

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

Committee of Seventy, Philadelphia 3.0, Jordan Strauss,
Brian Krisch, and Katherine Rivera
Petitioners,

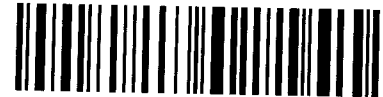
vs.

Anthony Clark, in his official capacity as City
Commissioner, Al Schmidt, in his official capacity as
City Commissioner, and Lisa M. Deeley, in her official
Capacity as City Commissioner
Respondents,

April Term, 2017

No. 3418

Committee Of Seventy Et-ORDRF



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Control No. 00-17047000

MEMORANDUM OPINION AND ORDER

The Petitioners, the Committee of Seventy, a self-described “independent elective watchdog in Philadelphia,” Petition at ¶5, Philadelphia 3.0, a self-described “leading advocate for election reform in Philadelphia,” *Id.* (“Organizational Petitioners), and the three named candidates who are running for local posts as Judge of Elections and Inspector of Elections, filed the underlying action on April 24, 2017, styled as a “Petition Action for Declaratory Judgment – Election Matter,” against the three named City Commissioners who comprise the Election Board in Philadelphia County (“Respondents”).

The Petitioners seek a declaration that the Respondents are statutorily ineligible to carry out the functions of their office as Philadelphia City Commissioners whenever there appears on the ballot a question relating to amendments to the Philadelphia Home Rule Charter. Because there are two ballot questions in the upcoming Primary Election on May 16, 2017, Petitioners request resolution of this matter on an expedited basis, before the May 16, 2017 Primary

Election.¹

The instant action represents the Organizational Petitioners third attempt to secure the replacement of the City Commissioners for the May 16, 2017 Primary Election.

By letter dated January 18, 2017, the Organizational Petitioners requested that the undersigned, as President Judge of the Court of Common Pleas, appoint judges or electors, pursuant to subsection 301 of the Election Code, 25 P.S. § 2641 (c), to “serve in the stead of the county commissioners” in overseeing the 2017 Primary Election. Neither the letter nor the hand-delivered envelope bore a street address, a return address, or an email address of either of the two signatories and, because the request was *ex parte*, no action could be taken thereon. *See Petition, Exhibit 1A and Exhibit 1B.*

On March 27, 2017 the Organizational Petitioners filed with the Supreme Court of Pennsylvania a *Petition for Review in the Nature of Mandamus* requesting the Supreme Court to compel the undersigned to appoint judges or electors, pursuant to subsection 2641 (c), to “serve in the stead of the county commissioners” in overseeing the 2017 Primary Election. The City Commissioners were granted leave to intervene and filed preliminary objections. By order dated April 19, 2017, the Supreme Court denied Petitioners’ *Petition for Review in the Nature of Mandamus* and dismissed the City Commissioners’ preliminary objections. *See Petition, Exhibit B.*

¹ The Organizational Petitioners noted in their Petition its interest in enforcing the Election Code as follows:

The two organizational Petitioners have an additional interest in enforcing this provision of the Election Code. If the City Commissioners are declared ineligible under the Election Code, it will render them unable to do their job and oversee elections nearly three-quarters of the time, given the recent frequency of ballot questions concerning Home Rule Charter amendments plus the undisputed need for the quadrennial appointment of interim replacements. The fact that the City Commissioners must be replaced in far more elections than not highlights the obsolescence of Philadelphia’s current model of elected City Commissioners, and it supports the organizational Petitioners’ efforts to replace that body with appointed and experienced professionals to oversee, administer, and modernize Philadelphia’s elections.

Petition, at ¶6.

Petitioners now request that the Court review Section 301 of the Election Code, 25 P.S. § 2641 and, pursuant to the Declaratory Judgment Act, 42 Pa. C.S. §§ 7531 *et seq.*, declare that the Philadelphia City Commissioners are disqualified from overseeing an election that includes a ballot question relating to amending the Philadelphia Home Rule Charter, and more specifically, from overseeing the May 16, 2017 Primary Election which includes a ballot question regarding an amendment to the Philadelphia Home Rule Charter. The City Commissioners filed preliminary objections to the Petition for Declaratory Judgment raising lack of jurisdiction for Petitioners' failure to add all interested parties, namely all of the candidate on the May 16, 2017 Primary ballot, and for "failure to state a claim (demurrer)."

