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

WILLIAM FRENCH and MELYNDA ANNE REESE,	:	
	:	**Civil No.: 3:23-cv-00538**
Plaintiffs,	:	
	:	**(Judge Mannion)**
v.	:	
COUNTY OF LUZERNE, LUZERNE COUNTY BOARD OF ELECTIONS and REGISTRATION,	:	
Defendants.	:	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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DATED: May 20, 2024

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Defendants Luzerne County ("County") and Luzerne County Board of Elections ("Board") (collectively "Defendants"), by and through their counsel, hereby file their brief in opposition to Plaintiffs' motion for summary judgment (Doc. 50) and brief in support (Doc. 52).

I. COUNTER STATEMENT OF CASE AND PROCEDURAL HISTORY

On March 28, 2023, Plaintiffs filed a civil rights action against Defendants as well as the Luzerne County Bureau of Elections alleging multiple violations of the First and Fourteenth Amendments of the United States Constitution, pursuant to 42 U.S.C. § 1983. (See Doc. 1, generally).

In their Complaint, Plaintiffs assert that their right to vote was infringed and denied during the general election held on November 8, 2022. (See Doc. 1 at Counts I-IV). This Court dismissed Count IV, partially granting Defendants' 12(b)(6) motion to dismiss the entire complaint, on December 4, 2023. (Docs. 18, 37-38). Plaintiffs did not file an amended complaint. (See Docket, generally). On December 19, 2023, Defendants filed an Answer to the Complaint. (Doc. 39). Discovery continued throughout 2023 and concluded on February 1, 2024. Defendants filed a motion for summary judgment, a statement of material undisputed facts, and an appendix of exhibits on April 15, 2024. (Docs. 47-49). Plaintiffs filed their own motion for summary judgment on the same day. (See Doc. 50).

In November of 2022, there were 186 polling precincts in 143 different locations in Luzerne County. (Doc. 48 at ¶ 43). A few weeks prior to Election Day, the County's acting Deputy Director of Elections, Emily Cook ("Ms. Cook"), notified the acting Director of Elections, Beth Gilbert ("Ms. Gilbert"), that the County was running low on 80-lb. paper—recommended for use in the electronic ballot marking devices—and would need to order more for the next election cycle. (Id. at ¶ 57). Ms. Cook also stated that she "thought" there would be enough paper to conduct the November 8th general election. Ms. Gilbert replied, "I will order." (Id. at ¶ 58). However, Ms. Gilbert did not follow through and the County did not order additional 80-lb. paper stock until November 8, 2022. (Id. at ¶ 59).

On November 8, 2022, Luzerne County experienced 80-lb. ballot paper shortages in multiple polling precincts in Luzerne County although the vast majority of precincts were not impacted. (Id. at ¶¶ 68-69). Out of 186 polling precincts, sixteen (16) polling precincts ran out of paper at some point on November 8, 2022, according to an investigation conducted by the Luzerne County District Attorney's Office. (Id. at ¶ 86). Initially, polling precincts were resupplied with the remaining 80-lb. paper stock on hand in the County's storage facility as well as by "Rovers" who are designated Election Day workers assigned the specific task of resupplying polling precincts; however, this did not curtail the paper shortages entirely. (Id. at ¶¶ 63-66; 71). The County also procured additional orders of 80-lb. paper stock that

were delivered to affected polling precincts throughout the afternoon and early evening of November 8, 2022 by local law enforcement. (Id. at ¶¶ 72, 75-76, & 87). Also, the County petitioned the Luzerne County Court of Common Pleas to extend voting hours until 10:00 p.m.—a request which was granted. (Id. at ¶ 79).

The County had a training program in place for poll workers and senior management within the Bureau of Elections prepared and utilized an election administration manual—detailing election procedures—prior to November 8, 2022. (Id. at ¶¶ 33-39; 40-41). Furthermore, County officials met almost daily to prepare for the November 8, 2022 general election. (Id. at ¶ 32).

The ballot paper shortages that occurred on November 8, 2022 had never occurred before or since. (Id. at ¶ 90); (also Doc. 49, Exhibit E, p. 15 of 24). The ballot paper shortages were not caused by intentional conduct by County officials. (Id. at ¶ 85).

