Virginia:

IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

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NEWPORT NEWS CIRCUIT COURT
GARY S. ANDERSON, CLERK
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SHELLY A. SIMONDS,
Petitioner,

v.

DAVID E. YANCEY,
Respondent.

Case No. CL 1704240B-04

Decision by three-judge court, designated by
Code of Virginia § 24.2-800 *et seq.*, in re:
Petition for Recount of the Ballots
in the General Election held on November 7, 2017, for the
Office of Member, House of Delegates,
94th House District,
Commonwealth of Virginia

This matter came to be heard upon Petitioner's motion for this Court to reconsider three decisions from the hearing of December 20, 2017, upon Respondent's objection, upon Petitioner's Response, and upon memoranda submitted by the parties.

Factual and Procedural Background

The State Board of Elections on November 20, 2017, certified the results of the General Election held on November 7, 2017, for the Office of Member, House of Delegates, 94th District. The certification reported Respondent with 11,601 votes and Petitioner with 11,591 votes. Petitioner filed a Petition for Recount on November 29, 2017. The Chief Justice of the Supreme Court of Virginia, pursuant to Code of Virginia § 24.2-800 *et seq.*, designated two judges to preside with the Chief Judge of the Seventh Judicial Circuit as a three-judge recount court.[1] The

[1] Section 24.2-801, Code of Virginia, provides that upon the filing of a petition for a recount of an election, "[the] chief judge of the circuit court in which a petition is filed shall promptly notify the Chief Justice of the Supreme

recount was held on December 19, 2017. The result of the recount reported Petitioner with 11,608 votes and Respondent with 11,607 votes. This Court held a hearing on December 20, 2017, to "rule on the validity of all questioned ballots and votes," "determin[e] all matters pertaining to the recount and redetermination of the vote as raised by the parties," and "certify to the State Board and the electoral board ... the vote for each party to the recount and declare the person who received the higher number of votes to be ... elected." Code of Virginia § 24.2-802(D)(3).

Prior to the beginning of the hearing, the Court received a letter dated December 19, 2017, from Kenneth Mallory, an election recount official. Mr. Mallory wrote that "[during] the recount election ... a ballot was called into question from Warwick precinct." Ex. 1, Letter of Kenneth Mallory, 19 December 2017, p. 1. Mr. Mallory described the questioned ballot, his consideration of it, and various discussions held about it during the recount. The ballot was marked an overvote and not included in the vote total for either candidate. Mr. Mallory wrote: "I now question whether we handled this ballot correctly. Even before we had finished the day, before we had finished our other precincts, I had questions and reservations about my decision to consider the ballot as an indiscernible overvote. I do not feel like I made the right decision in this case." *Id.* p. 2.

The Court heard argument from the parties on the issue of whether the Court should consider Mr. Mallory's challenge to this ballot being classified as an overvote. The Court found that the language of 24.2-802(D)(3) stating that "[the] written statement of any one recount

Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a court appointed and sitting under §§ 24.2-805 and 24.2-806." By order dated November 30, 2017, the Chief Justice of the Supreme Court of Virginia made such designation. The recount court was directed to hear the petition filed herein "on a date set by the Chief Judge of the three-judge court, and continuing until the matters presented in this case have been disposed of according to law."

official challenging a ballot shall be sufficient to require its submission to the court" was plain and unambiguous.[2] The Court ruled it would consider the validity of the ballot. The Court allowed the parties to inspect the questioned ballot and heard argument. Applying the guidelines adopted by the State Board of Elections at its meeting of October 6, 2015, and published in *Ballot Examples – Hand Counting Printed Ballots for Virginia Elections or Recounts* (Exhibit 3), the Court ruled the ballot was incorrectly classified as an overvote and should have been counted for the Respondent. Having determined all matters pertaining to the recount, the Court certified the vote for each party to the recount.

