

April 16, 2024



Action. Access. Progress.

Via email to gsweat@sweatlaw.com

Gary Sweat, Esq.
Washington County Solicitor
Crossroads Center
95 West Beau Street, Suite 605
Washington, PA 15301

Dear Mr. Sweat,

We have received complaints about the recent decision of the Washington County Board of Elections (“Board”) not to notify mail-ballot voters of mistakes they made when completing the declaration form on the outer return envelope, and to disallow them from “curing” such defects. An April 12 news account¹ indicates the Board’s decision to change the County’s past notice-and-cure practices was prompted by a recent federal appeals court decision that a civil rights statute does not require counting of ballots in undated and misdated mail-ballot-return envelopes.² As lawyers representing good-government organizations, voters, and amici in that U.S. Third Circuit Court of Appeals case, we wish to advise you that the Board is misreading the decision, which in no way prevents the election office from either notifying voters that their return envelopes are deficient or allowing them to cure. The Board’s decision to discontinue notice-and-cure practices not only risks needlessly disenfranchising potentially hundreds of eligible Washington County voters, but could ensnare the Board in litigation.

In *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, the U.S. Third Circuit Court of Appeals ruled only that the state-law requirement to handwrite the date on the outer-envelope-declaration form did not violate the Materiality Provision of the Civil Rights Act of 1964. ___F 4th ___, 2024 WL 1298903 (3d Cir. 2024). The case did not raise notice and cure issues, nor did the court’s decision reach them.

Whether a mail-in ballot transmitted in a return envelope that lacks a date or bears the wrong date can be counted is irrelevant to the Board’s decision whether to notify voters of facially obvious defects on the return envelopes or allow them to cure such defects. In other words, the ruling did not change current Pennsylvania law: mail ballots with undated or incorrectly dated envelopes will not be counted, but county Boards may still notify affected voters and allow them to “cure” the mistakes before 8:00 p.m. on Election Day. Pennsylvania courts have held that the Election Code does not prohibit such policies, and therefore counties are free to implement a “notice and cure”

¹ Mike Jones, *Washington County won’t allow voters to ‘cure’ defective mail-in ballots*, Washington Observer-Reporter (April 12, 2024), available at <https://www.observer-reporter.com/news/local-news/2024/apr/12/washington-county-wont-allow-voters-to-cure-defective-mail-in-ballots/>.

² *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, ___F 4th ___, 2024 WL 1298903 (3d Cir. 2024), pet’n for re’hrg filed April 10, 2024, and pending.

process without fear of violating the Election Code. *See Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061 (Pa. Commw. Ct. Sept. 29, 2022) *aff’d by an equally divided court*, 284 A.3d 207 (Pa. 2022). Most Pennsylvania counties have adopted “cure” policies, which have “generally been accepted in order to fulfill the longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Id.* at 4. Our understanding is that until last week’s decision, the Washington County Board allowed mail-in voters whose envelopes were missing a signature to “cure” at the election office and allowed voters with an incorrect or missing date to apply for a new ballot or vote provisionally on Election Day.³

If the Board’s April 11 decision remains in effect, hundreds of otherwise eligible Washington County voters will be needlessly disenfranchised. Local news reports indicate that even as of last week there were already 62 mail-in ballots in Washington County with fatal deficiencies on the outer envelope, and that Director Ostrander expects this number to increase. We strongly urge the Board to reconsider last week’s misguided decision—and do so quickly—so that at least some mail-ballot voters can learn of fatal deficiencies on their ballot-return packets and have an opportunity to preserve their votes by curing the defect on or before Election Day.

We are in a critical window before Election Day: The Washington County election office has already determined that it will not count certain voters’ ballots due to an error, and the Board has now *chosen* not to notify them while they still have an opportunity to remedy the loss of their right to vote. That determination raises serious constitutional procedural due process concerns. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). As Pennsylvania’s Supreme Court wrote recently, “‘a democratic government must . . . practice fairness . . . [which] can rarely be obtained by secret, one-sided determinations of facts decisive of rights.’” *Washington v. Pa. Dep’t of Corr.*, 306 A.3d 263, 266 (Pa. 2023) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951)). As it currently stands, the County’s elections office knows which voters have made an error that will prevent the ballot from being counted and is choosing to keep that fact a secret from the affected voters until it is too late for the voters to remedy the problem. That is unfair to the voters and to the candidates who have attracted their vote. Government officials should not knowingly disenfranchise any voters—especially when there is a ready solution to avoid the harm.

