

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Petition of Kimberly Nothstein :
to Strike the Nomination Petition :
of William G. Schwab for the :
Nomination of the Republican Party :
for Office of Supervisor for :
East Penn Township, :
Carbon County, Pennsylvania : No. 536 C.D. 2015

Appeal of: Kimberly Nothstein :

In Re: Petition of Jacob Nothstein :
to Strike the Nomination Petition :
of Guy Barry for the Nomination :
of the Democratic Party For :
Office of Supervisor for East :
Penn Township, Carbon County :
Pennsylvania : No. 537 C.D. 2015

Appeal of: Jacob Nothstein :

In Re: Petition of Jacob Nothstein to :
Strike the Nomination Petition of :
Randy Pfeiffer for the Nomination :
of the Democratic Party for Office :
of Supervisor for East Penn Township, :
Carbon County Pennsylvania : No. 538 C.D. 2015

Appeal of: Jacob Nothstein :

In Re: Petition of Kimberly Nothstein :
to Strike the Nomination Petition of :
Alice Berger for the Nomination :
of the Republican Party :
for Office of Supervisor for East :
Penn Township, Carbon County :
Pennsylvania : No. 539 C.D. 2015
Submitted: April 15, 2015

Appeal of: Kimberly Nothstein :

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTEDMEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: April 22, 2015

Before this Court are the consolidated appeals of four orders of the Court of Common Pleas of Carbon County (trial court) that refused to strike the nomination petitions of Alice Berger and William G. Schwab, who seek the Republican Party nomination for Office of Supervisor of East Penn Township, Carbon County, or the petitions of Guy Barry and Randy Pfeiffer, who seek the Democratic Party nomination for the same office.¹ Kimberly Nothstein petitioned to set aside the above-identified Republican candidates, and Jacob Nothstein, Kimberly's husband, petitioned to set aside the nomination petitions of the above-identified Democratic candidates. Jacob Nothstein is one of two incumbent Supervisors whose seats are sought by the candidates. Jacob and Kimberly Nothstein (collectively, Objectors) assert that the respective candidates did not timely file a statement of financial interests with the Township. The trial court held that the candidates' statements of financial interests were timely after finding, as fact, that the statements were placed into the mail before the filing deadline. Objectors contend that the documentary evidence does not support a finding of timeliness and request this Court to reverse the trial court.

Berger, Schwab, Barry and Pfeiffer (collectively, Candidates) seek to appear on the ballot for the May 19, 2015, primary election for Supervisor of East Penn Township. They were required, *inter alia*, to file a statement of financial

¹ The trial court's order also involved a fifth candidate, David Bryfogle, whose nomination petition was stricken. Bryfogle did not appeal.

interests by March 10, 2015. Failure to file a timely statement of financial interests with a local government is a fatal defect and will require a candidate to be removed from the ballot. *In re Paulmier*, 937 A.2d 364, 371 (Pa. 2007).

On March 12, 2015, Objectors submitted a request, pursuant to the Right-to-Know-Law,² for copies of all documents filed with the Township by candidates running for Township Supervisor in the 2015 primary election. From the Township's response, Objectors learned that the statements of financial interests of Berger and Schwab were received by the Township by mail on March 13, 2015. The Township had no statements of financial interests for Barry and Pfeiffer. Objectors filed petitions to strike Candidates' names from the ballot.³

At the hearing on Objectors' petitions to strike, Deanna Cunfer, the Township's secretary and Right-to-Know Law officer, testified that she stamped the statements of financial interests of Republican candidates Schwab and Berger as received on March 13, 2015. She explained that the two statements were delivered in one envelope, and the mailing envelope contained two U.S. postmarks, both dated March 11, 2015.⁴ As to the Democratic candidates, Barry and Pfeiffer, Cunfer testified that their statements of financial interests were hand-delivered by Barry on March 19, 2015. Cunfer did not receive anything by mail from either Democratic candidate. Cunfer also testified that Township mail is delivered to an unlocked mailbox at the end of the driveway leading to the Township building and that any Township officer may retrieve the mail. Once retrieved, all mail is to be

² Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

³ After they were served with Objectors' petitions to strike, Barry and Pfeiffer hand-delivered statements of financial interests to the Township on March 19, 2015.

⁴ She did not explain why one envelope would have two postmarks.

placed on her desk, but it is not secured. Again, any Township employee can remove mail from her desk.

