



# Corporation of Harpers Ferry

1000 WASHINGTON STREET • P.O. BOX 217

Harpers Ferry, West Virginia 25425

304-535-2206

Wayne Bishop,  
Mayor

BARBARA HUMES, JAY PREMACK, HARDWICK S. JOHNSON, JR., CHRISTIAN PECHUEKONIS, CHARLOTTE THOMPSON, COUNCIL MEMBERS  
KEVIN CARDEN, RECORDER

## BEFORE THE HARPERS FERRY ELECTION CONTEST TRIBUNAL

*IN RE: THE MATTER OF CONTESTED TOWN COUNCIL ELECTION*

NANCY SINGLETON CASE, and  
DEBORAH A. MCGEE,

Individual Contesters,

HARDWICK SMITH JOHNSON,  
CHARLOTTE WARD THOMPSON,  
CHRISTIAN PECHUEKONIS,  
MARJORIE FLINN YOST,  
BARBARA HUMES, and  
JAY PREMACK,

Individual Contestees.

## ORDER DECLARING ELECTION RESULTS

On August 24, 2019, the Town Council of the Corporation of Harpers Ferry (the “Town Council”) heard testimony and received evidence in the trial of this election contest. Having considered the evidence submitted by the parties, the arguments presented by counsel, and other proper written submissions, the Town Council makes the following findings of fact and conclusions of law:

### I.

## FINDINGS OF FACT

*Background and Procedural History*

1. On June 11, 2019, the Corporation of Harpers Ferry (the “Town”) held a municipal election for the offices of Mayor, Recorder, and five at-large council seats. Early voting began on May 29, 2019.

2. On June 17, 2019, the Board of Canvassers (the “Board”) met to conduct a canvass of election returns and otherwise perform all acts as required by law. At this meeting, the Board declined to count certain provisional ballots that were cast by voters not registered in the Harpers Ferry poll book. The Board could not lawfully consider extrinsic evidence and otherwise followed the West Virginia Secretary of State’s 2019 Best Practices Guide for Municipal Canvass. A representative of the Secretary of State’s office was present and observed the canvass. Following the conclusion of the canvass, the Board formally declared the results of the election.

3. The Board met 48 hours later, on June 19, 2019 to certify the election results. At this meeting, Recorder Kevin Carden asserted that two losing candidates had made a recount request. Recorder Carden failed to produce to the Board any written evidence of any recount request at that time despite request to do so by another member of the Board. Nonetheless, based only on Recorder Carden’s representations, the Board delayed certifying the election in order to conduct a recount.

4. The Board conducted the recount on June 26, 2019. The election results did not change.

5. On June 28, 2019, the Board formally certified the election results.

6. The newlyelected members of Town Council took office on June 29, 2019.

7. This election contest was commencedby Nancy Singleton Case and Deborah A. McGee, by counsel (the “Contesters”), on July 8, 2019, pursuant to West Virginia Code § 3-7-6, *et seq.*, by their filing with the Town a Notice of Intent to Contest Harpers Ferry Town Council Election (“Notice of Contest”).

8. The Notice of Contest names Hardwick Smith Johnson, Charlotte Ward Thompson, Christian Pechuekonis, Marjorie Flinn Yost, Barbara Humes, and Jay Premack as “Individual Contestees” (the “Contestees”).

9. The Notice of Contest claims that five specific provisional ballots rejected by the Board should have been counted. The Notice of Contest also made numerous other allegations concerning certain wrongly counted ballots and other insinuations of misconduct.

10. On July 18, 2019, Contestees Johnson, Thompson, Yost, and Humes, by counsel, jointly filed a responsive pleading, titled “Contestees’ Notice Pursuant to West Virginia Code § 3-7-6.”

11. Contestees Christian Pechuekonis and Jay Premack did not respond to the Notice of Contest.

12. The Contesters never filed or served an amended Notice of Contest.

13. The Town Council set the trial of this election contest for Saturday, August 24, 2019, at the Town Hall, beginning at 10:00 a.m.

