

IN THE SUPREME COURT OF OHIO

**State of Ohio ex rel.
Delaware Joint Vocational
School District Board of Education**

Relator,

V.

**Joseph W. Testa,
Tax Commissioner of Ohio**

Respondent.

Case No. 2017-0079

Original Action in Mandamus

AMENDED RELATOR'S REPLY BRIEF

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INTRODUCTION

Respondent erroneously maintains that, as the State Tax Commissioner, *he* must verify that a valid election occurred before his duty to provide certain tax calculations pursuant to R.C. 319.301 is triggered. Respondent further maintains that the *only* way to establish the validity of an election is by submitting a specific piece of paper completed by a board of elections. In doing so, Respondent constructs barriers to the exercise of his ministerial duties that are not grounded in law. While professing that he is simply carrying out his legal duty, and not reviewing the sufficiency of the underlying election, the majority of Respondent's Merit Brief is devoted to analyzing the errors of the Delaware County Board of Elections ("DCBOE") and the ensuing impact on the validity of the 2015 election for the Delaware Area Career Center ("DACC") property tax levy renewal ("Renewal Levy").

At the same time, Respondent fails to point to any statute, administrative rule or case decision to support his alleged duty to determine the validity of an election. In fact, Ohio law reserves the authority to declare the results of an election to the boards of elections and reserves the ultimate authority to determine the legal impact of an election irregularity to this Court. Moreover, Ohio law consistently favors the finality of elections and prohibits after-the-fact attacks on certified election results through other channels.

This case highlights exactly why final determinations regarding the legal impact of a mistake in the election process, even one of this magnitude, are reserved for this Court through a properly-raised election contest. Respondent's varying demands about what evidence must be submitted to confirm the validity of the Renewal Levy election have created a moving target that is impossible for DCBOE or DACC to hit.

Respondent is wrong in his assertion that, in the absence of a Form 5-U, his duty under R.C. 319.301 is not triggered. First, Respondent did not request that a Form 5-U be filed with his

office for any tax levies in 2015 when the Renewal Levy election took place. Instead, he accepted the Certificate of Result of Election alone. Second, the Form 5-U, which is an election-related form issued and used by the Ohio Secretary of State (“Secretary”), was not required by Respondent until almost a year *after* the Renewal Levy election. More specifically, Respondent began requesting a Form 5-U in October 2016, long after the Renewal Levy passed, but shortly before the property tax calculation process began for the 2017 tax collection year. The DCBOE error was discovered as a result and Respondent immediately recognized that a Form 5-U could not be provided under the circumstances and a year after-the-fact.

So instead, Respondent requested “some sort of certification or determination” from the Secretary regarding the validity of the Renewal Levy. DACC Merit Brief, E-mail from Wilson to Kaitsa, December 9, 2016. (Ex. 2-G). When the Secretary could not provide the requested guidance, Respondent instead sought some documentation “*in any format* that shows the breakout of the vote for all counties included in the DACC District.” Complaint, Exhibit 6, at 2 (emphasis added). That information had already been provided in the format of a letter from the County Prosecutor, statutory counsel for the DCBOE, but Respondent was still not satisfied. Now, in his Merit Brief, Respondent reverts to a request for a Certificate of Result of Election and states, for the first time, that he “would have accepted and relied on a certificate of election result from the Delaware Board if it represented that it reflected the results of the vote of the levy on a district-wide basis.” Respondent’s Merit Brief, at 11.

Respondent acknowledges that the Renewal Levy “passed by such a large margin that even if all of the omitted voters had voted against the levy, it would have passed.” *Id.* Respondent also had before him a Certificate of Result of Election that, despite the errors, does show the total vote cast in the entire DACC district, a letter from the Delaware County

Prosecutor's Office to demonstrate the validity of the election results in the entire DACC district, and guidance from the Secretary regarding the authority of the DCBOE to determine the validity of election results even under these unusual circumstances. Yet, Respondent continues to question the validity of the election while at the same time requesting an ever-shifting panoply of forms or verifications that cannot be provided.

Ohio law and the significant precedent of this Court are clear: questions regarding an error in the election proceedings are addressed through a properly filed election contest. And in the absence of such a contest, the election is not subject to collateral attack, the results are final, and the election must be honored in all future proceedings and contexts.

LAW AND ARGUMENT

A. Respondent Has a Clear Legal Duty to Calculate the Tax Rates and Has No Authority to Challenge the Validity of the Election.

