalidated. Objectors argued that after subtracting the invalid, unverified signatures and petitions, the Committee failed to meet the 10% threshold required by Article XI, Section 1103(c) of the Home Rule Charter. The Commission later reviewed the petitions again and on January 31, 2011, it reversed its prior declaration and certified the Initiative for submission to Council for further action.

Before the trial court, Objectors presented the testimony of Dee Rumsey (Ms. Rumsey), the Chief Registrar with the Northampton County Registration Division. Ms. Rumsey testified that the Commission directed her office to begin verifying the 23,391 total signatures to determine if they were valid. By the end of the hearing, she had verified 19,963 signatures of registered voters with 959 signatures yet unexamined. (Hearing Testimony (H.T.) at 132).

Objectors then called the circulators of the Petitions. Maryann Schmoyer (Ms. Schmoyer) was one of the 12 original signatories to the Initiative Petition who circulated 48 petitions. (H.T. at 71, 84). Ms. Schmoyer testified that she went to fire halls, church socials, and senior and community centers to obtain

² Objectors' petition may appear to be premature because the Commission had not yet certified the Committee's submission. However, Objectors filed their objections preemptively in order to comply with Section 977 of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §2937, which requires that contests to nominating petitions must be filed within seven days after the last day for filing nominating petitions.

signatures. (H.T. at 88). She would explain why she was there and what the purpose of the petition was, let people read the petition, ask them if their voter registration was up to date and if they lived in the County. (H.T. at 84). She then would put a petition at each table, of which she admitted there could be 10 to 15 at a time. (H.T. at 84-85). Ms. Schmoyer testified that she would walk around the room while the petitions were circulating, ask if anyone had any questions, and watch carefully as each person signed the petition. (H.T. at 85-87). On cross-examination Ms. Schmoyer denied circulating any petitions at bars or clubs, as alleged in the objections. (H.T. at 87).

Jack Dalessandro (Mr. Dalessandro) testified that he circulated two or three petitions at a time at a voting site in Washington Township on Election Day. (H.T. at 112). According to Mr. Dalessandro, he had a card table and chair set up and watched as each individual signed the petitions. (H.T. at 112). Mr. Dalessandro testified that the petitions never left his possession. (H.T. at 113).

William G. Coker, Jr. (Mr. Coker) testified that he saw several petitions lying unattended in bars and social clubs. (H.T. at 90-91). On cross-examination, Mr. Coker admitted that he could not specifically identify which petitions he allegedly saw unattended at these bars and clubs. (H.T. at 92).

Clayton Creamer (Mr. Creamer) testified that signatures numbered 1 through 25 on petition number 242, of which he was the circulator, all came from one apartment complex. (H.T. at 129-130). Mr. Creamer admitted that the individual voters did not fill in their own address – they filled in their apartment

number and Mr. Creamer's wife actually wrote in the apartment complex's address for all 25 signatures. (H.T. at 129-130).

Circulator Ellen J. Weiss (Ms. Weiss) testified that while she was the named circulator on a number of petitions, she was not the actual circulator on all of these petitions; she handed them out to others to actually obtain the signatures. (H.T. at 144). Ms. Weiss admitted that she did not personally circulate petition number 33, 35, 38, 41, 42, 56, 60, 61, 106, 179, 180, 206, 221, 265, 266, 298, 299, 302, 494, or 507, and that she only partially circulated petition number 40. (H.T. at 147-48, 150). Ms. Weiss testified that she was never given any real direction as to how to handle the petitions, and she did not know that what she was doing was incorrect. (H.T. at 145, 148).

Similarly, Dana Paisley (Mr. Paisley) testified that while he signed several petitions as the circulator, he gave some of the petitions to others to actually obtain the signatures. (H.T. at 152). Mr. Paisley testified that of the 1,188 signatures on his petitions, he was the actual circulator for only 399 signatures. (H.T. at 153). Mr. Paisley personally circulated petitions 44, 51, 90, 95, 401, and 430, but he did not personally circulate petitions 57, 63, 65, 71, 84, 98, 103, 104, 110, 361, 410, 461, 462, or 463. (H.T. at 153-56).³

³ The parties agreed that because Gerry Green was a resident of Lehigh County, he was not a valid circulator. (H.T. at 105). Mr. Green was responsible for petitions numbered 478 and 481, which contained 107 and 11 signatures respectively. (H.T. at 104). Similarly, the parties agreed that because Timothy Rehrig was a resident of Carbon County, he was not a valid circulator. (H.T. at 107). Mr. Rehrig was responsible for petition number 44 which contained 74 signatures, petition number 480 which contained 3 signatures, and petition number 482 which contained 105 signatures. (H.T. at 105). The parties agreed that Betty Fenstermacher was not a
(Footnote continued on next page...)

