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MISSOURI CIRCUIT COURT  
TWENTY-SECOND JUDICIAL CIRCUIT  
(City of St. Louis)

**FILED**  
SEP 02 2016  
22<sup>ND</sup> JUDICIAL CIRCUIT  
CIRCUIT CLERK'S OFFICE  
BY \_\_\_\_\_ DEPUTY

BRUCE FRANKS, JR., )  
 )  
Contestant, )  
 )  
vs. )  
 )  
PENNY V. HUBBARD, )  
 )  
Contestee. )

Case No.1622-CC09996  
Division No. 10

MEMORANDUM, ORDER AND FINAL JUDGMENT

This Petition for Election Contest was tried before the Court beginning on August 31, 2016, proceeding without continuance until its conclusion on the morning of September 2, 2016. All parties were present for trial either in person or through counsel. All parties were given a full and fair opportunity to present evidence and argument to the Court. The parties have submitted Proposed Findings of Fact and Conclusions of Law. Upon review of the record, the evidence adduced at trial, the submissions of the parties, including the Stipulated Findings of Fact, and the parties' Proposed Findings of Fact and Conclusions of Law, the Court now rules as follows.

Contestant brought this Petition for Election Contest alleging that there were irregularities of sufficient magnitude to cast doubt on the validity of the August 2, 2016 primary for the Democratic nomination for the 78<sup>th</sup> District of the Missouri General Assembly. Contestant alleges the City of St. Louis

Board of Election Commissioners, (sometimes referred to as the "Election Board"), improperly counted a significant number of absentee ballots in the election.

### **Stipulated Facts**

The parties have entered into stipulated facts, which are hereby incorporated into this Judgment, as set out below in full, with the omission of subject headings.

1. The parties enter into this stipulation of facts to be included in the record along with trial testimony and exhibits received into evidence by the Court in this matter.

2. This action is brought pursuant to §§ 115.527 to 115.601, RSMo., to challenge the results of the August 2, 2016 primary for the Democratic nomination for the 78<sup>th</sup> District of the Missouri General Assembly ("Contested Election"). The City of St. Louis Board of Election Commissioners ("Election Board") conducted the Contested Election.

3. This Court has jurisdiction over this action pursuant to §§ 115.529, 115.531, RSMo.

4. Venue for this action is proper in this Court because the Contested Election was held in the City of St. Louis, which is in the Twenty-Second Judicial Circuit. § 115.531, RSMo.

5. Contestant Bruce Franks, Jr., is a candidate for the 2016 Democratic Party nomination to serve the 78<sup>th</sup> District in the Missouri House of Representatives; he lives in the District.

6. Contestee Penny Hubbard is the incumbent Representative for the 78<sup>th</sup> District in the Missouri House of Representatives and the candidate declared the winner of the Contested Election; she lives in the District.

7. On August 2, 2016, the Board conducted the Contested Election in the City of St. Louis, Missouri.

8. Contestant Franks and Contestee Hubbard were the only two candidates in the Contested Election.

9. There were a total of 4316 votes cast in the Contested Election. 530 of the total votes cast were cast by absentee ballot.

10. 142 of the absentee votes in the Contested Election were cast at the central location of the Election Board. 89 of the walk-in absentee votes were cast on a touch screen voting machine and 53 of the votes were cast on an optiscan electronic voting machine. All 142 of these absentee ballots were counted by the Election Board. Contestant challenges the counting of these votes by the Election Board.

11. None of the walk-in absentee votes were placed in an absentee ballot envelope; Contestant Exhibits 3 and 4 are examples of absentee ballot envelopes sent to voters by the Board.

12. The only challenge to the 142 walk-in votes being made by Contestant is that the votes were not placed in executed ballot envelopes.

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13. 160 of the absentee votes cast and counted in the Contested Election were from voters who were entitled to vote according to the absentee voting process for the permanently disabled contained in Mo. Rev. Stat. Section 115.284.

14. The parties agree that eight votes - those of Arthur Bucholtz, Edna Jones, Retha Osmack, Tonya Busby, Dorothy Jordan, Moliqye Patton-Taylor, Dennis Delaney and Carl Lewis - were unlawfully cast and should not have been counted by the Election Board.