Petitioner moves this Court to reconsider three decisions from the hearing of December 20, 2017: (1) "the Court allowed one of Respondent's appointed recount officials to challenge a ballot by submitting a letter to the court the morning after the recount had already concluded;" (2) "the Court evaluated the apparent ballot that was the subject of the recount official's letter and re-determined the vote in the Warwick precinct for a second time after the recount;" and (3) "the Court ruled that the apparent questioned ballot should be counted as a vote for [the Respondent]." Petitioner's Motion for Reconsideration on an Expedited Basis. Petitioner submitted a Memorandum in Support of its motion. Respondent filed an objection and memorandum in support of objections, to which Petitioner replied by memorandum. The Court has reviewed and considered the motions and memoranda and is prepared to rule.[3]

[2] The Court, through Judge Cella, stated: "The statute says a written statement of any one recount official challenging a ballot shall be sufficient to require its, meaning the ballot, submission to the court. So if someone can challenge a ballot in writing, they can do it ... We have one written statement of a recount official. We have one written statement challenging a ballot. The statute says that is sufficient to require its submission to the court." TR. 17.

[3] Respondent asserts that "[after] the Recount Court rendered its decision and signed the [certification], the Recount Court was dissolved by operation of law." Respondent's Objection to Petitioner's Motion for Reconsideration, ¶ 3. Respondent consigns this issue to a footnote in his Memorandum, stating "[there] is a question as to when the Recount Court ... concludes and if Rule 1:1 of the Rules of the Virginia Supreme Court would apply."

Recount Procedure

Section 24.2-802, Code of Virginia, provides the procedure for a recount. Subsection (D)(3) reads, in relevant part, as follows:

> At the conclusion of the recount of each precinct, the recount officials shall write down the number of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates or for and against the question. They shall submit the ballots or the statement of results used, as to the validity of which questions exist, to the court. The written statement of any one recount official challenging a ballot shall be sufficient to require its submission to the court.
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> At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and votes. After determining all matters pertaining to the recount and redetermination of the vote as raised by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for each party to the recount and declare the person who received the higher number of votes to be nominated or elected, as appropriate, or (b) the votes for

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Respondent's Memorandum in Support of Objections, p.4, n.1. Respondent points out correctly that "[there] has been no case to determine if a party has a right to seek reconsideration." *Id.* This Court did consider whether its authority ended upon its certification of the vote to the State Board, but concluded that the certification was a judgment of this Court pursuant to Rule 1:1 and, therefore, remained under its control for twenty-one days following the certification. Additionally, the appointment of the three judge panel states the Petition for Recount shall "be heard on a date set by the Chief Judge ... and *continuing* until the matters presented in the case have been disposed of according to law." Supreme Court of Virginia, November 30, 2017 (emphasis added). For these reasons, this Court believes it has authority to rule on the Motion to Reconsider.

> and against the question and declare the outcome of the referendum. The Department shall post on the Internet any and all changes made during the recount to the results as previously certified by it pursuant to § 24.2-679.

Code of Virginia § 24.2-802(D)(3). Section 24.2-802(H), Code of Virginia, states that "[t]he recount proceeding shall be final and not subject to appeal."

Analysis

"Motions to Reconsider are not favored and should be rarely granted absent new evidence, manifest injustice, or clear error." *Com. ex rel. FX Analytics v. Bank of New York Mellon*, 84 Va. Cir. 473, 483 (Fairfax Cty. 2012). Petitioner alleges no new evidence; she states her motion for reconsideration should be granted "to avoid clear error and manifest injustice." The Court finds two issues to be dispositive of Petitioner's motion: (1) the Court's consideration of Mr. Mallory's letter; and (2) the Court's classification of the questioned ballot as a vote for the Respondent. The Court will address these issues in turn.

The Mallory Letter

Petitioner asserts § 24.2-802(D)(3) establishes a "timing restriction" limiting ballot challenges by recount officials to "two different, distinct points in the recount process: first, at the conclusion of the recount in *each* precinct, and second, at the conclusion of the recount of *all* precincts." Petitioner's Mem. pp. 8-9 (emphasis in original). As such, "the ballot challenge made by Mr. Mallory during the final court hearing in the recount was untimely, improper, and should not have been considered by the Court." *Id.* p. 11. Petitioner asserts "there is no Virginia authority to support the argument that a challenge to a ballot can be made after the recount for the relevant precinct has already concluded." *Id.* p. 12.