Objectors then argued that the trial court should start with 19,963, the total number of registered voters as found by the Registrar, and subtract the following: the 300 signatures obtained by Mr. Green and Mr. Rehrig; the 1,439 signatures obtained by Ms. Schmoyer; the 301 signatures obtained by Mr. Dalessandro; the 53 signatures obtained by Mr. Creamer; the 99 signatures obtained by Ms. Fenstermacher; and all 2,269 signatures obtained by Ms. Weiss and all 1,188 signatures obtained by Mr. Paisley because they admitted they did not follow the requirements of the Election Code. According to Objectors, subtracting all of these numbers from the starting point of 19,963 would put the Committee at 14,314 signatures, well under the 10% threshold.

The Committee conceded that the 452 signatures obtained by Mr. Green, Mr. Creamer, and Ms. Fenstermacher were invalid. However, the Committee argued that the signatures should be counted on the petitions that Ms. Weiss and Mr. Paisley personally circulated and that the entirety of their signatures should not be discounted due to their failure to follow the rules. The Committee also argued that Objectors failed to reconcile the signatures that they challenged with Ms. Rumsey's list of signatures in order to determine whether or not there was any overlap.

(continued...)

registered voter in the County and, therefore, the signatures she obtained as a circulator were invalid. (H.T. at 157). In addition, Objectors withdrew objection number 10 relating to Ms. Guzman and objection number 7 relating to Wendy Haggerty. (H.T. at 157).

The trial court found that Objectors failed to meet their burden of proving that the Committee did not meet the 10% registered voter threshold established by the Home Rule Charter. To meet their burden, Objectors had to prove that 3,761 signatures were invalid. Stated another way, the Initiative would need to have 19,631 valid signatures in order to meet the 10% threshold. The trial court found that the record only established that 2,469 individual signatures were invalid because those individuals were not properly registered. It held that 19,963 signatures were verified by the Chief Registrar's uncontested testimony, and the 959 signatures that she had not examined were deemed valid because Objectors did not specifically challenge those signatures as required by Section 977 of the Election Code, 25 P.S. §2937. Therefore, the trial court concluded that the Committee's Initiative was supported by 20,922 registered voters, more than enough to meet the 10% threshold.

As to challenges to the Petition based on improper circulation of the Petition, the trial court found Ms. Schmoyer and Mr. Dalessandro's testimony to be credible; they both fully complied with the requirements set forth in Section 909 of the Election Code, 25 P.S. §2869, and the Petitions they circulated were valid.. The trial court found Mr. Coker's testimony to be unreliable because it lacked certainty. He was not able to specifically identify which petitions he saw unattended; therefore, none of the petitions were found to be invalid because they were "languishing in bars," as alleged in the objections. (Trial Court Opinion at 8).

However, the trial court struck all of the signatures contained on petitions circulated by Mr. Green, Mr. Rehrig and Ms. Fenstermacher because

these three circulators were not residents or registered voters of Northampton County. These circulators obtained 117, 181, and 95 signatures respectively, which added up to 393 invalid signatures. The trial court also found that Objectors met their burden with respect to signatures 1 through 25 on petition number 242 because the petition circulator, Mr. Creamer, admitted that his wife filled out part of the address requirement instead of the voters themselves. The trial court rejected Objectors' argument that *all* of the signatures collected by Ms. Weiss and Mr. Paisley should be invalidated because they did not personally circulate some of their own petitions. Instead, the trial court struck only the signatures to which the circulators were unable to demonstrate full compliance with Sections 908 and 909 of the Election Code, 25 P.S. §2868 and 2869, which totaled 2,304 signatures.

Given these determinations, the trial court found that Objectors established that 2,722 signatures⁴ had to be stricken because the circulators could not establish full compliance with Sections 908 and 909 of the Election Code. However, by subtracting 2,722 from the total number of signatures submitted, there remained 20,669 valid signatures⁵ – again, well above the threshold of 19,631 verified signatures.

While if you added the list of unregistered signatures and lists of improper circulation, that number would be sufficient to remove the referendum

⁴ The trial court's equation would appear to be as follows: $393 + 25 + 2,304 = 2,722$ invalid signatures.

⁵ The trial court's equation here is as follows: $23,391 - 2,722 = 20,669$ verified signatures.

from the ballot, the trial court noted that Objectors made no effort to reconcile the individual invalid signatures derived from the Registrar's review with the petitions found invalid by the court. According to the trial court, it could not simply add the two totals together in order to determine a total number of invalid signatures, as suggested by Objectors, because there was no evidence to prove that the signatures found invalid by the Registrar were not also contained in the list of signatures found invalid by the court. The trial court noted that Objectors' argument ignored the presumption of validity in favor of every signature, a presumption which could only be overcome by competent, extrinsic evidence. *See In re Williams*, 625 A.2d 1279, 1281 (Pa. Cmwlth. 1993) (citing *Smith v. Brown*, 590 A.2d 816 (Pa. Cmwlth. 1991)); *In re Minotti*, 574 A.2d 119, 123 (Pa. Cmwlth. 1990). Objectors had the burden of proving each signature was invalid, and they failed to even attempt to prove there was no duplication. This appeal followed.⁶

I.

