

Incorrect Election Results Because of a Malfunctioning Voting Machine

Shannon v. Jacobowitz
(*David N. Hurd, N.D.N.Y. 5:03-cv-1413*)

On November 21, 2003, Matthew Shannon, the incumbent town supervisor in Whitestown, New York, filed a federal constitutional action contesting the election of a challenger for his office, David Jacobowitz, in the November 4 election.¹ Apparently, a single voting machine malfunctioned and registered only one vote for the incumbent on the Democratic Party line, because the counter failed to advance with each vote on that line.² (The incumbent was listed on the Democratic, Independence, and Conservative party lines; the challenger was listed on the Republican and Working Families party lines.³) After the votes were counted, the challenger was ahead of the incumbent by 25 votes.⁴ Comparing the malfunctioning machine to another machine at the same location, the plaintiffs estimated that the incumbent was deprived of approximately 134 votes.⁵ The plaintiffs included five voters who said they voted for the incumbent on the Democratic line at the malfunctioning machine.⁶

On the complaint's filing, a general order set a status conference before a magistrate judge for March 2004.⁷ On December 4, 2003, the plaintiffs submitted a brief, a proposed order to show cause, and affidavits of 70 voters who said that they voted for the incumbent on the Democratic line at the malfunctioning machine.⁸ That day, Judge David N. Hurd issued an order to show cause why the incumbent should not be declared the winner of the election.⁹ At a hearing on December 18,¹⁰ Judge Hurd issued a temporary restraining order enjoining the county board of elections from certifying a winner of the election and enjoining the challenger from taking the office.¹¹

1. [Complaint](#), Shannon v. Jacobowitz, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003), D.E. 1; [Shannon v. Jacobowitz](#), 394 F.3d 90 (2d Cir. 2005); [Shannon v. Jacobowitz](#), 301 F. Supp. 2d 249, 251 (N.D.N.Y. 2003).

2. [Shannon](#), 394 F.3d at 91–92; [Shannon](#), 301 F. Supp. 2d. at 252–53.

3. [Shannon](#), 394 F.3d at 91; [Shannon](#), 301 F. Supp. 2d. at 252; *see* [Complaint](#), *supra* note 1, at 4.

4. [Shannon](#), 394 F.3d at 91; [Shannon](#), 301 F. Supp. 2d. at 252.

5. [Complaint](#), *supra* note 1, at 5.

6. *Id.* at 3; [Shannon](#), 301 F. Supp. 2d. at 251.

7. [Docket Sheet](#), Shannon v. Jacobowitz, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003).

8. *Id.*; [Shannon](#), 394 F.3d at 92; [Shannon](#), 301 F. Supp. 2d. at 253; [Order to Show Cause](#), Shannon, No. 5:03-cv-1413 (N.D.N.Y. Nov. 21, 2003), D.E. 8.

9. [Order to Show Cause](#), *supra* note 8.

10. [Minutes](#), Shannon, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 23; [Shannon](#), 301 F. Supp. 2d. at 251.

11. [Temporary Restraining Order](#), Shannon, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 22; [Shannon](#), 301 F. Supp. 2d. at 251.

On December 30, Judge Hurd converted the temporary restraining order into a preliminary injunction.¹² Judge Hurd determined that federal relief was appropriate because the only possible state remedy was a quo warranto action,¹³ which could be so slow as to take the entire term of office and which would be discretionary with the attorney general.¹⁴ On January 27, 2004, Judge Hurd granted the plaintiffs a summary judgment.¹⁵

On January 7, 2005, the court of appeals reversed, holding that Judge Hurd was wrong to consider the adequacy of the quo warranto remedy without a showing of intentional state action against the plaintiffs.¹⁶ Judge Hurd, therefore, dismissed the action on February 2.¹⁷

The incumbent, nevertheless, held his office through 2007.¹⁸

12. *Shannon*, 301 F. Supp. 2d. at 258.

13. “A common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed” Black’s Law Dictionary 1371 (9th ed. 2009).

14. *Shannon*, 301 F. Supp. 2d. at 254–58.

15. *Opinion*, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Dec. 18, 2003), D.E. 48, available at [2004 WL 180253](#).

16. *Shannon v. Jacobowitz*, 394 F.3d 90, 97 (2d Cir. 2005).

“We have no occasion to consider, and therefore express no opinion on, whether the New York Attorney General’s refusal to bring a quo warranto action on facts such as these might constitute intentional state action of the sort necessary to create a potential due process violation.” *Id.* at 93 n.2.

17. *Judgment*, *Shannon*, No. 5:03-cv-1413 (N.D.N.Y. Feb. 2, 2005), D.E. 66.

18. Compare Whitestown Town Board Minutes, Jan. 1, 2008, available at <http://town.whitestown.ny.us/content/MinuteCategories/View/1/2008:field=minutes;/content/Minutes/View/138> (identifying Charles Gibbs as supervisor), with Whitestown Town Board Minutes, Dec. 19, 2007, available at <http://town.whitestown.ny.us/content/MinuteCategories/View/1/2007:field=minutes;/content/Minutes/View/156> (identifying Matthew Shannon as supervisor).