The parties argued at length in their briefs and during the May 12, 2017 hearing whether or not Philadelphia's Home Rule Charter is a "County Home Rule Charter." If it is, some of the sections of the election code at issue may apply; if it is not, these sections do not apply. The Court notes that Philadelphia's Home Rule Charter was enacted in 1951 pursuant to the First Class City Home Rule Act, Act of April 21, 1949, P.L. 665, No. 155, 53 P.S. § 13101 *et seq.*, which provides, in part: "Any city of the first class may frame and adopt a charter for its own government and may amend its charter whether the same has been originally adopted under the provisions of this act or provided by local, special or general law." The First Class City Home Rule Act has not been repealed, and in fact was last amended in 2004, and remains in full force and effect. *See* Act of November 30, 2004, P.L. 1523, No. 193. Similarly, Philadelphia's Home Rule Charter, which was adopted in 1951 and became effective in 1952, remains in full force and effect pursuant to the First Class City Home Rule Act. The Court further notes that county home rule charters are adopted pursuant to the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901 *et seq.*, which "... applies to all municipalities except cities of the first class and counties of the first class." Philadelphia is both a city of the first class as well as a county of the first class.

Clearly, then, the Philadelphia's Home Rule Charter is not a county home rule charter and references in 25 P.S. § 2641 to "county charter" or "Home Rule Charter" do not apply to Philadelphia.

We next turn to the statutory language of the Election Code section at issue, which currently provides as follows:

§ 2641. County boards of elections; membership

(a) There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.

(b) In each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county *ex officio*, or any officials or board who are performing or may perform the duties of the county commissioners, who shall serve without additional compensation as such. Except in counties of the first class, in counties which have adopted home rule charters or optional plans the board of elections shall consist of the members of the county body which performs legislative functions unless the county charter or optional plan provides for the appointment of the board of elections. In either case, there shall be minority representation on the board. The county body which performs legislative functions shall in the case where the board does not contain minority representation appoint such representation from a list submitted by the county chairman of the minority party.

(c) Whenever a member of the board of county commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead. Whenever there appears on the ballot a question relating to the adoption of a Home Rule Charter for the county or amendments to an existing county Home Rule Charter, the President Judge of the Court of Common Pleas shall appoint judges or electors of the county to serve in the stead of the county commissioners. Appointees who are not currently elected office holders shall receive compensation for such service as determined by the salary board plus mileage as specified by the county for expenses incurred when performing election board business.

However, not all of the provisions of the above section were adopted at the same time and we must therefore review them in context. As we do, we must be mindful to apply the provisions of the Statutory Construction Act of 1972 ("SCA"). Under the SCA, it is fundamental that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly[,] and that [e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). In this regard, the SCA instructs that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be

disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Pennsylvania Gaming Control Bd. v. City Council of Philadelphia, 593 Pa. 241, 254–55, 928 A.2d 1255, 1263 (2007). When the words of a statute are not explicit, the General Assembly’s intent may be ascertained by considering the contemporaneous legislative history, the former law, the mischief to be remedied, and the circumstances under which it was enacted. 1 Pa.C.S. § 1921 (c). Finally, under the SCA, a court may presume that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable; does not intend to violate the Constitution of the United States or that of Pennsylvania; and intends the entire statute to be certain and effective. 1 Pa.C.S. § 1922(1)-(3).

Subsection 2641 (a) was initially adopted in 1937 and has not been amended since even though other sections of Section 2641 have been amended. *See* Act of June 3, 1937, P.L. 1333, Art. 3, §301. This subsection clearly provides that each county in the Commonwealth shall have a county board of elections which shall have jurisdiction over the conduct of the primaries and elections.

The first sentence of Subsection 2641 (b) was also adopted in 1937 and clearly provides that the county board of elections shall consist of the county commissioners or any official or board that performs the duties of the county commissioners (i.e., the legislative body of the county). It should be noted that the “county commissioner” as early as 1929 only applied to counties of the second through eighth classes. *See* Act of May 2, 1929, P.L. 1279. In fact, Act 447 of 1929 specifically provides that it does not apply to counties of the first class. *Id.*, at Section 2. The duties and powers of the County Commissioners include the power “to adopt resolutions and ordinances prescribing the manner in which powers of the county shall be carried out and generally regulating the affairs of the county.” *See* Act of May 2, 1937, P.L. 2129, No. 435, §1; 16 P.S. § 509.