15. The Election Board accepted and counted absentee ballots from 57 voters who did not write their full address underneath their signature on the absentee ballot envelope before returning it to the Election Board; the Contestant contends that these votes were unlawfully included in the final tally, while the Contestee contends that they were properly counted.

16. The Election Board accepted and counted absentee ballots from 11 voters who received assistance filing out their absentee ballot and their assistant signed the absentee ballot but did not otherwise include a statement similar to the example provided in § 115.283.5. No absentee ballots provided by the Board include such a statement, and many ballot envelopes in this group state that no notary is required. The Contestant contends that these votes were unlawfully included in the final tally, while the Contestee contends that they were properly counted.

17. The Election Board accepted and counted an absentee ballot from one voter whose absentee ballot envelope did not include his full address and also did not include a statement similar to the example provided in § 115.283.5 from the person who assisted him in filling out his ballot. The absentee ballot received by that voter from the Election Board also stated that no notary was required. The Contestant contends that this vote was unlawfully included in the final tally, while the Contestee contends that it was properly counted.

18. A list of the voters described in paragraphs 15-17 is attached hereto and incorporated by this reference.

19. The Election Board accepted and counted absentee ballots from 21 voters who listed on their absentee ballot application

that the reason they sought to vote absentee was that they expected to be prevented from going to the polls on Election Day due to "incapacity or confinement due to illness or disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability." Based on the voter's absentee ballot application, the Election Board sent to these voters absentee ballots envelopes that included the statement "No Notary Required." When these ballots were sent back to the Election Board, however, the voter indicated a different reason for voting absentee that did require a notarization of their signature; these voters mailed their ballot envelopes back to the Election Board unnotarized. All 21 of these ballots were counted by the Election Board. The Contestant contends that these votes were unlawfully included in the final tally, while the Contestee contends that they were properly counted.

20. The Election Board accepted and counted absentee ballots from 6 voters whose stated justification for voting absentee would require notarization of their ballot envelopes, but the absentee ballot envelopes the Election Board sent to them stated that no notary was required. All 6 voters filled out and signed the absentee ballot envelopes provided to them by the Election Board

without having them notarized; the Contestant contends that these votes were unlawfully included in the final tally, while the Contestee contends that they were properly counted.

21. Prior to the deadline for requesting challengers, Franks made one call to the St. Louis City Democratic Party Central Committee Chairman to secure credentials to be a challenger at the Election Board but never received a return call.

22. Franks filed his Petition for Election Contest on August 17, the day after the Board announced the official results of the Contested Election.

23. Judge Julian Bush set the case for a preliminary hearing five days later on August 22.

24. Hubbard appeared specially to contest personal and subject matter jurisdiction by filing a Motion to Dismiss, contending that Franks was not permitted to initiate an election contest until the Secretary of State had certified the results of the election.

25. Judge Bush agreed and issued an order staying proceedings until the Secretary of State certified the results; the order stated that the Court would deem the Petition for Election Contest filed as of the date of the Secretary of State's certification.

26. The Secretary of State certified the results of the Contested Election on August 25, 2016.

27. In total Contestant challenges that 238 votes were wrongfully counted by the Election Board.

#### **Sunshine Law Case**

A related case was brought in this Court by Counsel for Contestant against the Board in Roland v. City of St. Louis Board of Election Commissioners, 1622-CC09861. In that case, Plaintiff David Roland contended that the Board failed to provide applications for absentee ballots and absentee ballot envelopes pursuant to a Missouri Sunshine Law request in violation of Missouri law. The Honorable Julian Bush of this Court found that the Board violated Missouri law when they failed to furnish these documents to Mr. Roland and ordered their production. These documents were then used in the instant proceeding.

#### **Findings of Fact**

Given the stipulated facts entered into by the parties and incorporated herein, extensive factual findings are unnecessary.

The Court finds that Contestant Franks won 1,999 (52.79%) of the votes cast at the polls on August 2, while Contestee Hubbard won 1,787 (47.21%) of those votes. Hubbard won 416 (78.49%) of



the votes cast via absentee ballot while Franks won 114 (21.51%) of the votes cast via absentee ballot. In the final tally, Hubbard received a total of 2,203 votes and Franks received a total of 2,113 votes. The margin of victory in the election was ninety (90) votes.

