

Absentee Ballots Delivered by Third Parties

Pierce v. Allegheny County Board of Elections
(Joy Flowers Conti, W.D. Pa. 2:03-cv-1677)

On the Friday before the November 2003 general election, two candidates filed a federal action to enjoin the counting of absentee ballots that were delivered to a board of elections by persons other than the voters. The district judge cleared her calendar and held a hearing that afternoon, after which she ordered the ballots in question segregated. She conducted a day-long hearing on Monday; on Tuesday, she ruled that the ballots should remain segregated and deemed challenged under state law. State officials and state courts eventually determined that some of the ballots in question were valid and some were not.

Subject: Absentee and early voting. *Topics:* Absentee ballots; ballot segregation; matters for state courts.

On the Friday before the November 2003 general election in Pennsylvania, two Republican candidates for office in Allegheny County filed civil actions in both state and federal court to enjoin the counting of absentee ballots that were delivered to the Allegheny County's board of elections by persons other than the voters.¹ There were 937 such ballots in question.² The court assigned the case to Judge Joy Flowers Conti, who issued a temporary restraining order that day after a hearing in the afternoon.³ She ordered segregation of the 937 absentee ballots in question.⁴

According to Pennsylvania law, when casting an absentee ballot, "the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to [the] county board of election."⁵ It was customary for the election board in Allegheny County to accept absentee ballots from third parties.⁶ In response to an inquiry from the Republican Party, the county board tightened its policy on October 22, 2003.⁷ There were concerns that the new policy prohibiting third-party delivery ran afoul of protections for

1. Docket Sheet, *Pierce v. Allegheny Cty. Bd. of Elections*, No. 2:03-cv-1677 (Oct. 31, 2003); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 688–89 (W.D. Pa. 2003); *In re Canvass of Absentee Ballots*, 577 Pa. 231, 843 A.2d 1223, 1227 (2004).

2. *Pierce*, 324 F. Supp. 2d at 688–91, 693, 706–09.

3. *Id.* at 689; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1227 n.5.

Tim Reagan interviewed Judge Conti for this report by telephone on October 31, 2012.

4. *Pierce*, 324 F. Supp. 2d at 689; see Mike Wereschagin, *Federal Judge to Decide on Absentee Ballots*, Pittsburgh Trib. Rev., Nov. 4, 2003.

5. 25 Pa. Stat. § 3146.6(a); *Pierce*, 324 F. Supp. 2d at 689–91, 698–700, 705–06 & n.1; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226; *In re Canvass of Absentee Ballots*, 839 A.2d 451, 453 & nn.1–2 (Pa. Commw. 2003).

6. *Pierce*, 324 F. Supp. 2d at 690; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226; *In re Canvass*, 839 A.2d at 453; see Jeffrey Cohan, *No Absentee Ballots Accepted from Third Parties*, Pittsburgh Post-Gazette, Oct. 24, 2003, at B22.

7. *Pierce*, 324 F. Supp. 2d at 690; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226; *In re Canvass*, 839 A.2d at 453–54; see Cohan, *supra* note 6.

disabled voters, so the policy was revised on October 27 to permit receipt of absentee ballots from third parties who submitted special certifications.⁸

It was clear to Judge Conti that prompt segregation of the ballots was essential to preserving the issue for litigation, because otherwise the ballots would become commingled and relief would become infeasible.⁹ Granting the temporary restraining order enabled the status quo to be preserved without unduly interfering with state proceedings.¹⁰ She cleared her calendar for the Friday afternoon proceeding, which attracted some public interest.¹¹ Her next hearing on Monday drew more interest, but not so much as to be a problem for the court.¹²

On Monday, the plaintiffs dropped their state-court action, and Judge Conti presided over a day-long hearing.¹³ On the following day, she converted her order into a preliminary injunction, declaring that the 937 ballots in question were to be segregated and deemed challenged under Pennsylvania law.¹⁴

The plaintiffs promptly paid the challenge fee of \$10 per ballot to the elections division.¹⁵ They hired a private investigator to examine the ballots, and they decided to go ahead with challenges for approximately 440.¹⁶ Each of those challenged voters was given notice of the challenge and hearing procedures.¹⁷ Some municipal races remained undetermined because of the challenged ballots.¹⁸

In a published opinion issued on November 13, Judge Conti explained that the candidates did not have standing to bring their federal complaint as candidates, but they had standing to bring the complaint as voters, because their votes could be diluted by improperly cast ballots.¹⁹ Whether any of Allegheny County's three policies for absentee ballots in 2003 violated state law was a matter for Pennsylvania's state courts to resolve, but whether the different counties were applying Pennsylvania law equally was a matter of equal

8. *Pierce*, 324 F. Supp. 2d at 690; *In re Canvass*, 577 Pa. 231, 843 A.2d at 1226–27; *In re Canvass*, 839 A.2d at 454; see Wereschagin, *supra* note 4.

