

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM FRENCH, ET. AL.

No. 3:23-cv-538-MEM

Plaintiffs

v.

LUZERNE COUNTY, ET. AL.

Defendants

**PLAINTIFFS' RESPONSE TO DEFENDANTS' CONCISE STATEMENT OF UN-
DISPUTED MATERIAL FACTS**

Under Local Rule 56.1, plaintiffs submit this response to defendants' concise statement of undisputed material facts (ECF No. 48).

1. Disputed. First, plaintiffs dispute this averment because it is not a fact but rather a legal conclusion. Second, under Fed. R. Civ. P. 56(c)(2), plaintiffs object that this fact is not supported by admissible evidence because the fact is irrelevant. Evidence is relevant when it is a "fact of consequence in determining the action." Fed. R. Evid. 401(b). Third, for purposes of summary judgment, material facts are those facts that are required to be shown under the substantive law of the case, *Boyle v. Cnty. of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998). The population of Luzerne County and its nature as a Home Rule County are not required to be shown under the substantive law of the case. Fourth, under LR 56.1 "statements of material facts in support of, or in opposition to, a motion shall include references to

the parts of the record that support the statements. The citation provided by defendants is not to the record but to a webpage.

2. Disputed. See previous response.

3. Not disputed in part, disputed in part. It is not disputed that 11 individuals serve on the County Council. It is disputed that the cited portion of the record supports the allegation that Council “appoint[s] a County Manager who is tasked with overseeing day-to-day administration of the County’s governmental operations and supervising personnel.” Moreover, the “fact” is not material to the dispute because the substantive law in this case does not depend on this fact.

4. Disputed. See response to paragraph 1.

5. Disputed. See response to paragraph 1.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed. Additionally, the Board is a county Board of Elections under the Pennsylvania Election Code. The “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.**” 25 P.S. § 2641(a) (emphasis added). Under the Election Code, the Board, among other things, **shall** provide each polling location with adequate supplies and shall instruct and train election officers regarding their duties. 25 P.S. §§ 2642 (b) and (g).

10. Undisputed.

11. Undisputed.

12. Undisputed in part, disputed in part. Undisputed that the Board is consulted when the County hires a director of elections. Disputed remaining legal conclusion.

13. Undisputed.

14. Disputed. The Pennsylvania Election Code states “[t]here 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.” 25 P.S. § 2641 (emphasis added). The Pennsylvania Election Code further states that county boards of election “**shall exercise**, in the manner provided by this act, all powers granted to by this act.” 25 P.S. § 2642 (emphasis added). The Pennsylvania Election Code states yet further that county boards shall perform all the duties imposed upon them by this act, which shall include the following . . . (b) to select and equip polling places that meet the requirements of this act . . . (d) to hire their own employees, voting machine custodians, and machine inspectors . . . (g) to instruction election officers in their duties.” 25 P.S. § 2642 (b), (d), and (g).

15. Disputed. See answer to paragraph 14.

16. Disputed. See answer to paragraph 14.

17. Undisputed.

18. Undisputed.

19. Undisputed.

20. Disputed. Under Fed. R. Civ. P. 56(c)(2), plaintiffs object that this fact because it is not supported by admissible evidence. This fact relies on inadmissible hearsay evidence. “Hearsay statements that would be inadmissible at trial may not be considered for purposes of summary judgment.” *Smith v. City of Allentown*, 589 F.3d 684, 693 (3rd Cir. 2009). The statements made by the Department of State to Cook regarding high turnover are hearsay statements and are therefore not admissible at the time of trial.

21. Undisputed.

22. Undisputed.

23. Undisputed.

24. Undisputed.

25. Undisputed.

26. Undisputed.

27. Undisputed.

28. Undisputed.

29. Undisputed.

30. Undisputed.

31. Undisputed.

32. Undisputed. But in none of those meeting did Pecora discuss with Gilbert ordering ballot paper for the election. Pecora dep., ECF No. 51-2, at 35:6-9 (“Q. During those meeting in September to November 2022 time frame, did you discuss ordering ballot paper? A. No.)

33. Undisputed.

34. Undisputed that Buglio trained election day poll workers and judges of election only. However, defendants' election officials responsible for administering its elections including, Gilbert, Cook, and Pecora. Buglio dep. at 24:2-7. Moreover, when defendants hired Buglio he was a 21 year old college student at King's College. Buglio dep. at 10:2-5, 11:4-5. Buglio had only worked as a judge of election or poll worker in three elections. *Id.* at 17:2. Buglio had not experience in administering elections, did not take any coursework in college in the administration of elections, and had never studied Pennsylvania or federal election laws. *Id.* at 14:2-9; 26:18-23. Before November 2022, Buglio had never provided any election related training. *Id.* at 27:4-6.