II. COUNTER STATEMENT OF QUESTION PRESENTED

1. Should Plaintiffs' motion for summary judgment be denied where Plaintiffs have failed to demonstrate the lack of genuine disputes of material fact regarding Defendants alleged *Monell* liability, pursuant to 42 U.S.C. § 1983, and where Defendants are entitled to summary judgment in their favor?

   Suggested Answer: Yes.

III. ARGUMENT

A. Summary Judgment Standard.

Motions for summary judgment are governed by Federal Rule of Civil Procedure 56. See Fed. R. Civ. P. 56(a). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Klein v. Weidner, 729 F.3d 280, 283 (3d Cir. 2013). A fact is material if it "might affect the outcome of the suit under the governing law" and a dispute is "genuine only if there is a sufficient evidentiary basis for a reasonable factfinder to return a verdict for the nonmoving party. Figueroa v. Moyer, 2023 U.S. Dist. LEXIS 190844 *8 (M.D. Pa. 2023).

To defeat a motion for summary judgment, the nonmovant must cite admissible evidence only. Id. When the nonmoving party "has the burden of proof, the moving party is not required to produce evidence showing the absence of a genuine issue of material fact." Gallashaw v. City of Phila., 774 F. Supp. 2d 713, 716 (E.D. Pa. 2011).

B. Plaintiffs' Substantive Due Process Rights Were Not Violated.

In their brief in support of their motion for summary judgment, Plaintiffs claim that their substantive rights to due process have been violated by Defendants.

(Doc. 52, pp. 11-14). However, they never alleged a violation of substantive due process in their complaint. (Doc. 1.); also (Doc. 37, pp. 17-18) ("Since Plaintiffs only plead a claim for procedural not substantive due process, the court will grant Defendants' motion to dismiss Count IV.") (emphasis added). While referencing substantive due process, Plaintiffs did not assert an independent cause of action instead framing Counts I and II under the First Amendment, as incorporated and applied to the states. (Docs. 1 and 37).

As this Court correctly noted, Plaintiffs merely alleged that they were deprived of their rights to procedural due process. (Doc. 37, p. 16) ("… ultimately Plaintiffs do acknowledge that they are only making a procedural due process claim.")

This Court partially granted Defendants' 12(b)(6) motion and dismissed Plaintiffs' procedural due process claims without prejudice. (Docs. 37 and 38). In the wake of that ruling, Plaintiffs elected not to file an amended complaint. (Docket, generally.) Likewise, Plaintiffs never filed a motion for reconsideration of this Court's Order, and memorandum of law in support, dismissing Count IV and characterizing the complaint as omitting any substantive due process claim. (Id.)

Discovery is now closed. Plaintiffs cannot advance a substantive due process claim for the first time in their brief in support of their motion for summary

judgment. Accordingly, this Court should dismiss Plaintiffs' motion for summary judgment on the basis of substantive due process.

Even if this Court were to construe Plaintiffs' complaint as embedding viable substantive due process claims in Counts I and II of the complaint, Defendants nevertheless would be entitled to summary judgment in their favor.

The Due Process Clause does not "guarantee against errors in the administration of the election." Acosta v. Democratic City Comm., 288 F. Supp. 3d 597, 644 (E.D. Pa. 2018) (citing Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970)). Likewise, elections should be free of "purposeful tampering" but not "free of error." Id. In Hennings v. Grafton, 523 F.2d 861, 863 (7th Cir. 1975), the court held that the due process clause is not implicated where "[v]oters alleged that mechanical difficulties with voting machines occurred, votes were not recorded properly, and election officials failed to provide substitute paper ballots." Acosta,436 F.2d at 90 (emphasis added). The Hennings court elaborated that "irregularities caused by mechanical or human errors and lacking in invidious or fraudulent intent" do not rise to the level of constitutional violations. Id. at 91; also Hennings, 523 F.2d at 863-64 (cataloguing election cases that are cognizable under § 1983 including dilution of votes, purposeful or systematic discrimination against voters of a certain class or political affiliation, and election frauds).