The Republican candidates presented the testimony of Amanda Kincaid, a paralegal in Schwab's law office. Kincaid testified that on March 10, 2015, she placed a statement of financial interests for Schwab in one envelope and a statement of financial interest for Berger in a second envelope. Kincaid then put both of these envelopes inside a third envelope, along with a cover letter. She addressed the envelope to Deanna Cunfer, Secretary, East Penn Township, 167 Municipal Road, Lehighton, Pa., 18735. She weighed the envelope and placed the required postage on it. At the end of her work day, at approximately 4:10 p.m., she took all of the law firm's mail, which included the envelope containing the financial statements and another envelope containing unrelated correspondence to the Township, to the post office. Kincaid handed the stack to a postal employee. Kincaid reported that none of the law firm's correspondence mailed that day was returned to the firm. Kincaid also explained that it is standard procedure in the law office for documents to bear the date they are mailed, regardless of when they are prepared. Thus, if a document was to be mailed on March 10th, but did not bear that date, Kincaid explained that "we would have pulled the document up onto our electronic system on my computer and would have redated it to have the date of the document correspond to the date of mailing." Notes of Testimony, March 20, 2015 at 43 (N.T. ____).

When asked on cross-examination if she remembered "taking this specific document on March 10th," Kincaid responded that "we take stacks of mail every day." N.T. 45. Because March 10, 2015, was the date on the cover letter for

the statements of financial interests, Kincaid was certain that March 10, 2015, was the date on which she mailed the envelope containing the financial statements.

Schwab testified that he dictated the cover letter on March 9, 2015. However, Berger did not get her statement of financial interests to him until the evening of March 9, 2015. Accordingly, the cover letter was redone the next day with a March 10, 2015, date. Schwab also testified that he directed Kincaid to mail the financial statements on March 10, 2015. He acknowledged that the postmark on an envelope he obtained from the Township, pursuant to a subpoena, was March 11, 2015. However, the Township produced only one envelope, and he did not know if that particular envelope was the one containing his financial statement or the envelope containing correspondence on other Township business that Kincaid also mailed on March 10, 2015.

Democratic candidate Guy Barry testified that on the morning of March 9, 2015, he and Randy Pfeiffer submitted their nomination petitions to the Bureau of Elections. Then, they went to Barry's house and made copies of their statements of financial interests. Barry placed the statements in an envelope addressed to the Township and mailed the envelope. He did not personally deliver the envelope, explaining that "[i]t was getting close to dinner time by that time. I didn't know if the office would be open and I had service calls." N.T. 69. Pfeiffer also testified; he confirmed Barry's account that their financial statements were mailed on March 9, 2015.

The trial court denied Objectors' petitions to strike. Relying upon *In re Nomination Petition of McMonagle*, 793 A.2d 174 (Pa. Cmwlth. 2002), the trial court concluded that so long as a statement of financial interests is placed into the

mail on or before the deadline, it is timely filed with the local governing authority. Further, as was noted in *McMonagle*, once an envelope is given to the postal authorities, what happens with it, including postmarking and actual delivery, is beyond the control of the candidate. Accordingly, mailing a statement of financial interests to a local governing authority on or before the deadline establishes compliance with Section 1104(b)(2) of the Public Official and Employee Ethics Act (Ethics Act), 65 Pa. C.S. §1104(b)(2). Crediting the testimony of Candidates, the trial court found that the statements of financial interests were mailed before the deadline, which constituted a timely filing.⁵ This precluded a grant of Objectors' petitions to strike.

Objectors appealed to this Court. They contend that the trial court erred in holding that Candidates' statements of financial interests were timely filed with the Township.⁶

Dispositive of this appeal is Section 1104(b) of the Ethics Act. It states as follows:

(b) Candidate.--

⁵ The envelope with the March 11, 2015, postmark offered by Township Secretary Deanna Cunfer contained a stamped metered rate of 48 cents. The trial court found that it was not the envelope that had contained the financial statements of the Republican candidates because the amount of postage was too low for an envelope containing two more envelopes and four sheets of paper. The trial court found, rather, that this envelope may have contained another law firm mailing to the Township.

⁶ Our review determines whether the trial court's findings of fact are supported by substantial evidence, whether the trial court abused its discretion or whether the trial court committed an error of law. *In re Hanssens*, 821 A.2d 1247, 1250 n.4 (Pa. Cmwlth. 2003). Where appellate review involves a question of law, our standard of review is *de novo* and our scope of review is plenary. *In re Nomination Petition of deYoung*, 903 A.2d 1164, 1165 (Pa. 2006). Our standard of review is deferential with respect to the trial court's factual findings.

(1) Any candidate for a State-level public office shall file a statement of financial interests for the preceding calendar year with the commission on or before the last day for filing a petition to appear on the ballot for election. A copy of the statement of financial interests shall also be appended to such petition.

(2) *Any candidate for county-level or local office shall file a statement of financial interests for the preceding calendar year with the governing authority of the political subdivision in which he is a candidate on or before the last day for filing a petition to appear on the ballot for election.* A copy of the statement of financial interests shall also be appended to such petition.

