

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

JUDGE ROCHELLE S. FRIEDMAN,	:	No. 39 MAP 2013
JUDGE ALAN M. RUBENSTEIN, IN HER	:	
AND HIS OFFICIAL CAPACITY, ROBERT	:	Plenary Jurisdiction assumed from
H. RIEFLE, BONITA L. DICARLO AND	:	Commonwealth Court at No. 81 MD
THOMAS A. BECKLEY, INDIVIDUALLY	:	2013
AND ON BEHALF OF QUALIFIED	:	
ELECTORS IN THE COMMONWEALTH	:	
OF PENNSYLVANIA,	:	
	:	
Petitioners	:	
	:	
v.	:	
	:	
GOVERNOR THOMAS W. CORBETT JR.,	:	
COURT ADMINISTRATOR ZYGMONT A.	:	
PINES, SECRETARY CAROL T.	:	
AICHELE, AND TREASURER ROBERT	:	
M. MCCORD, EACH IN THEIR OFFICIAL	:	
CAPACITY,	:	
	:	
Respondents	:	

OPINION

PER CURIAM

FILED: July 16, 2013

On February 15, 2013, Senior Judge Rochelle S. Friedman, Judge Alan M. Rubenstein, and several individuals alleging a status as qualified electors who voted for Judge Friedman and/or Judge Rubenstein, filed in the Commonwealth Court a Petition for Review in the nature of a Complaint for Declaratory and Equitable Relief (the "Complaint"). Petitioners raised a single cause of action under Article I, Sections 1 and 26 of the Pennsylvania Constitution, claiming that Article V, Section 16(b) of the state

charter – which mandates that judges retire on December 31st of the year they turn 70 – should be struck down as contrary to Pennsylvania’s Declaration of Rights, that is, Article I of the state Constitution. The jurists contended that Section 16(b) deprives them of their inherent right to be free of age-based discrimination; the electors asserted that the provision denies them their right to elect and retain jurists of their choice and to have those candidates serve to the end of their commissions. Petitioners sought relief in the form of a declaration that the retirement mandate is unconstitutional, as well as an injunction restraining the named Commonwealth officials from enforcing it. Respondents lodged preliminary objections in the nature of a demurrer, and Petitioners answered. The parties filed legal memoranda in support of their respective positions.¹

On May 10, 2013, having determined the existence of a substantial overlap among the issues raised in this case and two other matters which were pending in this Court – Driscoll v. Corbett, 19 MAP 2013, and Tilson v. Corbett, 20 MAP 2013 – we assumed plenary jurisdiction over the present dispute on our own motion. See 42 Pa.C.S. §726. Shortly thereafter, Petitioners filed an Application for Relief, requesting that we appoint a special master to “receive relevant testimony and evidence and allow Petitioners to create a developed record in support of the claims raised” in their Complaint. Application for Relief, at 12-13. In particular, Petitioners sought to introduce evidence supporting their claims that: mandatory retirement at age 70 is irrational; older Pennsylvania citizens are living and working longer than their 1968 counterparts; the compensation package available to senior judges is less valuable than that provided to commissioned judges; and individuals who voted for the judges in question believed

¹ The Commonwealth Court later approved the parties’ Stipulations of Dismissal as to Court Administrator Pines and Treasurer McCord. The remaining Respondents, Governor Corbett and Secretary Aichele, are represented by the Attorney General of Pennsylvania, and will be referred to collectively as the Commonwealth.

that they were electing the judges to a ten-year term. The Commonwealth opposed the Application for Relief, arguing that the Complaint’s allegations raise pure questions of law, and hence, no factual record is necessary.

After these pleadings were filed in our Court, we resolved the Driscoll and Tilson matters jointly, explaining that, in view of the “inalienable and indefeasible right [of the people] to alter . . . their government . . . as they may think proper,” PA. CONST. art. I, §2, “a revision to the organic law of the Commonwealth will only be deemed to violate the constitution that it amends (if at all) where the challenger has shown – clearly, palpably, and plainly – that the amendment is so unreasonable as to be considered ‘irrational.’” Driscoll v. Corbett, ___ Pa. ___, ___, ___ A.3d ___, ___, 2013 WL 2981713, at *12 (June 17, 2013) (quoting Gregory v. Ashcroft, 501 U.S. 452, 471, 111 S. Ct. 2395, 2406 (1991)). We determined that Article V, Section 16(b) did not fall into that category. To the contrary, we agreed with the highest appellate court of a sister state considering a similar constitutional provision, to the effect that:

[T]he amendment at issue . . . not only provides for the retirement of judges, but for their re-appointment as well. The restriction therefore results in an increase of judicial manpower by bringing in younger judges, while retaining the services of willing and able retired judges. It permits the orderly attrition of judges and promotes the advancement of general considerations of judicial efficiency. This insures the fitness of the judiciary as a whole and provides a judicial system of the highest caliber.