#### *The Election Contest Trial*

14. On August 24, 2019, the trial of this election contest was held as scheduled and concluded the same day. The Town Council heard testimony and received evidence. All witnesses were duly sworn. The entirety of the trial was transcribed by a court reporter.

15. At the start of the trial, Contesters, by counsel, made a “motion” to the Town Council that Councilmembers Johnson and Thompson be disqualified from hearing and deciding this election contest.

16. With the exception of Councilmember Pechuekonis, who had previously voluntarily declined to participate in the election contest proceeding, all then-members of Town Council in their official capacity heard testimony and received evidence at the trial.

17. At the outset of the trial, the Contesters expressly abandoned all election contest claims and allegations except for their claims that the provisional ballots of Leah Howell, George McCarty, Linda McCarty, and Adam Hutton (the “Provisional Voters”) should be counted.

18. The Contesters expressly stipulated that none of the names of the Provisional Voters were in the official registration record of the Corporation of Harpers Ferry (the “Poll Book”) at the time each of them cast their ballots.



19. Nikki Painter, Chief Deputy Clerk of Elections for the Jefferson County Voter Registration and Election Office, testified first.

20. Ms. Painter testified that she did not become aware of any problem with the alleged voter registration errors affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell until after the June 11, 2019 election.

21. Ms. Painter testified that she was first made aware of the alleged dispute over provisional ballots when Recorder Kevin Carden contacted her “to go over if [the provisional ballot voters] were registered in time and if [the Jefferson County Clerk’s office] had a record of them because they did not appear in the poll book.”

22. Ms. Painter further testified that she believed that the source of the alleged voter registration errors affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell was the West Virginia Department of Motor Vehicles (the “DMV”).

23. Despite her suspicions, Ms. Painter testified that neither she nor anyone in her office ever spoke to any representative of the DMV to investigate the source of the alleged registration error.

24. George McCarty testified concerning his residency and registration. Mr. McCarty testified that his voter registration information wrongly identified him as a resident of the Town of Bolivar. Mr. McCarty testified that he has been aware of this alleged error in his voter registration since August 2018, approximately ten months before the election at issue in this proceeding. Mr. McCarty blamed the DMV for his alleged registration error.

25. Linda McCarty testified concerning her residency and registration. Mrs. McCarty testified that her voter registration information wrongly identified her as a resident of the Town of Bolivar. Mrs. McCarty testified that she was aware of this alleged error in her voter registration since August 2018, approximately ten months before the election at issue in this proceeding. Mrs. McCarty blamed the DMV for her alleged registration error.

26. Adam Hutton testified concerning his residency and registration.

27. The Contesters presented no competent evidence from the DMV concerning the nature, source, or cause of the alleged voter registration errors allegedly affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell.

28. The Contesters did not present any testimony from Leah Howell. No competent evidence was presented concerning Ms. Howell's residency. Nor was any competent evidence presented concerning the nature or source of the alleged voter registration error affecting the official voter registration record of Ms. Howell.

29. The Contesters presented no evidence that Nancy Singleton Case provided any written request for a recount within 48 hours of the declaration of election. Nor did the Contesters present any evidence that Ms. Case paid the required bond concerning any recount request. Ms. Case's sworn allegations otherwise in the Notice of Contest leads the Town Council to find that Ms. Case's testimony is inconsistent and not credible.

30. Contesters Nancy Case and Deborah McGee were called by the Contestees and testified, among other things, about whether they fulfilled the necessary legal prerequisites to bring this election contest.

31. The Contestees called Kevin Carden as a witness, but Mr. Carden refused to testify.

32. Mr. Carden's anticipated testimony was relevant and necessary because evidence adduced from other witnesses established that Mr. Carden has first-hand knowledge and information about communications with the Jefferson County Clerk, including about the circumstances surrounding when, why, and how several allegedly erroneous registrations of the Provisional Voters were corrected on or after the day of the canvass. In fact, Mr. Carden is likely the only person who has much of that information.