This provision of Section 2641 (b) also has not been amended. However, the second sentence of Subsection 2641 (b) was adopted in 1978. *See* Act of June 1, 1978, P.L. 458, No. 135, and has not been amended. That provision provides as follows:

Except in counties of the first class, in counties which have adopted home rule charters or optional plans the board of elections shall consist of the members of the county body which performs legislative functions unless the county charter or optional plan provides for the appointment of the board of elections. In either case, there shall be minority representation on the board. The county body which performs legislative functions shall in the case where the board does not contain minority representation appoint such representation from a list submitted by the county chairman of the minority party.

Although there is no legislative history to explain the reasons for the addition of the quoted language, no such explanation is necessary. The General Assembly was well aware in 1976 and 1978 that Philadelphia, a county of the first class as well as a city of the first class, had adopted a City Ordinance in 1965 establishing its election board, as authorized by the Pennsylvania Constitution, Philadelphia's Home Rule Charter, and the consolidation of the City and County. The 1965 City Ordinance provides as follows:

§ 2-112. City Commissioners.

(1) *Composition.* There shall continue to be three City Commissioners who shall continue to be elected as now provided by law, of whom not more than two shall be members of the same political party or body. The City Commissioners shall take office on the first Monday in January in the year following their election. The term of office of the City Commissioners presently in office shall continue until the expiration of the term for which they were elected. Vacancies in the office of City Commissioner shall be filled by appointment of the Mayor with the approval of the Council for the unexpired term of the member causing the vacancy. In the event of the death of any person elected as a City Commissioner prior to his taking office, the same shall constitute a vacancy under this Section.

(4) *Powers, Duties and Functions.* All powers, duties and functions of the Registration Commission, including, but not limited to, those relating to the registration of voters are transferred to the City Commissioners. All the powers, duties and functions of the City Commissioners in their capacity as the County Board of Elections relating to the conduct of primaries and elections shall continue to be exercised by the City Commissioners.

Philadelphia Code, Section 2-112. Therefore, the language the General Assembly used in Section 2641 (b) expressed its clear intent to exempt Philadelphia from the provision adopted by the General Assembly in 1978 because Philadelphia already had a similar provision in place for its

election board. Moreover, the language which followed the prefatory clause (“*Except in counties of the first class*”), namely “*in counties which have adopted home rule charters or optional plans*” is a reference not to Philadelphia but to county home rule charters which are adopted pursuant to the Home Rule Charter and Optional Plans Law as provided in 53 Pa. C.S. § 2901 *et seq.* *See supra.*

Lastly, Subsection 2641 (c) as initially adopted in 1976 provided as follows:

(c) Whenever the ***members of the board of county commissioners*** are candidates for nomination or election to any public office or whenever there appears on the ballot a question relating to the adoption of a home rule charter for the county or amendments to an existing county home rule charter, the county commissioners ***shall not sit as the county board of elections***. The President Judge of the court of common pleas shall appoint judges to serve as the county board of election or where an insufficient number of judges are present, the president judge shall appoint a reputable elector of the county to serve as a member, with the judges on the county board of elections.

See Act of December 2, 1976, P.L. 1221, Section 1, No. 269. Emphasis supplied. The intent of this section was clear: the county commissioners who are the legislative body of the county² and also its election board were not to act as the county board of election if they were candidates for any public office or whenever there was a ballot a question relating to the adoption of a home rule charter for the county or amendments to an existing county home rule charter which they, as the legislative body, had adopted.

The above quoted 1976 language was replaced in 1979 with the following:

(c) Whenever a member of the board of county commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead. Whenever there appears on the ballot a question relating to the adoption of a Home Rule Charter for the county or amendments to an existing county Home Rule Charter, the President Judge of the Court of Common Pleas shall appoint judges or electors of the county to serve in the stead of the county commissioners.