Id. at ___, ___ A.3d at ___, 2013 WL 2981713, at *10 (quoting State ex rel. Keefe v. Eyrich, 489 N.E.2d 259, 264 (Ohio 1986); some internal quotation marks and citations omitted). We continued that, “although we have no doubt that many individual judges would be capable of serving with distinction beyond their mandatory retirement date . . . there are overall systemic goals that are rationally related to valid governmental and societal interests.” Id. Ultimately we summarized our reasoning as follows:

[T]here is colorable merit to Petitioners' position that, theoretically at least, there is some possibility that a constitutional amendment might impinge on inherent, inalienable rights otherwise recognized in the Constitution itself. Nevertheless, we do not believe that the charter's framers regarded an immutable ability to continue in public service as a commissioned judge beyond seventy years of age as being within the scope of the inherent rights of mankind. Rather, in view of the people's infeasible right to alter their government as they think proper through amending its basic charter, the mandatory retirement provision for judicial officers is subject to deferential, rational-basis review under both equal protection and due process, and it satisfies that standard. Therefore, although certain societal circumstances may have changed since 1968 when the challenged provision was added to the Constitution . . . the proper approach of conforming the Constitution more closely with Petitioners' vision of how experiential changes should be taken into account is to pursue further amendment to the Pennsylvania Constitution.

Id. at ___, ___ A.3d at ___, 2013 WL 2981713, at *13.²

In light of the above, any evidence that Petitioners seek to introduce concerning demographic changes that have occurred since 1968 would have no material effect upon the issue at hand. See generally id. at ___, ___ A.3d at ___, 2013 WL 2981713, at *10 ("As for any demographic changes that have taken place since the amendment was adopted in 1968, moreover, they are irrelevant."). Additionally, evidence is unnecessary relative to the claim that the age-70 retirement mandate is irrational, since this claim represents a legal conclusion that we rejected in Driscoll. Furthermore, to the extent the Application may be construed to request an opportunity to submit proofs

² As in Driscoll, resolution of the Commonwealth's demurrer entails assessing whether, accepting as true all well-pleaded, material facts (together with all inferences reasonably deducible therefrom), the complaint is insufficient to establish Petitioners' right to relief. See generally Driscoll, ___ Pa. at ___ n.8, ___ A.3d at ___ n.8, 2013 WL 2981713, at *7 n.8.

concerning the understanding or intent of individual voters,³ these too would be irrelevant, for several reasons.

First, relying on Firing v. Kephart, 466 Pa. 560, 353 A.2d 833 (1976), we developed in Driscoll that “judges who reach the constitutional retirement age are not elected to ‘regular’ terms – i.e., six years in the case of a justice of the peace, or ten years in the case of judges and Supreme Court Justices – but instead, to terms that expire early due to the mandatory retirement provision.” Driscoll, ___ Pa. at ___, ___ A.3d at ___, 2013 WL 2981713, at *11. This is a fact of which voters are deemed to be aware, as explained in Firing. See Firing, 466 Pa. at 569, 353 A.2d at 837 (reasoning that, when the plaintiff ran for judicial office, Article V of the Pennsylvania Constitution “was law, and both he and the electorate had notice that if he was elected his new term would be affected by the retirement provision of Section 16(b)” (emphasis added)). It follows that, when individual electors voted for the Petitioner judges, they voted for them to serve a term that expired on December 31st of the year the judges turned 70.

Insofar as Petitioners seek to make an evidentiary record demonstrating that they were led to believe otherwise, such a record would be incapable of supporting their claim. In the first place, an uninformed, confused, or otherwise irrational vote “is just as much of a vote as a rational one.” Koppel v. N.Y. State Bd. of Elections, 8 F. Supp. 2d 382, 386 (S.D.N.Y. 1998); cf. Ulland v. Growe, 262 N.W.2d 412, 416 (Minn. 1978) (“We know of no authority which would allow us to treat the votes of any voters, however ill-informed, as if they were somehow inferior [to] more thoughtfully cast ballots.”).

³ The Application for Relief does not explicitly ask for such an opportunity. It does, however, imply such a request, as it asks for the opportunity to make a record while also arguing that Petitioners’ allegations differ from those in the Driscoll and Tilson cases by, inter alia, including a claim that the qualified electors who voted for Judge Friedman in 2001 believed that she would be able to serve a full ten years. See Application for Relief, at ¶¶6, 12-15.

Second, to the degree Petitioners predicate their claim on an alleged ballot deficiency, the obvious remedy for such a circumstance, if proven, is to ensure that ballots are more informative. An alleged deficiency in how election authorities present a judicial ballot to the public cannot logically have any effect on the constitutionality of the judicial retirement provision.