35. Disputed. Buglio had worked as a poll worker and judge of election. He had only been eligible to vote for the previous 3 election cycles. *Id.*

36. Undisputed. But before November 2022, Buglio had never provided any election related training. *Id.* at 27:4-6. Moreover, Buglio also described the defendants training as "lackluster, "cookie-cutter, and leaving "a lot to be desired." *Id.* at 27:22-25, 29:6-7.

37. Disputed. Buglio's training did not include training related to what procedures should be followed if a polling location ran low or out of ballots. *Id.* at 31:2-10.

38. Disputed. Buglio's training did not include training related to what procedures should be followed if a polling location ran low or out of ballots. *Id.* at 31:2-10.

39. Undisputed. However, Buglio described that training as “lackluster,” “cookie cutter,” and leaving “a lot to be desired.” *Id.* at 27:22-25, 29:6-7.

40. Undisputed. But no part of polling procedure addresses what do to if a polling location runs low or out of paper. *Id.* at 31:2-10.

41. Disputed. During the November 2022 election, there were no specific and clear policies and procedures on how to administer election in the County. Gilbert dec., ECF No. 51-4 at ¶ 32. What defendants refer to as an “Election Guide” are notes on a steno pad of that Cook started taking in February 2022 that kept track of what was happening in the office. Cook dep. at 59:13-15, 64:2-11, 63:10-13 (“By and (sic) large, it was – I was writing down what he was having our team work on or having me work on so that we would have general knowledge.”) However, Cook had no experience or training in administering elections. *Id.* at 37:3-24. At some point those notes transitioned to a word document that Cook no longer has. *Id.* at 62:1-5; The only people that knew about this word document were Cook, Pecora, and Gilbert. *Id.* at 65:17-24. The County did not provide any training on whatever was contained in Cook’s word document. *Id.* at 66:7-13.

42. Undisputed.

43. Undisputed.

44. Undisputed.

45. Undisputed.

46. Undisputed.

47. Undisputed.

48. Undisputed.

49. Undisputed.

50. Undisputed.

51. Disputed. The County had no written policies and procedures for its SEAL Team to follow to fulfil these duties. Cook dep. at 94:1-6.

52. Disputed.

53. Undisputed.

54. Undisputed.

55. Undisputed.

56. Undisputed.

57. Undisputed.

58. Undisputed.

59. Undisputed.

60. Undisputed.

61. Undisputed.

62. Undisputed.

63. Undisputed. However, defendants never supplied the “rovers” with any training on what to do if a polling location ran out of paper. Cook dep. at 93:16-25, 94:1-10. Defendants also had no policy regarding how much extra paper each rover should receive. *Id.* at 117:1-4. The determination regarding how much extra ballot

paper each rover would receive was made by “Joanne” an administrative assistant.
Id. at 118:22-25.

64. Undisputed.

65. Undisputed. But see answer to paragraph 63.

66. Undisputed. But see answer to paragraph 63.

67. Undisputed.

68. Undisputed.

69. Undisputed.

70. Disputed. This fact relies on inadmissible hearsay evidence. “Hearsay statements that would be inadmissible at trial may not be considered for purposes of summary judgment.” *Smith v. City of Allentown*, 589 F.3d 684, 693 (3rd Cir. 2009).

71. Undisputed.

72. Undisputed.

73. Undisputed.

74. Disputed. This fact relies on inadmissible hearsay evidence. “Hearsay statements that would be inadmissible at trial may not be considered for purposes of summary judgment.” *Smith v. City of Allentown*, 589 F.3d 684, 693 (3rd Cir. 2009).

75. Undisputed.

76. Undisputed.

77. Undisputed.

78. Undisputed.

79. Undisputed.

80. Disputed. The documents identified do not state that French's polling location was the Freeland Event Center at 526 Fern Street, Freeland, PA. The document bates labeled 098 states French's was a registered voter with an address of 531 Center Street, Apt. 35, Freeland. French testified his polling location was the Freeland Ambulance Association, 417 Johnson Street, Freeland, PA 18224. French dep., ECF No. 51-7 at 22:9-24.