Respondent contends that he is simply carrying out his duty in requiring, variously, a Certificate of Result of Election or a Form 5-U or a verification from the Secretary. He argues that he has no clear legal duty to calculate the tax rates pursuant to R.C. 319.301(D) because “[n]o proper election certification has been presented to him for a multi-county District * * *.” Respondent’s Merit Brief, at 1. But no state law requires a “proper election certificate” or any specific piece of paper to trigger Respondent’s duty. Respondent does not, and cannot, point to any statute, administrative rule or court case that contains such a requirement.

Respondent’s attempt to elevate his request for a Certificate of Result of Election (or a Form 5-U, or both) to the status of a mandatory prerequisite to carrying out his statutory duty is simply misplaced, especially where he has all of the information requested in a different format. DACC maintains that Respondent cannot confer the force of law on his request for information without promulgating an administrative rule. DACC Merit Brief, at 15, 16. This Court has

previously ruled that while Respondent “is free to adopt routine practices to guide the exercise of his discretion [he] cannot confer the force of law on a requirement without promulgating it as a rule.” *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 62, 2012-Ohio-1871 (internal citations omitted). *See also, Progressive Plastics, Inc. v. Testa*, 133 Ohio St.3d 490, 2012-Ohio-4759.

Respondent does not acknowledge or attempt to distinguish the line of cases holding Respondent cannot adopt and enforce a “special instruction” without first complying with the administrative procedures set forth in Ohio Revised Code Chapter 119. *McLean Trucking Co. v. Lindley*, 70 Ohio St.2d 106, 114-116 (1982); *Condee v. Lindley*, 12 Ohio St.3d 90 (1984). *See also Renacci v. Testa, Tax Commr.*, Slip Op. No. 2016-Ohio-3394, ¶37 (holding that when Respondent “seeks to exercise administrative authority in a systematic way over a broad range of taxpayer claims, he must promulgate his pronouncement as an administrative rule.”) Yet that is precisely what Respondent attempts to do here. By variously requiring a Certificate of Result of Election, a Form 5-U, or both, and then refusing to act in the absence of such a document, Respondent has improperly elevated his request into a mandatory obligation.

Unable to cite to any legal authority to support a requirement for a specific piece of paper, Respondent instead posits several policy arguments as to why his review of an underlying election is necessary. Respondent argues that: “Under R.C. 319.031(D) [Respondent] must make certain that the tax is ‘authorized to be levied’ before he makes his calculations.” Respondent’s Merit Brief, at 10. But Respondent is wrong in claiming that *he* must confirm the validity of the authorization. Moreover, the plain language of R.C. 319.301(D) reveals the fallacy of Respondent’s contention. R.C. 319.301(D) sets forth only two statutory duties for Respondent: “With respect to each tax authorized to be levied by each taxing district, the tax commissioner, annually, *shall do both of the following** * *.” (Emphasis added). The two things that follow are

spelled out in R.C. 319.301(D)(1) and (2). They relate solely to providing calculations and are ministerial in nature, and not any review of the underlying election.

Even if Respondent is correct in his assertion that he must determine the validity of the underlying election, he is wrong in his insistence of a particular form or document to make that determination. Respondent next claims that: “The *best evidence* of whether a tax is authorized to be levied is the certificate of election results that is required to be filed for each levy.” Respondent’s Merit Brief, at 10 (emphasis added). Respondent’s assessment of what is the “best evidence” for tax purposes does not equate to the “only acceptable evidence.” Nor does it support Respondent’s assertion that such evidence is required by law or that he has no duty to act in the absence of such evidence.

Respondent then sets forth a number of far-fetched hypotheticals regarding the risks of an improper certification and the potential burden on the Respondent to check census data or determine what “could have been” if unregistered taxpayers decided to register in order to vote on an issue. Respondent’s Merit Brief, at 12. Respondent’s concerns stray well beyond the realm of any previous review by this Court when faced with a proper election challenge. Moreover, Respondent’s concerns do not comport with any reasonable interpretation of the facts of this case. Of the 70,045 parcels in the entire DACC district, 68,938 are located in Delaware County. Complaint, Exh. 2. Even if there were five potential voters on every parcel outside of Delaware County, both commercial and residential, and even if every one of those hypothetical residents all registered and voted against the Renewal Levy, the measure still would have passed by almost 5,000 votes.

