

To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Interpretation of N.J.S. 19:29-1 and N.J.S. 19:63-26 (*In the Matter of the Election for Atlantic County Freeholder District 3 2020 General Election*, 468 N.J. Super. 341 (App. Div. June 29, 2021))
Date: July 11, 2022

MEMORANDUM

Project Summary

In New Jersey, the laws governing voting and elections are primarily contained in Title 19.¹ The grounds for contesting an election,² and the procedures and rules governing voting by mail (Vote By Mail Law)³ are addressed by Title 19. An election “may be contested” based upon one or more of the nine grounds enumerated in N.J.S. 19:29-1, including “[w]hen . . . legal votes rejected at the polls [are] sufficient to change the result.”⁴ By contrast, N.J.S. 19:63-26 directs that “[n]o election shall be held invalid due to any irregularity or failure in the preparation or forwarding of any mail-in ballots.”⁵

In the Matter of the Election for Atlantic County Freeholder District 3 2020 General Election was brought by a losing candidate who contested the election of his opponent and claimed that enough mail-in ballots were defective — they did not include the Third District Commissioner⁶ election — to have changed the outcome.⁷ The Appellate Division found that the defective ballots fell within the scope of N.J.S. 19:63-26⁸ and also constituted “rejected legal votes as defined by N.J.S.A. 19:29-1(e).”⁹ The issue before the Court was whether N.J.S. 19:29-1 “appl[ies] to an election pursuant to the Vote By Mail Law.”¹⁰

To “[h]armonize N.J.S.A. 19:63-26 and N.J.S.A. 19:29-1 and read[] the statutes *in pari materia* with the overall scheme of [the] election [laws],” the Court held that, if applicable to a contest claim, “N.J.S.A. 19:63-26 operates as a rebuttable presumption [when a] contestant . . . assert[s] one or more of the grounds under N.J.S.A. 19:29-1.”¹¹

¹ N.J. Stat. Ann. §§ 19:1-1 to :63-31 (West 2022).

² N.J. STAT. ANN. §§ 19:29-1 to - 14 (West 2022).

³ N.J. STAT. ANN. §§ 19:63-1 to - 31 (West 2022).

⁴ N.J. STAT. ANN. § 19:29-1(e) (West 2022).

⁵ N.J. STAT. ANN. § 19:63-26 (West 2022).

⁶ *In the Matter of the Election for Atl. Cnty. Freeholder Dist. 3 2020 Gen. Election*, 468 N.J. Super. 341, 346 n.1 (App. Div. 2021) (“The position of the Board of Chosen Freeholders has become the Board of County Commissioners and the position of ‘Freeholder’ has been substituted by ‘County Commissioners.’”).

⁷ *Id.* at 347 – 48.

⁸ *Id.* at 360.

⁹ *Id.* at 356.

¹⁰ *Id.* at 357.

¹¹ *Id.* at 360.

Relevant Statutes

N.J.S. 19:29-1 provides, in relevant part, that:

The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by the voters of this State or of any of its political subdivisions affected thereby upon 1 or more of the following grounds:

e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result; . . .¹²

N.J.S. 19:63-26 provides, in relevant part, that:

No election shall be held to be invalid due to any irregularity or failure in the preparation or forwarding of any mail-in ballots prepared or forwarded pursuant to the provisions of P.L.2009, c. 79 (C.19:63-1 et al.).¹³

Background

In *Matter of the Election*, the unsuccessful candidate (Parker) in the November 3, 2020, election for Third District Commissioner, “filed a contest, asking the court to invalidate the election because a number of voters received defective ballots that did not include the Third District Commissioner election.”¹⁴ The margin of victory in the election was 286 votes and 335 erroneous ballots were sent to voters.¹⁵

In support of his contest claim, Parker contended that voters who received defective ballots “were unable to vote for a candidate of their choice,” and as a result, “had their legal votes rejected and were disenfranchised.”¹⁶ Since enough “legal votes [were] rejected at the polls . . . to change the results,” Parker argued the election result should be invalidated pursuant to N.J.S. 19:29-1(e).¹⁷

The winner of the election (Witherspoon) countered that the margin of victory should be compared against the number of defective ballots that were actually returned, rather than the total number.¹⁸ She also asserted that N.J.S. 19:63-26 “barred Parker’s challenge because the statute limits the court’s ability to overturn an election due to irregularities [in the preparation or

¹² N.J. STAT. ANN. § 19:29-1.