81. Disputed.

82. Disputed. upon arrival at his polling place, election officials and workers employed by the defendants told French he could not vote because the polling place did not have ballots on which he could cast a vote. Compl. at ¶ 10 and Williams dep. 81:24-25, 82:1-18. Election officials and poll workers employed by the defendants told French he was to come back later in the day to attempt to vote. Compl. at ¶ 36, 82:19-25, Williams dep., 83:1-4. As instructed, French returned to the same polling place at approximately 3:30 p.m. on election day. Compl. at ¶ 37; Williams dep. 83:6-12. But, again, election officials and workers told French he could not vote because there were still no ballots available. Compl. at ¶ 38; Williams dep. 83:13-23; French dep. at 43:5-15. Election officials and workers told the location will still waiting for ballots to be delivered and that there would be extended polling hours. *Id.* at 43:8-15. When French asked the official when the official believed he would be able to vote and the official responded, "I don't know." *Id.* at 45:8-15.

On the morning of November 8, 2022, Reese went to her polling place located at 248 State Route 4012, Shickshinny, Pennsylvania 18655 with her husband.

Compl., ECF No. 1 at ¶ 42, Williams dep., 84:1-11. Upon arrival, election officials and workers informed Reese that only her husband could vote because the polling location had only a limited number of ballots remaining and that Reese would have to return later in the day to cast her vote. At 4:00 p.m., Reese returned to vote. Compl., ECF No. 1 at ¶ 44, Williams dep., 85:1-12. When she returned, she was told there was still a waiting time. *Id.* But her husband's physical condition made him unable to wait in the line for a long period of time. *Id.* Reese again returned with her husband to cast her vote later in the day at approximately 6:30 p.m. Compl., ECF No. 1 at ¶ 45, Williams dep., 85:14-25.

Once again, however, Reese saw the length of the line was so long that she would not be able to wait with her husband for that long to vote. Reese dec., ECF No. 51-8 at ¶ 7. On November 8, 2022, at approximately 9:15 p.m., an election official employed by defendants called Reese and told her that ballots were finally available, and she could come to her polling place to vote. Compl., ECF No. 1 at ¶ 46, Williams dep., 86:3-15.

83. Undisputed.

84. Undisputed in part, undisputed in part. It is not disputed that the Luzerne County District Attorney issued a report. It is disputed that the report followed a "thorough" investigation. Moreover, the District Attorney's Report criticized the defendants' lack of training of its election officials. See ECF No. 49-5 at p. 23. The District Attorney stated that "lack of experience and training" caused the ballot paper shortage and resulting issues on Election Day in 2022. *Id.* The District Attorney also

noted that it warned of a lack of training a report prepared in 2021 that arose from an investigation into the 2021 primary election. *Id. see also*, Exhibit 2.

85. Undisputed. However, this fact is immaterial because whether the ballot shortage was caused by “intentional” conduct are not required to be shown under the substantive law of the case, *Boyle v. Cnty. of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998)

86. Disputed. Approximately 35-40 polling locations ran low or out of paper on election day in 2022. Cook dep. at 76:24-25, 77:1-7; Notes of Testimony, ECF No. 51-5 at 3:19-21 (“We’ve identified 35 polling locations that are being affected by the paper shortage.”) However, the precise number of locations is unknown because defendants did not retain any copies of records indicating the polling locations that ran out of or low on ballot paper. *See* Ans. to Pltf. Req. for Prod. No. 47 at Exhibit 1. Moreover, defendants testified before the Luzerne County Court of Common Pleas that voters could not vote at those locations that experienced paper shortages:

[GILBERT]: So about a half hour ago we got an update that the paper would be here in roughly four hours?

THE COURT: For that time frame no one is going to be able to vote?

[GILBERT]: At certain polling locations.

....

THE COURT: Because they’re essentially shut down for four hours.

[GILBERT]: Yes. And were not sure what other polling locations are going to run out of paper in the meantime. It might be more widespread.

....

THE COURT: These voters have been disenfranchised through not fault of their own.

[Counsel for Defendants]: Correct

Notes of Testimony, ECF No. 51-5 at 3:15-21, 7:8-13 (emphasis added).

The ballot-paper shortage was so widespread that the Court of Common Pleas extended polling hours county wide and not just at locations that the defendants could identify as being affected by the ballot shortage. *Id.* at p. 9.

- 87. Disputed. See answer to paragraph 86.
- 88. Disputed. See answer to paragraph 82.
- 89. Disputed. See answers to paragraphs 82 and 86.
- 90. Undisputed.

Respectfully submitted,

Dated: April 29, 2024

/s/ Walter S. Zimolong
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