33. Mr. Carden's testimony was also relevant and necessary because, as the testimony of the Contesters Ms. Case and Ms. McGee established, Mr. Carden is perhaps the only person who has critical first-hand knowledge about whether Ms. Case and Ms. McGee fulfilled the necessary legal prerequisites to bring this election contest. In short, Mr. Carden has personal knowledge of his communications with other witnesses who testified and his relationship to individuals, names, and witnesses in this case is relevant to the claims and defenses of the parties to the contest.

## II.

### CONCLUSIONS OF LAW

34. The Town Council is the only body that can hear and decide this election contest. Statute grants to “the governing body of the municipality” the sole power to “judge . . . any contest of a municipal election.” W. Va. Code § 3-7-6; *see also* Syl. Pt. 8, *State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 582, 148 S.E.2d 700, 703 (1966) (“The municipal council has original and exclusive jurisdiction to hear and decide contested elections involving the selection of municipal officers.”).

35. Under the Ordinances of Harpers Ferry, the “Town Council” is defined as “the governing body of the town” and “consists of” five Councilmembers, plus the Mayor and the Recorder. Ordinance 11.01; *id.* at 11.02. The Mayor and Recorder “have votes as members of the Town Council.” *Id.* 11.09.

36. “The council of a city, town, or village to which one, whose seat is contested, is elected, is the proper tribunal to try such contest, and not the council in office at the time of the election.” Syl. Pt. 1, *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S.E. 872 (1919). Therefore, the Town Council that sits in judgment of this election contest includes Mayor Wayne Bishop, Recorder Kevin Carden, and Councilmembers Barbara Humes, Hardy Johnson, Christian Pechuekonis, Jay Premack, and Charlotte Thompson. Councilmember Christian Pechuekonis voluntarily decided not to participate in this election contest.

37. Contestee Nancy Singleton Case lacks standing to bring or prosecute this election contest because she failed to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of election by the Board of Canvassers.

38. The motion made by the Contesters at the start of the trial of this election contest to disqualify Council members Johnson and Thompson is denied because the Town Council acting as a governing body has no legal authority to compel any one or more of its members to disqualify themselves from participating in any business that comes before Town Council. Disqualification is determined and undertaken on an individual basis.

39. The only issue presented for decision by the Contesters at the trial of this election contest is whether the ballots of the four Provisional Voters that were cast in the recent municipal election should be



counted. The Contesters bear the burden of proof and persuasion as the party who commenced this election contest.

40. Because Harpers Ferry has adopted a permanent voter registration system pursuant to Article 2 of Chapter 3 of the West Virginia Code, the provisions of that article apply to this election contest. *See State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 52 (1969) (applying provisions of permanent voter registration code to municipality that adopted it); *see also* Harpers Ferry, W. Va., Ordinances Ch. 1, Art. 103, § 103.04 (2019) (adopting permanent voter registration law of West Virginia).

41. Under the West Virginia Constitution and the West Virginia Code, a person must meet certain requirements in order to be able to cast a valid and countable ballot in an election. *See* W. Va. Const., Art. IV, § 1; W. Va. Code § 3-1-3.

42. Relevant to this contest, West Virginia law specifies that a person's ballot may not be counted unless he or she meets two requirements: (1) he or she is a "resident" of the municipality and (2) he or she is eligible and "duly registered to vote" in that municipality. *See* W. Va. Const., Art. IV, § 1; W. Va. Code § 3-2-1(c); *see also id.* § 3-2-2(a). If a person is either not a resident *or* is not properly registered in a municipality, then his or her vote cannot count in an election in that municipality.

43. In order to cast a valid and countable vote, a person must satisfy the residency requirement. Not only must a person be a resident of West Virginia, but that person must also be a "bona fide resident" of the county and "municipality in which he or she offers to vote." *See* W. Va. Code § 3-1-3; *see also* W. Va. Const., Art. IV, § 1. In addition, a person must establish residency at least thirty (30) days before he or she votes and remain a resident at the time that the vote is cast.

