IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM FRENCH and MELYNDA ANNE REESE,	:	
	:	**Civil No.: 3:23-cv-00538**
Plaintiffs,	:	
	:	**(Judge Mannion)**
v.	:	
COUNTY OF LUZERNE, LUZERNE COUNTY BOARD OF ELECTIONS and REGISTRATION,	:	
Defendants.	:	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants Luzerne County ("County") and Luzerne County Board of Elections ("Board") (collectively "Defendants"), by and through their counsel, hereby file their brief in support of their motion for summary judgment (Doc. 47), pursuant to Federal Rule of Civil Procedure 56 and Local Rules of the Middle of Pennsylvania 7.4-7.5.

I. Procedural History

On March 28, 2023, Plaintiffs filed a civil rights action against Defendants as well as the Luzerne County Bureau of Elections alleging multiple violations of the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §

1983. (See Doc. 1, generally). In their Complaint, Plaintiffs assert that their right to vote was infringed and denied during the general election held on November 8, 2022. (See Doc. 1 at Counts I-IV). Specifically, Count I of Plaintiffs' Complaint alleges that a paper shortage in certain polling locations denied Plaintiffs their right to vote in violation of the First and Fourteenth Amendments. (Id. at ¶ 108). Count II of Plaintiffs' Complaint alleges that Defendants failed to adequately train election staff and poll workers, which in turn disenfranchised Plaintiffs in violation of their First and Fourteenth Amendment rights. (Id. at ¶ 114). Count III of Plaintiffs' Complaint alleges that Defendants violated the Equal Protection Clause of the Fourteenth Amendment by maintaining "an unequal system of voting that lacks uniform standards and processes, severely burdens and denies equal access to the right to vote, and results in the arbitrary and disparate treatment of voters from election district to election district." (Id. at ¶ 126; also ¶¶ 127-130). Finally, Count IV of Plaintiffs' Complaint alleges that Defendants deprived Plaintiffs of their right to vote without due process of law in violation of the Fourteenth Amendment. (Id. at ¶ 133).

On May 2, 2023, Defendants filed a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 18). Both parties submitted dueling briefs on the motion to dismiss (See Docs. 18, 25, 28, and 34) and this Court issued a memorandum and order, on December 4, 2023, granting in part and denying in part Defendants' motion to dismiss. (See Docs. 37 and 38). The Luzerne County Bureau

of Elections was dismissed as an individually named defendant since it is a department of the County and Count IV—Plaintiffs' due process claim—was dismissed. (Id.) Plaintiffs did not file an amended complaint. (See Docket, generally).

On December 19, 2023, Defendants filed an Answer to the Complaint. (Doc. 39). Discovery continued throughout 2023 and concluded on February 1, 2024. Defendants filed a motion for summary judgment, a statement of material undisputed facts, and an appendix of exhibits on April 15, 2024. (Docs. 47-49). Plaintiffs filed their own motion for summary judgment on the same day. (See Doc. 50).

II. Statement of Facts

Luzerne County is a county of the Third Class—based upon population—and is one of only seven Home Rule Counties in Pennsylvania. (Doc. 48, ¶¶ 1-2). Pursuant to the Luzerne County Charter, the Board is an independent body that exercises general supervision over the administration of elections. (Id. at ¶ 9). The Board has no power to hire, supervise, and/or train employees of Luzerne County's Bureau of Elections. (Id. at ¶¶ 11-16). The Luzerne County Bureau of Elections is tasked with the administration of elections within the county. (Id. at ¶¶ 6-8).

In November of 2022, there were 186 polling precincts in 143 different locations in Luzerne County. (Id. at ¶ 43). The County utilizes electronic ballot marking devices ("BMDs") at each polling location. (Id. at ¶ 42). A voter selects

their candidate preferences on the electronic touchscreen and once the voter has reviewed and finalized their selections, they print out their ballot from a printer connected to the BMD. (Id. at ¶¶ 44-45). The voter must then personally feed the ballot into a tabulation scanner located within the polling precinct. Only then is the ballot officially cast and recorded. (Id. at ¶ 46). 80-lb. paper is recommended for use with the BMDs and tabulators. (Id. at ¶ 48).