This is a clear case of human error, which was not the byproduct of "invidious or fraudulent intent" and therefore, does not give rise to constitutional injury cognizable under § 1983. In October of 2022, election officials incorrectly assessed that they had enough ballot paper to administer the November 2022 general election. Even so, the situation could have been averted if the acting Director of Elections, Ms. Gilbert, followed through and ordered 80-lb. ballot paper as the acting Deputy Director of Elections requested. Once the problem was discovered, the County implemented remedial measures including procuring and delivering 80-lb. paper to affected polling precincts well-before the polls closed and ensuring that voting hours were extended.

Under *Monell*, the County cannot be held liable for the human error of a lower-level employee. Contrary to Plaintiffs' allegations that there was an "affirmative decision" not to order ballots, the record developed in this case shows that the acting Director of Elections negligently failed to order additional paper ballots for the upcoming election.[1]

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[1] Ms. Gilbert's declaration, in support of Plaintiffs' motion for summary judgment, does not state that she purposefully failed to order any ballot paper. (Doc. 51-4) Indeed, it does not address the text communication with her subordinate, Ms. Cook, at all. (Id.)

C. Defendants Did Not Concede That Voters Were Disenfranchised On November 8th 2022 When Petitioning The Luzerne County Court Of Common Pleas To Extend Voting Hours.

Plaintiffs argue that the statements of an assistant County solicitor during a hearing before the Honorable Lesa J. Gelb of the Luzerne County Court of Common Pleas ("Judge Gelb") on November 8, 2022 constitutes an admission that voters were disenfranchised because of the ballot paper shortages. (Doc. 52, p. 14 of 35 n.1).

The County petitioned to extend voting hours because it had already procured additional supplies of ballot paper—which were going to be delivered later that day—and the County wanted extra time to accommodate voters and deliver additional ballot paper to affected polling precincts, which at the time of the hearing was estimated to be less than 40 out of 186 voting precincts. (See Hearing Transcript, Doc. 49-8, p. 3 of 8, ¶¶ 8-10; p. 4 of 8, ¶¶ 8-10). Furthermore, the County informed Judge Gelb that the Bureau of Elections had received anecdotal reports that people left polling locations because they had to go to work or were unable to stay. (Id. at p. 3 of 8, ¶¶ 4-6).

While discussing how long the Court should extend voting hours, Judge Gelb and the county solicitor had the following exchange:

> Court: We want to protect the integrity of the election as best as possible.

....

County Solicitor: Your Honor, we put the two-hour limit in there (referring to the petition for relief) with the understanding that the Court or the [political] parties may have a different—an hour, three hours, two hours, whatever was decided.

Court: These voters have been disenfranchised through no fault of their own.

County Solicitor: Correct.

However, as the transcript bears out, no direct evidence was admitted from any registered voter in Luzerne County, let alone evidence regarding the individual Plaintiffs, that would support a judicial finding that voters were disenfranchised. Furthermore, the only issue before Judge Gelb was the County's petition to extend voting hours. Moreover, both the County—especially the solicitor— and the Court were responding in real-time based upon the best information available.

On the contrary, an extensive investigation conducted by the Luzerne County District Attorney's Office concluded that no voter disenfranchisement occurred. (Doc. 49-5, pp. 14-15) ("More specifically, simply because something goes awry in the voting process, does not equate to voter disenfranchisement or suppression.") Likewise, the D.A.'s investigation confirmed that many precincts reported that they ran out of paper when they were merely running low on ballot paper and kept accepting votes. (Id. at p. 10 of 24, n. 8).

The County solicitor's statement during the November 8th hearing is not an admission that any voters—let alone Plaintiffs—were disenfranchised and summary judgment should not be premised upon it.

D. Plaintiffs Have Not Brought A Class Action On Behalf Of Similarly Situated Voters And Their Prayer For Declaratory And Injunctive Relief Should Be Narrowly Tailored To Them Alone.