No credible evidence was presented from which this Court could find that any voter fraudulently cast a vote in this case. The evidence presented shows that the absentee voters in the August 2, 2016 election did everything they were told to do by election officials and staff. Any error or irregularity that this Court finds herein, is solely the responsibility of the City of St. Louis Board of Election Commissioners.

#### **Election Contest Law**

"The right to contest an election exists by virtue of statute only and is not a common law or equitable right." State ex rel. Bouchard v. Grady, 86 S.W.3d 121, 123 (Mo. App. E.D. 2002) (citing Board of Election Com'rs of St. Louis County v. Knipp, 784 S.W.2d 797, 798 (Mo. banc 1990)). "The relief the courts may grant is limited to what the statutes specifically authorize." Id.

"[By] allowing election contests, the General Assembly has determined that the accuracy of election results is a matter of

significant importance to our democratic process." Marre v. Reed, 775 S.W.2d 951, 952 (Mo. banc 1989). "If as a result of election irregularities the wrong candidate is declared the winner, more is at stake than the losing candidate's disappointment; the people have lost the ability to impose their will through the electoral process." Id. "Thus to claim that [an] election contest is no more than an adversary proceeding between a losing candidate and the officially announced winner is to misunderstand the *raison d'etre* of election contests and to discount the importance the legislature has placed on accuracy in elections." Id. "In bringing an election contest, the contestant speaks for the entire electorate, seeking to assure all that the democratic process has functioned properly and that the voters' will is done." Id. (citing Foster v. Evert, 751 S.W.2d 42, 43-44 (Mo. banc 1988)).

A new election is a "drastic remedy, reserved for those situations in which the court finds there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." Knipp, 784 S.W.2d at 798. "A new election tosses aside the aggregate of the citizens' votes, both those properly and improperly cast, and for that reason, a new election remedy is appropriate where the validity of the entire

election is under suspicion, not simply the result of the election." Id. "Only when the trial court is firmly convinced irregularities affected the outcome of the election should an election be voided." See Gerrard v. Board of Election Comm'rs, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995).

"[The] decision to overturn an election and thereby disenfranchise the voters should not be taken lightly." Barks v. Turnbeau, 573 S.W.2d 677, 681 (Mo. App. 1978). "However, the opportunity to vote by absentee ballot is clearly a privilege and not a right." Id. "Compliance with the statutory requirements is mandatory." Id.

"If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement." Id. "In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will." Id. "If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial." Id.

### Relevant Statutes

Section 115.531 RSMo. provides for the filing of a petition to contest a primary election in "the office of the clerk of the circuit court of any circuit in which part of the election was held and in which any alleged irregularity occurred."

Section 155.533 RSMo. provides for the procedure after such a petition is filed.

Section 115.545 RSMo. states as follows:

Upon completion of the procedures provided for in this subchapter, the court shall render its judgment based upon the issues of law and fact and cause a certified copy of its judgment to be transmitted to each affected election authority and to the secretary of state. Each election authority to which a copy of the judgment is sent and the secretary of state shall correct their records to conform to the judgment.

Section 115.547 RSMo. provides that this Court may require a contestant in a contested primary election to post a bond for the costs and expenses of the election contest and that the Court may adjudge the expenses of any election contest against the unsuccessful party.

Section 115.549 RSMo. states as follows:

If any court trying a contested primary election determines there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election, it may order a new primary

election for the contested office. The order shall set the date of the election, which shall not be less than fourteen or more than thirty days after the order is issued, and shall be sent by the clerk of the court to each election authority responsible for conducting the special election. In its order, the court shall specify the name of each candidate for the office to be voted on at the special election, and the election shall be conducted and the votes counted as in other primary elections. Notice of the election shall be given in such manner as the court directs. The person receiving the highest number of votes at a special party primary election shall be his party's nominee for the contested office. The requisite number of persons receiving the highest number of votes at any other special primary election shall be the nominees for the office.

Section 115.275 RSMo. provides for definitions relative to absentee ballots.

Section 115.277.1 RSMo. states as follows:

Except as provided in subsections 2, 3, 4, and 5 of this section, any registered voter of this state may vote by absentee ballot for all candidates and issues for which such voter would be eligible to vote at the polling place if such voter expects to be prevented from going to the polls to vote on election day due to:

(1) Absence on election day from the jurisdiction of the election authority in which such voter is registered to vote;

(2) Incapacity or confinement due to illness or physical disability, including a

person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability;

(3) Religious belief or practice;

(4) Employment as an election authority, as a member of an election authority, or by an election authority at a location other than such voter's polling place;

(5) Incarceration, provided all qualifications for voting are retained;

(6) Certified participation in the address confidentiality program established under sections 589.660 to 589.681 because of safety concerns.