Respondent even blames DACC for failing in its duty “whether legal or practical, to be diligent for its students.” Respondent’s Merit Brief, at 2. Respondent provides no legal

authority for this claim, nor any explanation for how such an alleged failure excuses Respondent from carrying out his statutory duty. Respondent's arguments are flawed. From either a legal or practical standpoint, once a school district has authorized a levy, it must allow the entity charged with the statutory responsibility to carry out elections to do just that. While DACC wishes that it had recognized this error in time to avoid this situation, the fact of the matter is that it did not and had no duty – or authority – to review the internal paperwork or processes of the DCBOE.

Neither the DACC nor Respondent need engage in the type of administrative micromanagement that Respondent suggests. A school district is not required to hover over board of elections staff to monitor the ministerial duties required to place an issue on the ballot. Nor is Respondent required to pour over census data to calculate the number of potential registered or unregistered voters who might have voted in a particular election. Rather, each participant in the process must carry out its own statutory duties as required by law and may not take on duties that are statutorily imposed upon others.

A school district's duty is to authorize the tax to be levied by passing the appropriate authorizing resolutions, obtaining certifications from the county auditor, and placing those before the correct board of elections. R.C. 3311.21, R.C. 5705.03, and R.C. 5705.25. The legal duty to administer and declare the results of a multi-county election falls upon the board of elections of the most populous county in the district. R.C. 3311.21, R.C. 3505.71. Respondent's duty is to review the tax abstracts presented to him by county auditors, seek such additional information as may be necessary *to make the calculations required*, and then provide those calculations to county auditors. R.C. 319.301.

To the extent an error occurred in the election process, any aggrieved can bring an election contest. R.C. 3515.08(A) provides the exclusive and specific remedy for correcting

errors or mistakes in election proceedings. *State ex rel. Byrd v. Summit County Board of Elections*, 65 Ohio St.3d 40, 43 (1981), citing *State ex rel. Commrs. of the Sinking Fund v. Brown*, 167 Ohio St. 71, 75 (1957). But where, as here, the election error does not change the results of the election, this Court has consistently held that such an election challenge cannot stand. “[E]very reasonable presumption should be indulged in favor of upholding the validity of an election and against ruling it void.” *Squire v. Greer*, 117 Ohio St.3d 506, 2008-Ohio-1423, ¶14, citing *In re Election Contest of Democratic Primary Election Held May 4, 1999 for Clerk, Youngstown Mun. Court*, 88 Ohio St.3d 258, 262 (2000).

Despite his intentions to the contrary, Respondent’s actions have had a very real and very tangible impact on the election results and on DACC. 28,457 electors voted in favor of the Renewal Levy. Complaint, Ex. 4, Ex. 4-C. Their wishes are not being carried out despite, as even Respondent acknowledges, the fact that there is nothing to indicate that the result of the election would have been different had there been full compliance with election laws. *Maschari v. Tone*, 103 Ohio St.3d 411, 414, 2004-Ohio-5342; *State ex rel. Board of Edn. of Springfield Local School Dist. v. Maxwell*, 144 Ohio St. 565 (1945); *City of Cincinnati v. Puchta, Mayor*, 94 Ohio St. 431 (1916). This Court has consistently held that this type of collateral attack on election results is improper. DACC respectfully urges this Court to make a similar determination in the instant matter.

B. In the Alternative, if Respondent is Deemed to Have the Authority To Examine the Impact of an Election Irregularity, Respondent Must Carry out his Duty Consistently and With Uniformity.

Should this Court accept Respondent’s arguments and find that he does have a duty to make determinations as to the validity of an election or the sufficiency of a Certificate of Result of Election, then Respondent should be required to carry out that duty in a uniform manner. Respondent highlights the Mogadore City Schools election where he accepted a Certificate of

Result of Election from the Summit County Board of Elections, calculated tax rates, and later learned from Portage County that the levy actually failed. While the Mogadore example explains why Respondent now *requests* a Form 5-U, it does not justify his *requiring* the form in the absence of an administrative rule to that effect. Moreover, the Mogadore situation only highlights the inconsistency in Respondent's position and supports DACC's contention that determinations about the validity of an election are properly reserved to the boards of elections and this Court.

In the Mogadore situation, Respondent accepted the Certificate of Result of Election from the most populous board of elections and made the required tax calculations. Later, based on additional information from Portage County, Respondent became aware of an error in the certification. Apparently without insisting on a Form 5-U, Respondent recalculated the election results himself, concluded that "the vote against the levy in Portage County was large enough to result in the defeat of the levy for the school district," determined the election actually failed, and decided to omit the Mogadore tax from his revised tax calculations. Respondent's Exhibit 1, Affidavit of Shelly Wilson, at 2-3.