O'Hare's main argument on appeal is that the trial court erred by concluding there was a duplication of efforts between the Registrar and the Objectors and by failing to add together the total number of invalid signatures established by the Registrar and the trial court. However, the trial court did not

⁶ When reviewing the order of a trial court concerning the validity of challenges to an election petition, our standard of review is whether there was an abuse of discretion or an error of law, and whether the findings of fact are supported by substantial evidence. *In re Flaherty*, 564 Pa. 671, 678, 770 A.2d 327, 331 (2001). We also note that the Election Code must be liberally construed, and the party alleging defects in an election petition bears the burden of proving that the petition is invalid. *Id.*

specifically find that there was any duplication; it merely stated that the possibility existed and that “[t]o what extent there is duplication, one will never know.” (Trial Court Opinion at 16). We agree with the trial court that we cannot possibly know if some or even all of the invalid signatures were contained in both the Registrar’s list and the list found invalid by the trial court’s examination of the petitions because Objectors made absolutely no attempt to reconcile these figures. They failed to conduct a page and line review of the submitted petitions despite the fact that they presented the testimony of Ms. Rumsey, the Chief Registrar and the one person with the requisite knowledge to conduct such a review.

What happens quite frequently in election cases is that a signature can potentially be invalidated for numerous reasons – for example, the address the voter provided on the petition did not match his voter registration card *and* the circulator was not present when the voter actually signed the petition; or the voter did not provide a date or street address *and* the circulator was not a resident of the county. Absent a page and line examination of all of the invalidated signatures, it is impossible to know whether or not there was any overlap. Given this fact and the presumption under election law that a signature is valid, the trial court correctly determined that it could not simply add the two figures together to determine a total number of invalidated signatures.

II.

Mr. O’Hare also argues on appeal that the trial court erred in validating the signatures collected by Ms. Schmoyer because her actions in

circulating 10 to 15 petitions at a time proved that she could not make the five-point determination regarding each signatory to her election petitions as required by Section 909 of the Election Code. We disagree.

Section 909 of the Election Code provides, in pertinent part, as follows:

Each sheet shall have appended thereto the affidavit of the circulator of each sheet, setting forth--(a) that he or she is a qualified elector duly registered and enrolled as a member of the designated party of the State, or of the political district, as the case may be, referred to in said petition . . . ; (b) his residence . . . ; (c) that the signers thereto signed with full knowledge of the contents of the petition; (d) that their respective residences are correctly stated therein; (e) that they all reside in the county named in the affidavit; (f) that each signed on the date set opposite his name; and (g) that, to the best of affiant's knowledge and belief, the signers are qualified electors and duly registered and enrolled members of the designated party of the State, or of the political district, as the case may be.

25 P.S. §2869. The Supreme Court of Pennsylvania interpreted this section of the Election Code in *In re Flaherty*, 564 Pa. 671, 770 A.2d 327 (2001), stating the following:

The language in Section 909, therefore, unambiguously requires that the circulator

affirming the petition be aware of five criteria about each individual signer: (1) the signer signed the petition with full knowledge of its contents; (2) the signer's address is correct; (3) the signer resides in the county in the affidavit; (4) the signer signed the petition on the date set forth; and (5) to the best of the circulator's knowledge and belief, the signer was a qualified elector and a member of the party claimed on the petition. In order to know this information, it seems clear that the circulator needs to be present when each signer agrees to sign the petition.

564 Pa. at 686, 770 A.2d at 336. Ms. Schmoyer testified that when she circulated her petitions, she always addressed the crowd, explained who she was, why she was there, what the petition contained, and asked if anyone had any questions. She also testified that she specifically asked each signatory if their voter registration was up to date and whether they resided in the County. Ms. Schmoyer testified that she walked around the fire hall or gathering place and watched as each person signed the petition. This testimony, which the trial court found to be credible, amounts to substantial evidence to support the trial court's decision that Ms. Schmoyer met the five criteria required by Section 909 of the Election Code. In addition, her credible testimony was that she was physically present when each person agreed to sign the petition, as required by *In re Flaherty*.

III.

Finally, Mr. O'Hare argues that the trial court should have invalidated *all* of the signatures collected by Ms. Weiss and Mr. Paisley because they admitted

they did not personally circulate some of the petitions to which they attested they were the circulators. However, the trial court found the testimony of Ms. Weiss and Mr. Paisley to be credible. Both witnesses testified to which petitions they personally circulated, and Objectors failed to present any evidence that these circulators did not meet the five criteria outlined above in Section 909 of the Election Code with respect to the petitions they personally circulated. Given the presumption of validity and Objectors' failure to present any evidence to rebut this presumption, the trial court correctly determined that Objectors failed to meet their burden regarding the validity of the petitions personally circulated by Ms. Weiss and Mr. Paisley.

Because Objectors failed to meet their burden of proving that at least 3,761 signatures were invalid, the decision of the trial court is affirmed.

DAN PELLEGRINI, JUDGE

Judges Cohn Jubelirer and Simpson did participate in the decision in this case.

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ORDER

AND NOW, this 1st day of April, 2011, the order of the Court of
Common Pleas of Northampton County, dated February 9, 2011, and docketed at
No. C-48-CV-2011-75, is hereby affirmed.

DAN PELLEGRINI, JUDGE