In their brief in support of their motion for summary judgment, Plaintiffs contend that they "bring this action to vindicate their constitutional rights and to obtain equitable relief to assure that their rights (and the voting rights of others) are not violated again." (Doc. 52, p. 7 of 35) (emphasis added). However, Plaintiffs did not seek to certify this case as a class action, which must be done as soon as practicable after the civil action is initiated. Fed. R. Civ. P. 23(c)(1)(A). Accordingly, even if this Court were to deny Defendants' motion for summary judgment and then subsequently find at trial that Defendants violated Plaintiffs' constitutional rights, then both declaratory and injunctive relief should be narrowly tailored to vindicate the rights of the named parties only—not an undefined, unidentified, and uncertified class. Contra Ury v. Santee, 303 F. Supp. 119, 125 (N.D. Ill. 1969) (certified class action against village in Illinois asserting that poll consolidation plan infringed upon the class's First Amendment right to vote). Indeed, nothing in the record proves widespread voter disenfranchisement occurred. (Doc. 49-5, p. 11 of 24) ("Throughout the course of the investigation, detectives

learned that sixteen (16) polling places ran out of ballot paper, but switched to either emergency or provisional ballots such that voting was not fully interrupted.") Unlike Ury, Plaintiffs have not included any affidavits from other voters who attempted to vote and could not do so. Ury, 303 F. Supp. at 125 (397 voters submitted affidavits that they could not vote). Moreover, Plaintiffs can point to no evidence in this record that ballot paper shortages were a long-running and historic problem that was ignored.

Plaintiffs should not be entitled to declaratory and/or injunctive relief beyond the individual claims that they have brought forth since they elected not to attempt to certify this case as a class action. Santiago v. Philadelphia, 72 F.R.D. 619, 626 (E.D. of Pa. 1976) (granting class certification to plaintiffs seeking injunctive and declaratory relief to terminate policies and practices at a Philadelphia juvenile detention center); also Koehler v. USAA Cas. Ins. Co., 2019 U.S. Dist. LEXIS 158154, *18-19 (E.D. Pa. 2019).

In this case, Plaintiffs have not even attempted to certify this case as a class action, but yet they seek summary judgment to protect and vindicate the rights of other unnamed voters. Their failure to do so also militates in favor of this Court granting Defendants' summary judgment in their favor. (See Doc. 54, pp. 8-10).

It "is important for federal courts to be exquisitely sensitive to interfering in state and local elections because, as the Supreme Court has noted, states have the

power to regulate the elections of their own officials." Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 915 (E.D. Va. 2018). Federal court intervention in cases of "accidental mistakes on the part of election officials in administering an election…would effectively transform any inadvertent error in the administration of state and local elections into a federal equal protection violation." Id. at 919. Federal courts are not authorized to become "state election monitors." Gamza v. Aguirre, 619 F.2d 449, 453-54 (5th Cir. 1980).

The "constitutional right established in Reynolds v. Sims, however, is not absolute and is properly limited by respect for the political and federal framework established by the Constitution." Id. at 453. Federal courts should decline to intervene and grant injunctive and/or declaratory relief when "episodic events" or "isolated events that adversely affect individuals" occur during the administration of an election because such instances are "not presumed to be a violation of the equal protection clause." Id.

The paper shortage should never have occurred and it was avoidable; however, it remains an "isolated" and "episodic event" and Plaintiffs are not entitled to constitutional relief merely because errors occurred.

E. The Director Of Elections Is Not A Policymaker For Purposes Of *Monell* Liability.

An "act by a municipal official with policymaking authority is an act of the municipality itself." Figueroa, 2023 U.S. Dist. LEXIS at **12-13 (internal citation omitted). However, not all municipal officials possess "policymaking authority." Id. A policymaking official is "one who is responsible for establishing final policy with respect to the subject matter in question." Id.; also Santiago v. Warminster Twp., 629 F.3d 121, 135 n.11 (3d Cir. 2010) (holding that township police chief is not an official policymaker over the police department). An official "has policymaking authority…when (1) as a matter of state law, the official is responsible for making policy in the particular area of county business in question; and (2) the official's authority to make policy in that area is final and unreviewable." Dennis v. Dejong, 953 F. Supp. 2d 568, 590 (E.D. Pa. 2013) (emphasis added).