Finally, although the right of suffrage has been recognized as “fundamental” and “pervasive of other basic civil and political rights,” Bergdoll v. Kane, 557 Pa. 72, 85, 731 A.2d 1261, 1269 (1999) (quoting Moore v. Shanahan, 486 P.2d 506, 511 (Kan. 1971)), electors do not have an inherent, inviolate, pre-constitutional right to vote for judicial candidates whose terms of office are unaffected by a constitutionally-mandated retirement age. There is nothing in Article I of the organic law to suggest such a concept. Article V sets the term of office, either as a “regular” term, PA. CONST. art. V, §15(a), or as a term that is “not regular” because of mandatory age-70 retirement. Firing, 466 Pa. at 566, 353 A.2d at 836; see Driscoll, ___ Pa. at ___, ___ A.3d at ___, 2013 WL 2981713, at *11 (“Since the Constitution provides for mandatory retirement at age 70, the Constitution does not itself provide for the election of any judge for any term that extends beyond the age of 70.”). An elector may choose whom to vote for, but the elector is not entitled to the judicial services of the elector’s preferred candidate beyond that person’s term of office. Cf. id. (“[T]his case is about Petitioners’ effort to extend their term beyond the term for which they were elected by nullifying operative terms of the Constitution.”).

Accordingly, nothing in the Application for Relief convinces us that a factual record could materially aid this Court in ruling on the Commonwealth’s demurrer.

Turning to the demurrer itself, we note that many of the contentions advanced by Petitioners are foreclosed by Driscoll. The only two new substantive allegations raised

by Petitioners are that: (a) qualified electors who vote for a judge have a constitutionally-protected entitlement to enjoy the “full service” of that judge, absent removal for cause, Complaint, at ¶72; and (b) the 2001 amendment to Article V, Section 16(b) – in which the retirement date was changed from the day the judge attains the age of 70 to December 31st of the year in which the judge attains that age – is irrational and unconstitutionally discriminatory because it results in a retirement age based solely on the contingency of the judge’s birthday, see Complaint, at ¶40; accord Application for Relief, at ¶¶12, 16.⁴ In discussing the Application for Relief, we have already rejected the first of these contentions.

The second pertains to the 2001 change in retirement date from the judge’s 70th birthday, to December 31st of the year the judge turns 70. Although this would appear to reduce the complained-of harm by extending the judge’s term of office, Petitioners nonetheless argue that it compounds the irrationality of the 1968 amendment. See Complaint, at ¶¶35, 40. As such a contention constitutes an opinion or a conclusion of law, it need not be accepted for purposes of ruling on the demurrer. See, e.g., Crozer Chester Med. Ctr. v. Dep’t of Labor & Indus., 610 Pa. 459, 466, 22 A.3d 189, 194 (2011).

As in Driscoll – and, again, assuming, arguendo, that a state constitutional amendment can be declared invalid as substantively contrary to the constitution it amends – we must consider whether the classification approved by the voters in 2001 is

⁴ In a variation on the claim that judges have a vested entitlement to serve ten years upon being elected or retained, Petitioners allege that Article V, Section 16(b) violates Article V, Section 16(a), which generally prohibits diminishing a judge’s compensation during the judge’s term of office. See Complaint, at ¶67. As reflected in Driscoll, however, the Constitution itself precludes such a claim since it limits judges’ terms of office according the mandatory age-70 retirement criterion. See Driscoll, ___ Pa. at ___, ___ A.3d at ___, 2013 WL 2981713, at *11.

“so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the people’s actions were irrational.” Driscoll, ___ Pa. at ___, ___ A.3d at ___, 2013 WL 2981713, at *9 (quoting Gregory, 501 U.S. at 471, 111 S. Ct. at 2406). We do not believe that a December 31st retirement date is irrational. To the contrary, it serves multiple rational purposes related to the public interest.

First, it improves the orderly succession of judges or justices by standardizing the retirement date of an outgoing judge so that it occurs at the end of the calendar year. This enhances predictability and aligns judicial terms with the terms of other governmental officials that end on or about the last day of the year. Secondly, delaying retirement until the end of the year reduces – or in the case of odd-year retirements, eliminates – judicial vacancies that previously arose when a jurist was forced to retire in the middle of the year. Such reduction or elimination serves to lengthen the term of an elected judge while shortening the term of a judge who is appointed to fill a vacancy. See Barbieri v. Shapp, 476 Pa. 513, 520, 383 A.2d 218, 222 (1978) (“[W]henver possible, election is the constitutionally prescribed method for filling judgeships in Pennsylvania. The appointment procedure of [Article V, S]ection 13(b) is a stopgap to fill seats that unexpectedly fall vacant.”); Berardocco v. Colden, 469 Pa. 452, 459, 366 A.2d 574, 577 (1976) (same). At the same time, Section 16(b)’s discriminatory effect is minimal, in that the variance in actual retirement ages as between judges is always less than one year. That being the case, the standardization to end-of-year retirement readily passes scrutiny under the very lenient standard set forth in Driscoll, applicable to constitutional amendments approved by the electorate of Pennsylvania.

For the reasons supplied above, Petitioners’ Application for Relief is denied, the Commonwealth’s preliminary objections in the nature of a demurrer are sustained, and the Petition for Review is dismissed with prejudice.

Mr. Chief Justice Castille files a concurring opinion.