² Philadelphia does not have “county commissioners.” Only counties of the second through eight classes have “County Commissioner” who may exercise the legislative duties of the county. In Philadelphia, the legislative power of the City are exercised by “. . . a Council, subject only to the provisions of [the Philadelphia Home Rule Charter]. *See* Philadelphia Home Rule Charter, Section 1-101. Nonetheless, we do appoint judges to act in place of Philadelphia’s county board of election whenever a City Commissioner is a candidate for reelection to that position in order to avoid a conflict of interest.

Act of July 21, 1979, P.L. 189, No. 63. The legislative history does shed light into the reasons for the amendment. This amendment was proposed because the subsection was interpreted to require all county commissioners to be replaced even if only one was a candidate for elective office and also to address the situation when not enough judges are available to appoint to act as the election board.³

³ On May 7, 1979, when House Bill 208 was being considered for the third time in the House, the below exchange explains the rationale for the amendment of Subsection 2641 (c):

Mr. BRANDT. ... In a brief explanation of the amendment, numbered 851, the judges in Lancaster County court were concerned about the language in subsection (c) under section 301, particularly where it says, "Whenever the members of the board of county commissioners are candidates for nomination or election to any public office" They felt that this language should be changed, because it was their opinion, depending on who would read this, that all commissioners would have to resign regardless of whether they were on the ballot or not, and in that specific instance the suggested amendment says, "Whenever a member . . ." so they can change that particular member.

Mr. PICCOLA. ... *The amendment only deals with the fact that when one member of the board of county commissioners becomes a candidate for any office, even though the other two may not seek any office, all three of them are automatically disqualified from serving as the board of elections. This amendment will correct that by saying that only that member who is a candidate for a public office is disqualified. If the other two choose not to run for any office or run for reelection, then they will not be disqualified from sitting as members of the board of elections.*

* * *

Mr. RITTER. Mr. Speaker, as I read the present language, the existing law, where it talks about members of the county board of commissioners who are candidates for nomination or election, in that instance, under present law, "The President Judge of the Court of Common Pleas shall appoint judges to serve as the county board of elections or where an insufficient number of judges are present, the president judge shall appoint a reputable elector of the county to serve as a member, with the judges on the county board of elections." Mr. Brandt's amendment seeks to take that out, because there are brackets, Mr. Speaker, around subparagraph (c). The whole subparagraph (c) is going to be replaced by this language: "Whenever a member of the board of county commissioners is a candidate, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead." The difference is that under present law it is when there is an insufficient number of judges to take those places that an elector shall be appointed. Mr. Brandt's amendment takes the part out about an insufficient number of judges and gives the discretion automatically to the president judge that if you do not want to make judges sit on the board of elections, you can appoint anyone. My argument is that I think the present law is sufficient, and we ought to have the judges filling those vacancies only in the event where there are not enough judges. Then go out and take a qualified elector.

Legislative Journal, May 7, 1979, at p. 672. Emphasis supplied.

Therefore, there was no intent to change the previous application of Subsection (c) which, as implemented, clearly required the replacement of the county commissioners, *qua* election board, whenever they were running for reelection (or for any elected office) or whenever there appeared on the ballot a question adopting or amending a county charter which they, as the legislative body, had adopted. In those situations, a clear conflict existed due to their conflicting duties as legislative body and supervisors of the election during which legislation they enacted as county commissioners would be on the ballot in an election they supervised. Therefore they needed to be replaced in connection with their duties as the election board. Moreover, as discussed *supra*, references to the adoption or amendment of the “Home Rule Charter for the county” are nor references to Philadelphia’s Home Rule Charter but to charters adopted pursuant to the Home Rule Charter and Optional Plans Law. For these reasons, we cannot grant Petitioners’ requested relief and enter the following

ORDER

AND NOW, this 15th day of May, 2017, upon consideration of the “Petition Action for Declaratory Judgment – Election Matter” filed on April 24, 2017, the Preliminary Objections of Respondents the City Commissioners filed on May 11, 2017 and oral argument presented on May 12, 2017, it is hereby ORDERED and DECREED that the Petitioners’ request is denied with prejudice.⁴

BY THE COURT:



Hon. Sheila Woods-Skipper,
President Judge, Court of Common Pleas
Philadelphia County

⁴ Respondents’ Preliminary Objections are dismissed as moot.