The solution to notify affected voters is straightforward. As Director Ostrander explained, counties can enter codes into the SURE system that trigger an automatic email to voters who have provided an email address. But rather than doing that, it appears that the Board’s most recent directive calls for election staff to enter the ballots as “received”—even when the return-envelope is obviously deficient—which will email the voter *only* that the mail ballot has arrived in the election office. Moreover, the email message, in our understanding, advises the voter that they may not vote at their polling place on Election Day. That admonition is inaccurate because voters whose mail ballots will not count can cast a provisional ballot and preserve their fundamental right to vote. Absent a hint of any problem, these voters will reasonably believe their ballots will be counted—which is not true. That misleading email is unfair.

Rather than marking defective mail ballots as “received,” Board staff should enter the appropriate “canceled” or “pending” codes provided by the Department of State. These options will generate an automatic email that notifies the affected voters that their mail-in ballot will *not* be counted, thereby giving the individual time before 8:00 p.m. on Election Day to cure the defect and preserve

³ Mike Jones, *Washington County elections officials considering options for ballot ‘curing,’* Washington Observer-Reporter (March 13, 2024), available at <https://www.observer-reporter.com/news/local-news/2024/mar/13/washington-county-elections-officials-considering-options-for-ballot-curing/>

their vote. For instance, the PEND-OTHER code⁴ notifies voters that the county has “noticed an error” on the ballot envelope and instructs voters that they may “go to [their] polling place on election day and cast a provisional ballot.”

This straightforward SURE-system protocol—which is not burdensome on the election office—will notify voters that their ballot will not be counted and give them critical information about an *existing* procedure to salvage their vote under the Election Code. *See Keohane v. Delaware Cnty. Bd. of Elections*, No. 2023-004458 (Ct. Comm. Pls. Sept. 21, 2023) (ordering the Delaware County Board of Elections to count provisional ballots cast by voters who learned that their mail-in ballot had been canceled due to errors on the outer envelope). Inputting the rejection into SURE to make the voter aware that their vote will not count is a *minimal* due process protection that the Board of Elections can readily provide to protect the fundamental right to vote and ensure that this sacred right is not irremediably denied.

The Board’s April 11 decision not to notify or allow voters with facially deficient mail-ballot-return envelopes to cure the deficiency—based on a serious misreading of a case being handled by some of undersigned counsel—risks violating Washington County voters’ constitutional due process rights under the Pennsylvania Constitution. We urge the Board to reverse course and direct Election staff to enter “pending” or “canceled” codes in the SURE system. That is the least the Board could do to protect its residents’ right to vote. The County could go a step further, as some counties do, by contacting the affected voters and advising about the provisional ballot process, or by publishing a list of voters to non-profit organizations and political parties who can do that outreach. We urge the Board to take both steps to minimize how many Washington County voters will be disenfranchised. Please feel free to contact us at ksteiker-ginzberg@aclupa.org.

Public Interest Law Center
Mimi McKenzie
Legal Director

Benjamin Geffen
Senior Attorney

ACLU of Pennsylvania
Witold Walczak
Legal Director

Marian K. Schneider
Senior Policy Counsel for Voting Rights

Stephen Loney
Senior Supervising Attorney

Kate Steiker-Ginzberg
Voting Rights Legal Fellow

cc: Chairman Nick Sherman (*via email c/o Administrative Assistant*)
Vice Chair Electra Janis (*via email c/o Administrative Assistant*)
Commissioner Larry Maggi (*via email c/o Administrative Assistant*)
Election Director Melanie Ostrander (*via email*)

⁴ Based on current information, the PEND-OTHER code generates an automatic email to voters that reads: “The county has noticed an error with your ballot envelopes, which means your ballot may not be counted. If you cannot fix the errors in time, you can go to your polling place on election day and cast a provisional ballot.”