Section 115.279 RSMo. provides for applications for absentee ballots.

Section 115.283.1 RSMo. states:

Each ballot envelope shall bear a statement\* on which the voter shall state the voter's name, the voter's voting address, the voter's mailing address and the voter's reason for voting an absentee ballot. On the form, the voter shall\* also state under penalties of perjury\* that the voter is qualified to vote in the election, that the voter has not previously voted and will not vote again in the election, that the voter has personally marked the voter's ballot in secret or supervised the marking of the voter's ballot if the voter is unable to mark it, that the ballot has been placed in the ballot envelope and sealed by the voter or under the voter's supervision if the voter is unable to seal it, and that all

information contained in the statement is true\*. In addition, any person providing assistance to the absentee voter shall include a statement on the envelope identifying the person providing assistance under penalties of perjury. Persons authorized to vote only for federal and statewide officers shall also state their former Missouri residence. (\*emphasis added)

Section 115.283.6 RSMo. states:

Notwithstanding any other provision of this section, any covered voter as defined in section 115.902 or persons who have declared themselves to be permanently disabled pursuant to section 115.284, otherwise entitled to vote, shall not be required to obtain a notary seal or signature on his or her absentee ballot.

Section 115.283.7 RSMo. states:

Notwithstanding any other provision of this section or section 115.291 to the contrary, the subscription, signature and seal of a notary or other officer authorized to administer oaths shall not be required on any ballot, ballot envelope, or statement required by this section if the reason for the voter voting absentee is due to the reasons established pursuant to subdivision (2) of subsection 1 of section 115.277.

Section 115.291 RSMo. describes the procedure for absentee ballots and demands that the absentee ballot be placed in the ballot envelope and that the statement on the ballot envelope be filled out.

Section 115.295.2 RSMO states "If the statements on any ballot envelope have not been completed, the absentee ballot in the envelope shall be rejected." (\*emphasis added)

However Section 115.294 states "[o]ther provisions of law to the contrary notwithstanding, no absentee ballot shall be rejected for failure of the voter to state on the ballot envelope his reason for voting an absentee ballot."

Section 115.299 RSMo. provides for the counting of absentee ballots. Section 115.299 RSMo. provides a specific and tedious process that must be followed "to count absentee votes on election day", including: appointment of teams of election judges; delivery of the absentee ballots; signed receipting for the ballots; providing a ballot box, tally sheets and statements of returns. Once these requirements are met, Section 115.299.3 and Section 115.299.4 requires, among other things, each team to count votes on all absentee ballots, by one member of each team, closely observed by another member of the team from a different party, opening each absentee ballot envelope and calling the voter's name in a clear voice.

Section 115.303 RSMo. provides for challenging absentee ballots in the same manner as described in Section 115.429 RSMo.



Section 115.429 RSMo. states as follows:

1. The election judges shall not permit any person to vote unless satisfied that such person is the person whose name appears on the precinct register.

2. The identity or qualifications of any person offering to vote may be challenged by any election authority personnel, any registered voter, or any duly authorized challenger at the polling place. No person whose right to vote is challenged shall receive a ballot until his identity and qualifications have been established.

3. Any question of doubt concerning the identity or qualifications of a voter shall be decided by a majority of the judges from the major political parties. If such election judges decide not to permit a person to vote because of doubt as to his identity or qualifications, the person may apply to the election authority or to the circuit court as provided in sections 115.193 and 115.223.

4. If the election judges cannot reach a decision on the identity or qualifications of any person, the question shall be decided by the election authority, subject to appeal to the circuit court as provided in section 115.223.

5. The election judges or the election authority may require any person whose right to vote is challenged to execute an affidavit affirming his qualifications. The election authority shall furnish to the election judges a sufficient number of blank affidavits of qualification, and the election judges shall enter any appropriate information or comments under the title "Remarks" which shall appear at the bottom of the affidavit. All executed

affidavits of qualification shall be returned to the election authority with the other election supplies. Any person who makes a false affidavit of qualification shall be guilty of a class one election offense.