While the Director of Elections is tasked with day-to-day administration of elections in Luzerne County, Plaintiffs err by construing the Director of Elections as a policymaker, under *Monell*, pursuant to their allegations that the County failed to hire or train the Director of Elections and other subordinates. However, while the Director of Elections was the municipal official with final authority to procure ballot paper and historically had done so in Luzerne County (See Doc. 49-2, pp. 6-7 of 22), she did not have "final and unreviewable" policymaking authority regarding hiring

and training decisions. (See Id. at p. 11 of 22) (detailing that "day-to-day operations of the Luzerne County Election Bureau and administration of elections—including but not limited to supervision of employees…falls under the purview of the Executive Branch of the County government…" which is led by the County Manager.); (also Doc. 49-1, pp. 25-26 of 70) (detailing the powers and duties of the County Manager pursuant to the Home Rule Charter).

To defeat a summary judgment motion, Plaintiffs must point to some admissible evidence in the record beyond the mere allegations and conclusions in the complaint. This Court should rightly reject the self-serving affidavit submitted by Ms. Gilbert, an ex-employee of the County, in support of Plaintiffs' motion for summary judgment because "conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment." Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 161 (3d Cir. 2009); also In re CitX Corp., 448 F.3d 672, 680 (3d Cir. 2006) ("Because they are not subject to cross-examination, affidavits are scrutinized carefully.")

It is self-evident that the Director of Elections cannot be faulted for hiring herself or for failing to train herself or her staff since she did not possess "final and unreviewable" authority in the area of hiring and training within the county government. (See Doc. 51-4, p. 2 of 7, ¶¶ 7, 12, & 30-31). The County Manager oversees the entire executive branch and nearly all County employees with few

exceptions. Accordingly, the County Manager's Office has "final and unreviewable" authority regarding hiring and training. Plaintiffs did not depose former County Manager Randy Robertson during discovery and cannot point to any uncontroverted evidence in the record that County policymakers failed to hire qualified personnel or conduct training of election workers that would warrant summary judgment in their favor.

F. Plaintiffs Have Failed To Demonstrate *Monell* Liability.

i. Plaintiffs' First Amendment Claims.

Plaintiffs allege that they were disenfranchised by Defendants because they failed to hire, train, and/or supervise Bureau of Elections personnel as well as substantially burdened their ability to vote on November 8th due to maladministration of the election by not procuring a sufficient amount of ballot paper prior to Election Day. However, negligence and even maladministration are not cognizable under § 1983. Hennings, 523 F.3d at 865.

First, "local governments are responsible only for their own illegal acts." Connick v. Thompson, 563 U.S. 51, 131 S.Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011)(internal citation omitted). Governments cannot be held "vicariously liable under § 1983 for their employees' actions." Id. Instead, a local government may only be liable if "action pursuant to official municipal policy" deprived an individual of

a constitutional right. Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

The Supreme Court "has recognized four kinds of municipal policies—(1) formally approved rules, (2) unofficial widespread customs, (3) actions of municipal policymakers, and (4) deliberate indifference by the municipality." Figueroa, 2023 U.S. Dist. LEXIS at *12. In their brief, Plaintiffs concede that Defendants did not have a formally approved rule or an unofficial widespread custom not to order paper for elections. (Doc. 52). Instead, they frequently allege that the "affirmative actions"—or rather inactions—of municipal policymakers amounted to deliberate indifference and deprived Plaintiffs of their constitutional right to vote. (Id.).

Municipal actors are not liable, pursuant to § 1983, for single-incident occurrences caused "by a lower-level employee acting under color of law" because such evidence is insufficient to establish either an official policy or custom of the municipality itself. Fletcher v. O'Donnell, 867 F.2d 791, 793 (3d Cir. 1989). Here, Ms. Cook texted Ms. Gilbert that the County's ballot paper supply was running low, which Ms. Gilbert acknowledged and replied that she would order it. Ms. Gilbert's failure to do so—a single act—is not imputed to the County, under *Monell*, as an official policy, custom, or practice of the County itself. Oklahoma City v. Tuttle, 471 U.S. 808, 824, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

In rare circumstances, a plaintiff may assert "single incident" liability but "faces a high burden to show that the suffered violation was a highly predictable consequence of a situation that policy makers know to a moral certainty that is likely to occur." Rossman v. Primecare Med. Inc., 2024 U.S. Dist. LEXIS 5585 *35 (M.D. Pa. 2024). Furthermore, "liability in single-incident cases depends on the likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights." Id. at *35-36.