(3) No petition to appear on the ballot for election shall be accepted by the respective State or local election officials unless the petition has appended thereto a statement of financial interests as set forth in paragraphs (1) and (2). Failure to file the statement in accordance with the provisions of this chapter shall, in addition to any other penalties provided, be a fatal defect to a petition to appear on the ballot.

65 Pa. C.S. §1104(b) (emphasis added).⁷

The Pennsylvania State Ethics Commission's regulation defines "filed" as follows: "Official papers are filed on the date they are *physically*

⁷ This mandate is repeated, word for word, in a regulation of the Pennsylvania State Ethics Commission. It states:

(a) A candidate for State level public office shall file a Statement of Financial Interests with the Commission on or before the last day for filing a petition to appear on the ballot and a copy of the Statement shall be appended to the petition.

(b) *A candidate for county and local public office shall file a Statement of Financial Interests with the governing authority of the political subdivision wherein the candidate is seeking office on or before the last day for filing a petition to appear on the ballot and a copy of the Statement shall be appended to the petition.*

51 Pa. Code §15.3 (emphasis added).

received at the *Commission Office* whether delivered by United States mail, express carrier, hand delivery or by Facsimile Service (FAX).” 51 Pa. Code §11.1 (emphasis added). However, this regulation applies only to statewide candidates who must file their financial statements with the Ethics Commission. A candidate for local office files with the “governing authority of the political subdivision wherein the candidate is seeking office” 51 Pa. Code §15.3.

Candidates argue that this Court’s holding in *McMonagle*, 793 A.2d 174, established that mailing is an appropriate method of filing a statement of financial interests with a local governing authority. Further, it was within the trial court’s authority as factfinder to credit Candidates’ sworn testimony that they placed their statements of financial interests into the mail by March 10, 2015, the deadline for filing. Neither the Ethics Act nor a regulation requires that a statement of financial interests must be received by the local governing authority on or before the filing deadline.

Objectors contend that the Ethics Act requires actual receipt by the deadline. In support, they cite *In re Nomination Petition of Robert Guzzardi*, 99 A.3d 381 (Pa. 2014), where the Pennsylvania Supreme Court held that there is no exception to the requirement that in order for a statewide candidate’s statement of financial interests to be timely “filed,” it must be physically received by the Ethics Commission by the filing deadline. 51 Pa. Code §11.1.

However, there is no binding regulation or statutory provision mandating that the local governing authority physically receive the statement of financial interests on the filing deadline. There is no regulation that defines “filing” to mean “receiving.” In short, *Guzzardi* is inapposite.

McMonagle, 793 A.2d 174, on the other hand, is on point and persuasive.⁸ *McMonagle* involved candidates for local offices who did not personally file their statements of financial interests with the local authority. Relevant hereto is that part of the decision relating to six candidates.

Four candidates, Robert McMonagle, Paul Gennetti, Philip P. Morganti and William Regan, were concerned that a predicted snowstorm would impede their ability to hand-deliver their statements of financial interests to the township office by the deadline of March 6, 2001. Accordingly, they placed their four statements in one envelope addressed to the township secretary and mailed it at the post office on March 4, 2001. This was confirmed by the postmark on the envelope. The predicted snowstorm occurred, prompting the closing of the township office at 1:00 p.m. on March 5, 2001, and all day on March 6, 2001. The four financial statements were received by the township on March 8, 2001, according to the stamp affixed to each. A fifth candidate, Christopher Yevitz, attempted to file his statement with the township on March 6, 2001, but found the office closed. He called the Lackawanna County Board of Elections and was directed to mail the statement, which he did on March 6, 2001, at 5:00 p.m. When the township received the envelope, it showed a March 7, 2001, postmark. A sixth candidate, John Flyte, gave his financial statement to Mary Ann Smith to file on March 6, 2001. When she found the township office closed, she went to her place

⁸ *McMonagle* is a single judge opinion authored by Judge Bonnie Brigance Leadbetter that may be cited as persuasive authority pursuant to this Court's internal operating procedures. 210 Pa. Code §69.414(b). It bears noting that a reported single judge opinion filed after October 1, 2013, in an election law matter "may be cited as binding precedent" in a subsequent election law matter. 210 Pa. Code §69.414(d).

of employment, placed the statement in an envelope, addressed it to the township and handed it to a U.S. mail carrier. When the township received Flyte's statement, the envelope contained a postmark of March 7, 2001.

Objectors petitioned to strike the nomination petitions for all six candidates on the theory that their financial statements were untimely filed because they were not received by the local governing authority on or before the deadline of March 6, 2001. The trial court denied the objectors' petition, and this Court affirmed.