44. In order to be a resident of a municipality—for purposes of casting a vote—a person must have a physical presence in that municipality and intend to remain there for the foreseeable future. *See White v. Manchin*, 173 W. Va. 526, 538 (1984) (equating, for purposes of election law, residence with domicile, which has two elements "(1) [b]odily presence in a place [and] (2) [t]he intention of remaining in that place"); *see also* Syl. pt. 7, *State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580 (1966) (explaining

residency requirement and applying domicile rule to municipal election); W. Va. Code § 3-1-3; *see also* W. Va. Const., Art. IV, §1 (requiring a permitted voter be a “resident”); W. Va. Code § 3-2-2 (mandating that a person must be “a legal resident” of location in order to register to vote).

45. A voter must be a resident of a municipality at the time of casting a ballot and for a 30-day period before casting a ballot. *See* W. Va. Const., Art. IV, § 1; *See Ellis*, 153 W. Va. at 51 (equating “offer[ing] a vote” with “cast[ing]” a ballot); W. Va. Code § 3-1-3.

46. Therefore, if someone was not a resident for the 30-day period immediately before casting a ballot or was not a resident at the time he or she cast a ballot, then that person’s vote cannot count under West Virginia law. *See Peck*, 150 W. Va. at 588 (concluding that residency requirement contained in Article IV, section 1 of West Virginia Constitution “applies to cities”).

47. In addition to being a resident of the municipality, a voter must also meet voter registration requirements in order for that person’s vote to count. *See* W. Va. Code § 3-2-1; *see also* W. Va. Const., Art. IV, § 12 (“The Legislature shall enact proper laws for the registration of all qualified voters in this state.”); *State ex rel. Willhide v. King*, 126 W. Va. 785, 789 (1944) (concluding that § 12 of Article IV of the Constitution was “sufficient to warrant” enactment of voter registration requirements).

48. There are three voter registration requirements relevant to this contest: (1) a person must be “eligible” to register to vote, *see* W. Va. Code § 3-2-1(c); (2) a person must be “duly registered” to vote, *see id.*; and, (3) a person must be properly registered not later than twenty-one (21) days before the election in question. *See id.* at § 3-2-6(a) (setting the deadline for voter registration). A voter must satisfy *each* of those three requirements in order for his or her vote to count.

49. The purpose of these registration requirements is to enable election officials to determine whether someone satisfies the constitutional and statutory qualifications before he or she actually casts a ballot. *See State ex rel. Daily Gazette Co. v. Bailey*, 152 W. Va. 521, 525 (1968) (explaining that registration statutes “protect . . . the ballot box”).



50. A person is only “duly registered” for a municipal election when his or her registration shows that he or she resides in the municipality.

51. Under the West Virginia Code, “duly registered” means that a person is registered to vote in the location holding the election. As applied to a municipality, the Supreme Court of Appeals of West Virginia has determined that a “duly registered” voter “must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides.” *See Ellis*, 153 W. Va. at 52.

52. In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records—when he or she casts a ballot, then that person’s vote cannot count in an election of that municipality. *See* Syl. pts. 2&3, *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446 (1949).

53. Because of the importance of such residency information, when a person fills out a voter registration application, he or she must identify the address, city, and county where he or she resides *under oath*. *See* W. Va. Code § 3-2-5(c)(3).

54. A person must be duly registered to vote by the registration cutoff date, which is 21 days before the election. Under that cutoff date, voter registration “closes on the twenty-first (21) day before the election.” *Id.* at § 3-2-6(a).

55. Although a voter can register during the time between the cutoff date and the election, that voter would not be duly registered to cast a ballot in the next election (that is, the election less than 21 days away). *See* Syl. pt. 1, *State ex rel. Lawhead v. Kanawha Cnty. Court*, 129 W. Va. 167 (1946) (applying prior version of code that imposed thirty-day cutoff).

56. Therefore, if a voter had not registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be duly registered to vote in that election. *See Ellis*, 153 W. Va. at 52 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election); *Lawhead*, 129 W. Va. at 172 (applying former version of code that contained 30-day cutoff period and concluding that “[i]t is plain that in order to vote at an election a person must be registered thirty

days or more prior to that election”). In other words, that person’s vote cannot not be counted in that municipal election.