9. Interview with Hon. Joy Flowers Conti, Oct. 31, 2012.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Pierce*, 324 F. Supp. 2d at 689.

14. *Id.*; *In re Canvass of Absentee Ballots*, 577 Pa. 231, 843 A.2d 1223, 1227 & n.5 (2004); *In re Canvass of Absentee Ballots*, 839 A.2d 451, 454 & n.3 (Pa. Commw. 2003); see Robert Baird, *Absentee Challenge Proceeds*, Pittsburgh Trib. Rev., Nov. 5, 2003; Torsten Ove, *937 Ballots to Be Held for Possible Challenges*, Pittsburgh Post-Gazette, Nov. 5, 2003, at C8.

15. See Baird, *supra* note 14.

16. See Mike Wereschagin, *Some Races Hinge on Fate of Ballots*, Pittsburgh Trib. Rev., Nov. 12, 2003.

17. *In re Canvass*, 839 A.2d at 454–55; see Wereschagin, *supra* note 16.

18. See Wereschagin, *supra* note 16.

19. *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 692–93 (W.D. Pa. 2003).

protection under the U.S. Constitution.²⁰ An appeal was dismissed as settled in January 2004.²¹

On November 14, 2003, the elections board determined that seventy-four ballots should be disqualified.²² These included ballots cast according to county policy at the time that was later determined to be too lenient.²³ The wife of Senator John Kerry and the local U.S. Attorney were among the affected voters.²⁴ Some valid votes were disqualified because they had been commingled with invalid votes.²⁵ On November 26, a state judge ruled that the ballots should be counted after all,²⁶ a decision that was affirmed on appeal.²⁷ Pennsylvania's supreme court, however, determined that fifty-six ballots were invalid because they had not been delivered by the voter as required by state law.²⁸

Both of the federal plaintiffs lost their elections.²⁹

20. *Id.* at 695–99.

21. Docket Sheet, *Pierce v. Allegheny Cty. Bd. of Elections*, No. 03-4667 (3d Cir. Dec. 11, 2003).

22. *In re Canvass of Absentee Ballots*, 577 Pa. 231, 843 A.2d 1223, 1228 (2004); *In re Canvass*, 839 A.2d at 455; see Jeffrey Cohan, *County Throws Out 74 Absentee Ballots*, Pittsburgh Post-Gazette, Nov. 15, 2003, at A1.

23. See Cohan, *supra* note 22.

24. See *id.*

25. *In re Canvass*, 577 Pa. 231, 843 A.2d at 1228; *In re Canvass*, 839 A.2d at 454; see Cohan, *supra* note 22.

26. *In re Canvass*, 577 Pa. 231, 843 A.2d at 1228–29; *In re Canvass*, 839 A.2d at 455–56, 458; see Jeffrey Cohan, *Judge Validates Absentee Votes*, Pittsburgh Post-Gazette, Nov. 27, 2003, at C1; Mike Wereschagin, *75 Absentee Ballots Will Be Counted*, Pittsburgh Trib. Rev., Nov. 28, 2003.

27. *In re Canvass*, 839 A.2d at 453, 460, *rev'd*, 577 Pa. 231, 843 A.2d 1223; see David M. Brown, *Validity of 75 Ballots Affirmed*, Pittsburgh Trib. Rev., Dec. 19, 2003.

28. *In re Canvass*, 577 Pa. 231, 843 A.2d 1223; see Jeffrey Cohan, *Third-Party Delivery of Ballots Ruled Illegal*, Pittsburgh Post-Gazette, Mar. 11, 2004, at B2; *Gantman Won Judge's Seat with Wider Lead*, Phila. Inquirer, Mar. 9, 2004, at B7.

29. *In re Canvass*, 577 Pa. 231, 843 A.2d 1223, 1225 & n.1.