The Court begins its consideration of Petitioner's motion with an analysis of the statute. The standard this Court applies in interpreting a statute has been clearly articulated by the Supreme Court of Virginia. "In interpreting [a] statute, 'courts apply the plain meaning … unless the terms are ambiguous or applying the plain language would lead to an absurd result." *Miller & Rhoads Building, L.L.C. v. City of Richmond,* 292 Va. 537, 541 (2016). The "central focus [of the Court] is to ascertain and give effect to the intention of the General Assembly." *Boasso America Corp., d/b/a Greensville Transport Co. v. Zoning Administrator of the City of Chesapeake, et al.,* 293 Va. 203, 207 (2017) (quoting *Miller v. Highland County*, 274 Va. 355, 364 (2007)). Legislative intent is determined "from the words contained in the statute." *Ricks v. Commonwealth,* 290 Va. 470, 477 (2015) (quoting *Elliott v. Commonwealth*, 277 Va. 457, 463 (2009)). The Supreme Court of Virginia has repeatedly admonished that "where … a statute is clear and unambiguous, '[t]he question … is not what the legislature intended to enact, but what is the meaning of that which it did enact. We must determine the legislative intent by what the statute says and not by what we think it should have said.' Thus, the paramount principle of statutory interpretation is 'to interpret the statute as written.'" *Miller & Rhoads Building,* 292 Va. at 541-42 (internal citation omitted) (quoting *Carter v. Nelms*, 204 Va. 338, 346 (1963); quoting *City of Lynchburg v. Suttenfield*, 177 Va. 212, 221 (1941)). In determining that intent, "words are to be given their ordinary meaning unless it is apparent that the legislative intent is otherwise." *Lovisi v. Commonwealth*, 212 Va. 848, 850 (1972). "Furthermore, [t]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results." *Ricks*, 290 Va. at 477 (quoting *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007)) (internal quotation marks omitted). "Language is ambiguous if it admits of being understood in more than

one way or refers to two or more things simultaneously. An ambiguity exits when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness." *Travelers Property Casualty Co. v. Ely*, 276 Va. 339, 344 (2008) (internal citations omitted).

Applying this standard, the Court finds the language of § 24.2-802(D)(3) to be clear and unambiguous. The language is not difficult to comprehend, it is not of doubtful import, and it does not lack clearness or definiteness. *See Blake v. Commonwealth*, 288 Va. 375, 381 (2014) (quoting *Boynton v. Kilgore*, 271 Va. 220, 227 n.8 (2006)). The statute states that "[the] written statement of any one recount official challenging a ballot shall be sufficient to require its submission to the court." Va. Code § 24.2-802 (D) (3). The Court received a "written statement" by Mr. Mallory, a recount official, that challenged the disposition of a ballot. That was sufficient to "require" the submission of the ballot to the Court. There is no statutory language requiring the written statement of the recount official to be made at a certain time. The only procedural consideration in the statute is that the parties be allowed "to inspect the questioned ballots" and the court hear argument prior to its certification. Likewise, there is no language that the failure to submit a written statement at a certain time operates as a waiver of the right of a recount official to so act. This plain interpretation of the statute is to be preferred to Petitioner's narrow construction which would limit or eliminate the ability of a recount official to bring matters of concern to the attention of the court. Petitioner's interpretation of the statute would prevent the court from fulfilling its statutory duty to determine "*all matters* pertaining to the recount." Va. Code § 24.2-802 (D) (3) (emphasis added).[4]

[4] Petitioner argues that the Court's actions violate the provision that "[t]here shall be only one redetermination of the vote in each precinct." Petitioner's Mem. pp. 6-9. The Court's actions in ruling on the validity of questioned ballots is encompassed by the redetermination process outlined in the statute

Further, it is the responsibility of this Court to read together statutes concerning the same subject and to construe them "so as to avoid conflict between them and to permit each of them to have full operation according to their legislative purpose." *Eastlack v. Commonwealth,* 282 Va. 120, 125-126 (2011). The Supreme Court of Virginia has stated that "[s]tatutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement." *Blake*, 288 Va. at 383 (quoting *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957)). The General Assembly in Title 24.2, Chapter 9, Article 1, has enacted a specific and detailed statutory scheme regulating electoral recounts. The Court finds that its interpretation of § 24.2-802(D)(3) avoids conflict with other provisions of § 24.2-800 *et seq*. For instance, § 24.2-802(A) states that "[the] chief judge of the circuit court or the full recount court may, consistent with State Board of Elections standards, resolve disputes over the application of the standards and direct all other appropriate measures to ensure the proper conduct of the recount." Code of Virginia, § 24.2-802(A). Section 24.2-802(B) provides that "[commencing] upon the filing of the recount, *nothing* shall prevent the discovery or disclosure of any evidence that could be used pursuant to § 24.2-803 in contesting the results of an election." Code of Virginia, § 24.2-802(B) (emphasis added).[5] This broad grant of authority – allowing the court to "resolve disputes," "direct all other appropriate measures to ensure the proper conduct of the recount," and let "nothing ... prevent the discovery or disclosure of evidence" – indicates the clear intention of the General Assembly that the recount court provide a timely, thorough, and accurate resolution of the recount. Interpreting § 24.2-802(D)(3) as establishing a "timing restriction" limiting ballot challenges by recount