57. Based on the Contesters’ stipulation that none of the names of the Provisional Voters were in fact in the official registration record of the Corporation of Harpers Ferry—the Poll Book—at the time each of them cast their ballots, the ballots cannot be counted in accordance with state law.

58. The alleged voter registration errors affecting the official voter registration records of George McCarty, Linda McCarty, Adam Hutton, and Leah Howell were allegedly caused by someone or some policy at the DMV. However, because the Contesters presented no evidence from the DMV, the Contesters failed to satisfy their burden of proof or persuasion as to the source, nature, or cause of the alleged voter registration errors at issue in this proceeding.

59. As a result, the Contesters presented insufficient evidence to allow the Town Council to conclude that such alleged registration errors affecting the votes of the Provisional Voters constituted the type of technical errors that may be disregarded under law.

60. Even assuming sufficient, competent evidence was presented at trial to allow the Town Council to conclude that the registration information of the Provisional Voters in fact contained incorrect address information caused by individuals or policy at the DMV that caused those voters not to appear in the Harpers Ferry Poll Book at the time of the election, such incorrect registration errors do not constitute the type of technical error that may be disregarded under law.

61. This conclusion is compelled by the binding decision of the West Virginia Supreme Court of Appeals in *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446, 57 S.E.2d 881 (1949), which held that the persons whose names appeared on the voter registration records used in county and state elections but not on municipal registration records were not entitled to vote.

62. In that case, the Supreme Court of Appeals acknowledged the statutory provision stating that “errors, omissions or oversights” shall be “disregard[ed] . . . if it can reasonably be ascertained that the challenged voter was entitled to vote.” *Id.* at 453, 57 S.E.2d at 885 (citing the predecessor statute to current W.

Va. Code § 3-1-41(e)). However, the Supreme Court did not apply that provision to the facts of that case to count the challenged votes of voters whose names did not appear to be registered in the municipality of Kenova's poll book.

63. Instead, the upshot of the *Galloway* decision is that a voter's failure to be properly registered in a municipality, where that municipality has adopted a permanent registration system, is not a mere technical error that must be disregarded. *See id.* (holding that the "challenged ballots" were not "otherwise valid" and thus not countable "[b]ecause the voters who cast these ballots were not duly registered by reason of the absence of their names from the municipal registration list or record").

64. The Town Council cannot change statutory law or the law expounded by the Supreme Court of Appeals. The duty of the Town Council is only to apply the facts to the law.

### III.

#### CONCLUSION

For all of the foregoing reasons, the Harpers Ferry Election Contest Tribunal hereby **DECIDES** that the four provisional ballots at issue in this election contest cannot be counted under West Virginia law. This election contest is hereby **DISMISSED WITH PREJUDICE**. Pursuant to WV Code § 3-7-7 the Tribunal hereby **DECLARES** that the true results of the June 11, 2019 Harpers Ferry Town Council Municipal Election is as certified on June 28, 2019 and remains unchanged.

The Town Clerk is directed to mail a copy of these Findings of Fact and Conclusions of Law to all counsel of record.

Entered this the 11<sup>th</sup> day of September, 2019.

#### **Harpers Ferry Election Contest Tribunal**

By Majority Opinion:

/s/ Wayne Bishop, Mayor

/s/ Barbara Humes, Councilmember



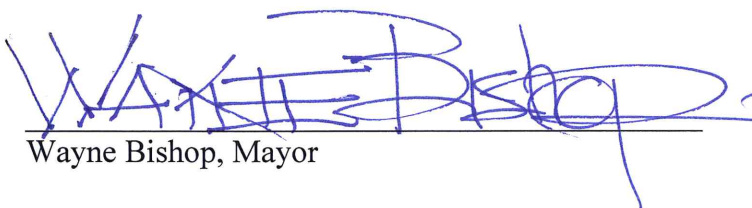
/s/ Hardwick Johnson, Councilmember

/s/ Charlotte Thompson, Councilmember

The Dissent reserves the right to file a dissenting opinion.

I certify that this is a true and accurate copy of the Order Declaring Election Results

By:

 Sept. 11, 2019  
Wayne Bishop, Mayor