¹³ N.J. STAT. ANN. § 19:63-26.

¹⁴ *Id.* at 346 – 47.

¹⁵ *Id.* at 351 – 52.

¹⁶ *Id.* at 349.

¹⁷ *Id.*

¹⁸ *Id.* at 350 (“Witherspoon contends there is no evidence . . . that qualified voters who should have been sent a ballot that contained the race, and did not vote, would have voted if sent the correct ballot [and] voters were explicitly given the option to cure the ballot deficiencies by voting provisionally on Election Day.”) (internal quotations omitted).

forwarding of mail-in ballots] and supersedes N.J.S. 19:29-1.”¹⁹

The trial court rejected Witherspoon’s statutory argument, finding that “election laws should not be construed so as to deprive voters of their franchise,” and concluding that “the issues raised . . . were . . . fundamental errors that may have altered the outcome of the election because voters were denied the right to vote.”²⁰ With respect to the correct calculation of “rejected legal votes,” the trial court observed that the New Jersey Supreme Court has previously framed “[t]he essential question [as] whether voters were denied the opportunity to vote for a candidate of their choice.”²¹

The court held that voters who received defective ballots were “properly characterized as ‘rejected legal votes,’”²² and “found Parker met his burden to set aside the election” pursuant to N.J.S. 19:29-1(e).²³

Analysis

On appeal, Witherspoon raised the same objections to the contest claim. The Attorney General²⁴ argued that N.J.S. 19:63-26 creates a “rebuttable presumption against overturning an election unless there are grounds to do so under N.J.S. 19:29-1.”²⁵ The Court began its analysis with the principle that “election laws are to be liberally construed to the end that voters are permitted to exercise the franchise and that the will of the people as expressed through an election is heard.”²⁶

- *Meaning of “Rejected” Votes*

The Appellate Division initially examined whether the defective ballots constituted “rejected” votes within the meaning of N.J.S. 19:29-1(e).²⁷ To find an election invalid, “those contesting it [must] show that as a result of irregularities ‘the free expression of the popular will in all human likelihood has been thwarted.’”²⁸ The Court stated that “[a] vote has been ‘rejected’ . . . ‘in any situation in which qualified voters are denied access to the polls’ . . . or . . . ‘through no fault of their own’ [are] ‘prohibited from voting for a specific candidate by some irregularity in the voting procedures.’”²⁹ To contest an election, “a petitioner . . . need not identify for whom the

¹⁹ *Id.* at 352 – 53; *see id.* at 359 – 60 (“[T]he parties stipulated the ballot defect was an error by the Office of the Atlantic County Clerk, not the voters [and t]herefore, the defect here was in mailing or preparation of the ballots, and implicated N.J.S.A. 19:63-26.”) (internal quotations omitted).

²⁰ *Id.* at 351

²¹ *Id.* (citing *In re Petition of Gray-Sadler*, 164 N.J. 468, 475 (2000)).

²² *Id.* (“The judge reduced [335] to 328 to account for the seven voters who received corrected ballots.”).

²³ *Id.* at 352.

²⁴ *Id.* at 346, note 2 (“Parker did not participate in this appeal. In the trial court, the Attorney General appeared on behalf of the Board and the Superintendent of Elections to address the aspect of this case relating to the utilization of expert testimony. We granted his motion to appear as *amicus curiae* in this appeal.”).

²⁵ *Id.* at 353.

²⁶ *Id.*

²⁷ *Id.* at 354.

²⁸ *Id.* (quoting *Gray-Sadler*, 164 N.J. at 482).