The ballot paper shortage was a fluke occurrence and not an intentional act. The shortages experienced on November 8, 2022 had never happened before—or since—in Luzerne County. Contra League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 478 (6th Cir. 2008) (alleging that the entire state of Ohio operated a constitutionally defective electoral system for more than 30 years). Moreover, an alleged violation of the Pennsylvania Election Code is insufficient to prove a constitutional violation. Hennings, 523 F.2d at 864. Likewise, in "Anderson, Burdick, and their progeny, courts have considered the constitutionality of state statutes, regulations, or policies that burden the right to vote, not accidental mistakes on the part of election officials in administering an election." Lecky, 285 F. Supp. at 918.

An "institutional defendant may…be liable for constitutional violations resulting from inadequate training or supervision of its employees if the failure to

train amounts to a custom of the municipality." Grayson v. Dewitt, 2016 U.S. Dist. LEXIS 138189 *11-12 (M.D. Pa. 2016). Moreover, "failure-to-train claims…must meet precise and demanding legal criteria." Colburn v. Upper Darby Township, 946 F.2d 1017, 1028 (3d Cir. 1991) (emphasis added). § 1983 liability for failure-to-train claims are "especially difficult," Grayson, *supra*, and a plaintiff must establish that "the failure to train amounts to deliberate indifference to the rights of persons with whom [a municipal employee] come[s] into contact." Reitz v. County of Bucks, 125 F.3d 139, 145 (3d Cir. 1997).

Deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action," such that "policymakers are on actual or constructive notice that a particular omission in their training program causes…employees to violate citizens' constitutional rights." Tuttle, 471 U.S. at 822-23. Indeed, "not all failures or lapses in training will support liability under § 1983." Woloszyn v. County of Lawrence, 396 F.3d 314, 325 (3d Cir. 2005) Furthermore, a plaintiff must demonstrate that "the municipality had notice of that deficiency and chose to ignore it." Figueroa, 2023 U.S. Dist. at *19.

Here, there were no prior incidents of ballot paper shortages such that Defendants had "knowledge of a prior pattern" or "a history of employees mishandling" such that it needed to be corrected through additional training. In all respects, the events of November 8th 2022 were avoidable; however, the ballot paper

shortage did not result from a policy or custom of Defendants or their failure to train their employees. Indeed, the fateful text exchange between Ms. Cook and Ms. Gilbert in October of 2022 demonstrates that County election officials had sufficient enough training to identify their supply needs, determine that more paper would need to be ordered, and alert the Director of Elections, with procurement authority, to buy more. This does not prove the lack of a training program.

Indeed, prior to November 8, 2022, the County commissioned a judge of elections to revamp its existing training program for poll workers and each poll worker received a copy of the County's polling place procedures manual. (See Doc. 48, ¶¶ 33-40. Furthermore, the County developed an internal election guide for senior level Bureau of Elections employees to work from as they prepared for an election. (Id. at ¶¶ 40-41). Moreover, many Bureau of Elections employees worked in the bureau for decades and Ms. Cook administered multiple elections before November of 2022. Accordingly, the idea that the County administered elections with untrained and inexperienced workers is a distortion of the record.[2]

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[2] The County prioritized hiring a permanent Director of Elections in the summer through fall of 2022 after Ms. Gilbert's predecessor resigned with less than five months before the general election. The County offered the position to an out-of-state candidate who declined the offer in late September. The County then appointed Ms. Gilbert and Ms. Cook in an acting capacity until after the election. Regardless, the County had every expectation that the Bureau was prepared to administer the upcoming election. (Doc. 48, ¶¶ 22-26).

ii. Plaintiffs' Equal Protection Claim.

In Count III, Plaintiffs argue that their ability to vote was dependent on where they lived compared to other registered voters and therefore, they were denied equal protection of the law.