#### **Conclusions of Law**

The Court has jurisdiction over the parties and the claims asserted.

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In Sections 115.275 through 115.304 RSMo., the Absentee Voting statutes, the Missouri legislature set forth specific and detailed requirements for the application for, delivery, and casting of absentee ballots. This specific process requires the use of a ballot envelope that contains certain information, a "statement". The statement, including information required to be provided under penalties of perjury, creates protections that ensure that Missouri citizens have the ability to fairly cast their absentee ballots and have absentee ballots fairly counted for a fairly decided election contest. In addition, the use of these envelopes insures the ability to challenge absentee ballots, as provided by Section 115.303 RSMo.

The Board's failure to require the use of the ballot envelopes, when it accepted and counted the 142 absentee ballots, placed in person at the Election Board's central office, violated Missouri law. The Election Board's failure to

follow the statutorily required procedure, invited less absentee ballot voting oversight and also circumvented the protections provided for contesting absentee ballots. The Election Board's failures untied, and set adrift, the tedious and specific statutory process that the Missouri legislature previously put into place for absentee voting. These tedious and specific statutory provisions cannot be ignored, nor circumvented, but must be specifically followed.

The Election Board disregarded the statutes related to absentee voting by failing to require 142 absentee voters to use envelopes as provided by Missouri law. This disregard of the relevant statutes constitutes an irregularity. See Gerrard, 913 S.W.2d at 90.

The Board cannot rely on 15 CSR 30-10.080 to expand or modify the statutes at issue to allow for absentee voting without the use of ballot envelopes. "If a regulation is inconsistent with the statute, it is the statute, not the regulation, that this Court will apply." Union Elec. Co. v. Dir. of Revenue, 425 S.W.3d 118, 125 (Mo. banc 2014).

Furthermore, Section 115.227 RSMo., the Automated Voting Equipment statutes, states that all provisions of law not inconsistent with Sections 115.225 to 115.235 RSMo. shall "apply

with full force and effect to elections in each jurisdiction using an electronic voting system." Noticeably, the Automated Voting Equipment statutes do not contain the words "envelope" or "absentee". Whereas, the Absentee Voting statutes contain the word envelope approximately twenty times and the word absentee can be found throughout these statutes. The Court finds that the provisions contained in the Absentee Voting statutes are not inconsistent with the provisions contained in the Automated Voting Equipment statutes.

In addition, as stipulated to by the parties, eight additional votes were improperly counted by the Board in the underlying election.

The Court is firmly convinced that these irregularities affected the outcome of the election. These irregularities were more than "petty procedural infirmities but abuses of the election law which cannot be ignored." Barks, 573 S.W.2d at 682.

The number of votes called into question exceeds the margin of the apparent victor and is of sufficient magnitude to cast doubt on the validity of the initial election. See Marre, 775 S.W.2d at 954.

JUDGMENT

The Court now **Orders, Adjudges and Decrees** as follows.

The Court finds in favor of Contestant Bruce Franks in his Petition for Election Contest and against Contestee Penny Hubbard.

The Court **Orders** the St. Louis City Board of Election Commissioners to conduct a special election for the 78<sup>th</sup> State House District, at which registered voters will choose either Bruce Franks, Jr., or Penny Hubbard, as the Democratic nominee to be placed on the ballot for the November 8, 2016, General Election. This election shall be conducted and the votes counted as in other primary elections.

The date for this election shall be Friday, September 16, 2016, a date not less than fourteen or more than thirty days after this Order and Judgment is issued.

Notice for this election shall be as provided in Section 115.127 RSMo.

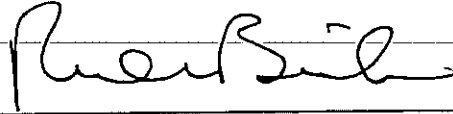
The Court will not exercise its discretion under Section 115.547 RSMo. to require Contestee to pay the costs and expenses of the special election.

Each party shall bear their respective costs of court

incurred herein.

Copies of this Order and Judgment shall be sent by the clerk of the court to each election authority responsible for conducting the special election.

SO ORDERED:



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Rex M. Burlison  
Circuit Judge  
Division 10

Dated: SEPTEMBER 2, 2016  
AT 4:10 P.M.