²⁹ *Id.* at 355 (quoting *Gray-Sadler*, 164 N.J. at 475 – 76).

rejected voter voted or would have voted, only that the rejected votes were sufficient in number that, if all were credited to him, the results of the election would change.”³⁰

In rejecting Witherspoon’s argument that the calculation of “rejected” votes depends on whether a voter actually voted by returning their mail-in ballot, the Court analogized to the facts in the New Jersey Supreme Court case *In re Petition of Gray-Sadler*.³¹ In *Gray-Sadler*, the irregularity related to unclear instructions for submitting a vote for write-in candidates in the race for borough council.³² Although the number of write-in votes that were rejected by the Board of Elections was not more than the margin of victory, the Court “concluded [that] many of the voters who did not vote for council at all may have been deterred by the confusing instructions,” and therefore, “it was impossible to determine with reasonable certainty those candidates who received a majority of the votes.”³³ Similarly, in *Matter of the Election* “[t]he defective ballots sent to 335 voters provided them no opportunity to vote for any candidate in the Third District County Commissioner race” and thus, “[r]egardless of their intent, these voters were disenfranchised.”³⁴

Consequently, the Appellate Division held the defective mail-in ballots fell within the definition of “rejected legal votes” in N.J.S. 19:29-1(e).³⁵

- *Interaction Between N.J.S. 19:29-1 and N.J.S. 19:63-26*

The Court then addressed whether “N.J.S.A. 19:29-1 [applies] to an election pursuant to the Vote By Mail Law, N.J.S.A. 19:63-1 to -28.”³⁶ In analyzing this “issue of first impression,” the Court considered both the canons of statutory interpretation and the intent of the legislature.³⁷

To “discern[] . . . legislative intent,” the Appellate Division examined “not only the particular statute in question, but also the entire legislative scheme of which it is a part,” as well as “the legislative objectives sought to be achieved by enacting the statute.”³⁸ When interpreting election laws particular, courts “must . . . construe[statutes] in a common-sense way that accords with the legislative purpose” of favoring “the enfranchisement of voters.”³⁹

Guided by these principles, the Court determined that the Legislature did not “intend[] to eliminate the ability to contest an election pursuant to N.J.S.A. 19:29-1 merely because the vote occurred by mail.”⁴⁰ The Court rejected Witherspoon’s argument that the omission of “mail-in ballot deficiencies” from N.J.S. 19:29-1 demonstrated a legislative intent “to exclude such deficiencies as potential grounds for invalidating an election,” and that the enactment of N.J.S.

³⁰ *Id.* at 354.

³¹ *In re Petition of Gray-Sadler*, 164 N.J. 468 (2000).

³² *Matter of the Election*, 468 N.J. Super. at 355.

³³ *Id.* (citing *Gray-Sadler*, 164 N.J. at 482 – 84).

³⁴ *Id.* at 356.

³⁵ *Id.*

³⁶ *Id.* at 357.

³⁷ *Id.*

³⁸ *Id.* (internal quotations omitted).

³⁹ *Id.* at 358.

⁴⁰ *Id.* at 360.

19:63-26 “clarified that exclusion.”⁴¹ The Court found this interpretation “would lead to an absurd result, construe [the] election laws in a way to deprive voters of the franchise, and devitalize N.J.S.A. 19:29-1.”⁴² Rather, the Court favored the Attorney General’s suggested interpretation, which it found “[h]armoniz[ed] N.J.S.A. 19:63-26 and N.J.S.A. 19:29-1 and read[the] statutes in pari materia with the overall scheme” of the election laws.⁴³

Therefore, the Court held that “N.J.S.A. 19:63-26 establishes a presumption that an irregularity or failure in the preparation of forwarding of any mail-in ballot will not invalidate an election,” which may be rebutted “by asserting one or more of the grounds under N.J.S.A. 19:29-1 as a basis to invalidate the election.”⁴⁴

Pending Bills

Currently, there are no pending bills addressing either N.J.S. 19:29-1 or 19:63-26.

Conclusion

Staff seeks authorization to conduct research and outreach to determine whether N.J.S. 19:63-26 would benefit from a modification to clarify that it operates as a rebuttable presumption when filing an election contest on one of the grounds set forth in N.J.S. 19:29-1, as set forth by the Appellate Division in *In the Matter of the Election for Atlantic County Freeholder District 3 2020 General Election*.

⁴¹ *Id.* at 357 (“She argues ‘mail-in ballots are simply different that regular in-person ballots’ because, unlike in-person voting, mail-in voting allows the voter the recourse of filling out a provisional ballot on election day.”).

⁴² *Id.*

⁴³ *Id.* at 360.

⁴⁴ *Id.* (“An election shall be set aside if the trial judge concludes the contestant has proved a basis to do so under N.J.S.A. 19:29-1 by a preponderance of the evidence and the judge finds that no person was duly elected, as per N.J.S.A. 19:29-9.”).