However, Plaintiffs were not the victim of arbitrary and capricious governmental action as "a result of specific election procedures." Democratic Cong. Campaign Comm. v. Kosinski, 614 F. Supp. 3d 20, 54 (S.D.N.Y. 2022) (holding that the difference in treatment of two voters is not an equal protection violation pursuant to Bush v. Gore, 531 U.S. 98 (2000) if not the result of specific election procedures); also Gamza, 619 F.2d at 454. At best, Plaintiffs may have encountered voting irregularities that occurred in less than 20 of 186 voting precincts in Luzerne County on November 8th; however, this cannot be construed as disparate treatment resulting from "specific election procedures."[3]

Plaintiffs rely upon Ury v. Santee, 303 F.3d Supp. 119 (N.D. Ill. 1969), to support their equal protection claim. (Doc. 52, pp. 14-15). However, the events of November 8, 2022 in Luzerne County were materially different than the actions of government officials in the Ury case. In Ury, voting delays at the polls were caused

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[3] Plaintiffs rely upon Dunn v. Blumstein, 405 U.S. 330, 336 (1972) to bolster their equal protection claim; however, in Dunn, the U.S. Supreme Court struck down a Tennessee statute establishing "durational residency requirements" before an individual could vote within the state. Dunn has nothing to do with election administration irregularities, which are at issue here.

by the deliberate actions of the village board to consolidate voting precincts from 32 to 6 by formal vote and "without discussion" or "consideration…given…to the effect of consolidation of 32 precincts into six" would have during a competitive election. Id. at 123. Also, the village board did not consider "the number of voters assigned to the respective precincts." Id. Luzerne County's mistaken belief that they had sufficient ballot paper to conduct the general election and the acting Director of Elections' failure to order more ballot paper between mid-October and Election Day is a far cry from the purposeful consolidation actions implemented in Ury. Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 917-18 (E.D. Va. 2018) (distinguishing Ury and holding that government mistakes or simple negligence are not cognizable under the due process clause).

In Hennings (a 7th Circuit case decided after Ury), plaintiffs argued that "mechanical and other operating difficulties" occurred "at many of the 50 [voting] precincts" in Coles County, Illinois and that election officials "failed to provide paper ballots as a substitute, which caused the occurrence of long waiting lines." Hennings, 523 F. 2d at 863. Furthermore, plaintiffs alleged that judges of elections allowed voters to vote twice when certain machines failed to properly record votes. Id. Nevertheless, the 7th Circuit affirmed the district court judgment in favor of the county holding that there was no cognizable claim under § 1983. Id. at 864. The Hennings court noted that "allowing voters to vote a second time in precincts where

the voting devices broke down without establishing procedures to assure that their previous votes had not in fact been registered…was of course not an adequate discharge by election officials of their responsibilities, but it did not rise to the level of a constitutional violation." Id.

Similarly, the ballot paper shortage on November 8, 2022 was not an adequate discharge of County officials' duties to ensure, as nearly as possible, the seamless administration of the election; however, it does not rise to a constitutional violation.

IV. CONCLUSION

For any or all of the foregoing reasons, Plaintiffs' motion for summary judgment should be denied in its entirety.

Respectfully submitted,

s/ Drew P. McLaughlin
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DATED: May 20, 2024

WORD COUNT CERTIFICATION

In accordance with Local Rule 7.8, undersigned counsel for Defendants Luzerne County and Luzerne County Board of Elections and Registration hereby certify that the foregoing brief in support contains less than 5,000 words. Specifically, relying upon the word count feature of the word processing system, the foregoing brief contains 4,984 words.

/s/ Drew P. McLaughlin
Drew P. McLaughlin, I.D. No. 324430

DATED: May 20, 2024

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that requires filing confidential information and documents differently than non-confidential information and documents.

s/ Drew P. McLaughlin
Drew P. McLaughlin, I.D. No. 324430

DATED: May 20, 2024

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

WILLIAM FRENCH and MELYNDA ANNE REESE,	:	
	:	**Civil No.: 3:23-cv-00538**
Plaintiffs,	:	
	:	**(Judge Mannion)**
v.	:	
	:	
COUNTY OF LUZERNE, LUZERNE COUNTY BOARD OF ELECTIONS and REGISTRATION,	:	
	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Drew P. McLaughlin, hereby certify that I have caused to be served on this day, a true and correct copy of Defendants' brief in opposition of Plaintiffs' motion for summary judgment upon all counsel of record via ECF filing as follows:

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DATED: May 20, 2024