With respect to the nominating petitions of Yevitz and Flyte, this Court noted that the vagaries of the local manner of conducting municipal business presented problems to candidates attempting to file financial statements with the local government's secretary. Yevitz and Flyte did everything they could to file timely. Their credited testimony was accepted to prove they had mailed their financial statements on March 6, 2001.

With respect to the other four candidates, this Court held that the postmark of March 4, 2001, on the envelope containing their four financial statements proved that they were timely filed.⁹ Because Section 1104(b)(2) of the Ethics Act does not require a specific manner of filing, this Court concluded that it may be satisfied by placing a financial statement into the mail on or before the filing deadline. The Court further found that

⁹ Notably, this Court rejected the trial court's reliance on *State Ethics Commission v. Baldwin*, 445 A.2d 1208 (Pa. 1982), which was legislatively overruled by a 1989 amendment to the Ethics Act. In *Baldwin*, the Pennsylvania Supreme Court held that a late filing of a financial statement could be cured by amendment. In 1989, the General Assembly amended the Ethics Act to make an untimely filing a "fatal defect" that is not amendable. See Act of June 26, 1989, P.L. 26, No. 9, §4(b)(3); recodified, *as amended*, at 65 Pa. C.S. §1104(b)(3).

official documentation of the date of mailing such as a postmark or postal receipt will suffice to fix the date of filing financial interest statements with local governments.

McMonagle, 793 A.2d at 181. Because the evidence established a timely mailing, it did not matter that the statements were not stamped "received" until after the filing deadline.

Here, the trial court relied upon the *McMonagle* ruling with respect to Yevitz and Flyte, whose mailed envelopes showed postmarks one day after the deadline but, nevertheless, were deemed timely. The trial court reasoned that in *McMonagle*, "the postmark itself was neither a common denominator nor the determining factor." Trial court op. at 16. Rather, the relevant factor was the credible testimony of Yevitz and Flyte that they placed their statements into the mail by the March 6, 2001, deadline. Yevitz and Flyte were thwarted by the fact that the township office was closed, leaving them no choice but to mail their statements. This Court explained that "[r]equiring that candidates be stricken from the ballot for any deviation from filing in the proper time and place presupposes that assuring strict compliance is within the candidates' control." *McMonagle*, 793 A.2d at 180.

The envelope produced by the Township upon Schwab's subpoena showed a postmark of March 11, 2015. Kincaid disputed that postmark because she testified that she mailed Schwab's and Berger's financial statements in a single envelope on March 10, 2015. The trial court found, as fact, that the envelope produced by the Township contained other correspondence Kincaid mailed to the Township at the same time she mailed the financial statements.

Section 1104(b)(2) of the Ethics Act, 65 Pa. C.S. §1104(b)(2), requires a candidate to file a statement of financial interests with the governing authority by the last day for filing a petition to appear on the ballot for election. Section 1104(b)(3) states that failure to comply is a “fatal defect” to a petition to appear on the ballot. *McMonagle* established, however, that placing a statement of financial interests into the mail on the deadline constitutes a timely filing. Neither the Ethics Act nor any other authority mandates a certain method of filing. Likewise, there is no mandate that a statement of financial interests actually be processed by the local governing authority on or before the day of the filing deadline. That the Township did not have a record of receiving two of Candidates’ financial statements was of no moment, given the Township secretary’s description of the casual mail handling procedures of the Township.

As has been explained by this Court:

The mailbox rule creates a rebuttable presumption that an item which is properly mailed will be received; the presumption cannot be nullified by only an assertion that the item was not received. Notably, this Court has stated that “evidence of actual mailing is not required.” As alternative proof, “when a letter has been written and signed in the usual course of business and placed in the regular place of mailing, evidence of the *custom* of the establishment *as to the mailing* of such letters is receivable as evidence that it was duly mailed.” Whether a piece of mail was actually sent is a purely factual determination.

* * *

[U]nless a rule or regulation specifies otherwise, proof of mailing is not a *requirement* for a party to prove that a document was actually mailed.

C.E. v. Department of Public Welfare, 97 A.3d 828, 833 (Pa. Cmwlth. 2014) (citations omitted and emphasis in original). The trial court credited the testimony

of Candidates that they placed their statements of financial interests into the mail by the deadline of March 10, 2015. That the Township stamped two statements as having been received on March 13, 2015, did not mean they were not timely mailed, or filed. Likewise, that two were not received, even by March 10, 2015, had no consequence under the mailbox rule. The evidence accepted by the trial court established that all four were mailed and, thus, filed on March 10, 2015.

Accordingly, the orders of the trial court are affirmed.



MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 22nd day of April, 2015, the orders of the Court of Common Pleas of Carbon County in the above-captioned appeals are AFFIRMED.



MARY HANNAH LEAVITT, Judge

Certified from the Record

APR 22 2015

and Order Exit