In the instant matter, Respondent received a Certificate of Result of Election from the DCBOE, then became aware of an error in the certification. In both DACC and Mogadore, Respondent reviewed additional materials and made a mathematical determination about the votes cast in each election. But unlike the Mogadore situation, Respondent's mathematical determination in the instant case verifies the passage of the levy. "The Commissioner recognizes that the [Renewal Levy] passed by such a large margin that even if all of the omitted voters had voted against the levy, it would have passed." Respondent's Merit Brief, at 11.

In the Mogadore situation, Respondent took it upon himself to recalculate the votes cast and concluded that there were **not** sufficient votes to secure passage of the levy. Without obtaining the Form 5-U that would have only reaffirmed the conclusion that Respondent already reached on his own, he provided tax calculations that did **not** include the Mogadore levy. Here, Respondent concluded that there **were** sufficient votes to secure passage of the Renewal Levy but, for lack of a Form 5-U that would have only reaffirmed the determination that Respondent already made, provided tax calculations that did **not** include the DACC levy.

This is not the Mogadore case. But if Respondent is going to exercise a presumptive duty to determine the validity of election results, then he must do so consistently. The requirement for consistency in administrative action is particularly important in cases where, as here, Respondent attempts to enforce his request retroactively. There is no question that Respondent's request for the Form 5-U was first made on October 12, 2016. Respondent's Ex. 1, Affidavit of Shelley Wilson ¶8 and Ex. B thereto. There is also no question that the Renewal Levy election took place in November 2015—almost a full year earlier.

If Relator truly needs a specific document to perform his calculation, or needs a process to address faulty information provided to him, then this Court has already advised him of the appropriate recourse. Rather than reacting on an *ad hoc* basis to what he perceives to be erroneous information, Respondent should pass an administrative rule.

It is also important to note that Respondent is not the last bastion of review before a tax is levied. As demonstrated by the Mogadore situation, Respondent's tax calculations are returned to the counties where additional procedures by county auditors and treasurers must take place by law. Errors such as the one that occurred with the Mogadore matter are (and were) corrected by county treasurers who actually issue property tax bills. By arguing that he must verify the results

of an election to prevent a Mogadore-like error, Respondent improperly attempts to take on a duty that is not his to usurp. It is not Respondent's duty to issue property tax bills or affirm that all of the appropriate taxes appear thereon. Respondent's claim that he must verify the validity of an election to prevent improper property tax bills from being issued is ill-founded, as the Mogadore situation demonstrates.

CONCLUSION

Initially, Respondent was willing to provide the required tax calculations based solely upon some type of validation by the Secretary. The Secretary advised that the authority to provide Respondent with such validation could only come from a county board of elections. Yet when the Delaware County Auditor resubmitted the Certificate of Result of Election, accompanied this time by an explanatory letter from the Delaware County Prosecutor regarding the validity of the election for the entire DACC district, Respondent still refused to act.

To the extent Respondent had the authority to question the election results at all, he had the answers to his questions at that point. Between the Certificate of Results of Elections and the Delaware County Prosecutor's letter, Respondent had everything he sought from the Secretary or from a Form 5-U. In the absence of a legal requirement for a particular form to be submitted, DACC maintains that Respondent had all of the information needed to carry out his ministerial duty and a clear legal duty to do so. As such, DACC respectfully urges this Court to order Respondent to provide the required tax calculations.

Respondent "respectfully urges the Court, if it is decided to grant relief despite his concerns, to shape the remedy carefully enough for [Respondent] to implement it without opening the door to mistaken certifications in the future." Respondent's Merit Brief, at 4. DACC maintains that the Respondent's duties are clear and ministerial. Election errors do not

alleviate Respondent of his statutory duties, nor do they cloak him with authority to engage in extra-statutory review.

However, if this Court chooses to craft a more limited remedy, DACC joins in Respondent's request and submits that, in the absence of a Form 5-U or an appropriate election contest, where a board of elections and its county prosecutor affirm the validity of an election as to the entire district, Respondent should accept such affirmation as conclusive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing *Amended Relator's Reply Brief* was served this 7th day of February, 2017 via electronic mail and ordinary U.S. Mail, postage pre-paid, to the following:

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