[5] One such ground is "objection to the conduct of results of the election accompanied by specific allegations which, if proved true, would have a probably impact on the outcome of the election." Va. Code § 24.2-803(B).

officials would create conflict between the statutes and deny each of them full operation according to their legislative purpose.[6]

The Court does not find that its ruling allowing the ballot challenge by Mr. Mallory to be clear error or to cause manifest injustice.

The Challenged Ballot

Petitioner asserts that the Court's decision to count the challenged ballot as a vote for the Respondent was "clearly erroneous." Petitioner's Mem. pp. 14-20.

In considering whether this ballot was an overvote, the Court consulted the Board's *Ballot Examples – Hand Counting Printed Ballots for Virginia Elections or Recounts*. The relevant guidelines state as follows:

> (5) Any ballot which is marked for more than one candidate for the office shall be deemed an overvote and no vote shall be counted except as provided in this section.
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> (8) Any ballot that has any mark … in the target area or candidate area for one candidate, and on which other marks in the target areas or candidate areas for any other candidates have been partially erased, scratched out, or otherwise obliterated, shall be counted as a vote for the candidate for which the mark was not erased, scratched out, or otherwise obliterated, provided no other candidate is similarly marked.

[6] Petitioner asserts that the Court's decision was "manifestly unjust" in that it "did not afford counsel for Ms. Simonds to submit late challenges during the December 20 hearing." The Court points out that only the written statement of a recount official challenging a ballot is sufficient to require its submission to the court. Petitioner produced no evidence at the hearing that any other recount official had made such a written challenge.

Ballot Examples – Hand Counting Printed Ballots for Virginia Elections or Recounts (5) (8), pp. 5, 11. The questioned ballot included filled-in ovals for both the Petitioner and the Respondent, with a single line drawn through the filled-in oval for the Petitioner.

Applying the plain and unambiguous language of the guidelines, the challenged ballot would be considered an overvote due to the ovals being filled in for both candidates, unless an exception applied. Thus the issue for the Court was to determine if the line through the filled-in-oval for the Petitioner "partially erased, scratched out, or otherwise obliterated" the mark for the Petitioner. It was clear to the Court that the line was not a partial erasure or obliteration of the mark for the Petitioner. Thus the issue was whether the line through the mark was a scratch out. *Webster's Third International Dictionary* defines "scratch" as follows: "to cancel by drawing a line through." The filled-in oval for the Petitioner had a line drawn through it. Therefore, the Court found that it corresponded to the definition of a scratch. As such, "the ballot shall be counted as a vote for the candidate for which the mark was not erased, scratched out, or otherwise obliterated."[7]

The Court does not find that its ruling counting the challenged ballot as a vote for the Respondent to be clear error or to cause manifest injustice.

Decision

The right of a citizen to cast a free vote has been secured to us by the blood of patriots shed from Lexington and Concord to Selma, Alabama. The manifest injustice against which we must always guard is the chance that a single vote may not be counted. It matters not the

[7] Petitioner states that this Court interpreted the "slash mark" as "a mark of opposition to Ms. Simonds." Petitioner's Mem. p. 17. The Court made no such conclusion. The Court applied the plain language of the *Ballot Examples* to determine if the ballot was an overvote or should be "counted as a vote for the candidate for which the mark was not erased, scratched out, or otherwise obliterated."

importance of the disposition of a ballot in a given election; it matters the dignity of the citizen, the integrity of the electoral process, and the destiny of our constitutional republic. These principles animate the provisions of Title 24.2, Chapter 9 of the Code of Virginia. The application of these statutory provisions required this Court to rule as it did on December 20, and require it again to so rule.

Petitioner's Motion for Reconsideration is respectfully denied.