A few weeks prior to Election Day, the County's acting Deputy Director of Elections, Emily Cook ("Ms. Cook"), notified the acting Director of Elections, Beth Gilbert[1] ("Ms. Gilbert"), that the County was running low on 80-lb. paper and would need to order more for the next election cycle. (Id. at ¶ 57). Ms. Cook also stated that she "thought" there would be enough paper to conduct the November 8th general election. Ms. Gilbert replied, "I will order." (Id. at ¶ 58). However, Ms. Gilbert did not follow through and the County did not order additional 80-lb. paper stock until November 8, 2022. (Id. at ¶ 59).

On November 8, 2022, Luzerne County experienced 80-lb. ballot paper shortages in multiple polling precincts in Luzerne County although the vast majority of precincts were not impacted. (Id. at ¶¶ 68-69). Out of 186 polling precincts,

[1] When she served as the acting Director of Elections in November of 2022, Ms. Gilbert was known as Beth Gilbert-McBride; however, for ease of reference and to accurately reflect her name today, Defendants refer to her as Ms. Gilbert in their brief in support. (See Doc. 51-4).

sixteen (16) polling precincts ran out of paper at some point on November 8, 2022, according to an investigation conducted by the Luzerne County District Attorney's Office. (Id. at ¶ 86).[2] These sixteen polling precincts also received deliveries of 80-lb. paper on November 8, 2022 and hours before the polls closed. (Id. at ¶ 87). Initially, polling precincts were resupplied with the remaining 80-lb. paper stock on hand in the County's storage facility as well as by "Rovers" who are designated Election Day workers assigned the specific task of resupplying polling precincts; however, this did not curtail the paper shortages entirely. (Id. at ¶¶ 63-66; 71). The County also procured additional orders of 80-lb. paper stock that were delivered to affected polling precincts throughout the afternoon and early evening of November 8, 2022 by local law enforcement. (Id. at ¶¶ 72, 75-76, & 87). Also, the County petitioned the Luzerne County Court of Common Pleas to extend voting hours until 10:00 p.m.—a request which was granted. (Id. at ¶ 79).

The County had a training program in place for poll workers and senior management within the Bureau of Elections prepared and utilized an election administration manual—detailing election procedures—prior to November 8, 2022. (Id. at ¶¶ 33-39; 40-41). Furthermore, County officials met almost daily to prepare for the November 8, 2022 general election. (Id. at ¶ 32).

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[2] However, polling precincts also had emergency and provisional ballots at their disposal so there were other means to accept votes even if the 80-lb. paper supply dwindled. (Id. at ¶ 86).

The ballot paper shortages that occurred on November 8, 2022 had never occurred before or since. (Id. at ¶ 90); also Doc. 49, Exhibit E, p. 15 of 24 (detailing ballot paper historical purchasing order data by the Bureau of Elections). The ballot paper shortages were not caused by intentional conduct by County officials. (Id. at ¶ 85).

III. Question Presented

1. Should Defendants' motion for summary judgment be granted where Plaintiffs have failed to demonstrate any genuine dispute of material fact regarding Defendants' alleged *Monell* liability, pursuant to 42 U.S.C. § 1983?

   Suggested Answer: Yes.

IV. Argument

A. Summary Judgment Standard.

Motions for summary judgment are governed by Federal Rule of Civil Procedure 56. See Fed. R. Civ. P. 56(a). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Klein v. Weidner, 729 F.3d 280, 283 (3d Cir. 2013). A fact is material if it "might affect the outcome of the suit under the governing law" and a dispute is "genuine only if there is a sufficient evidentiary basis for a reasonable factfinder to return a verdict for the nonmoving party. Figueroa v. Moyer, 2023 U.S. Dist. LEXIS 190844 *8 (M.D. Pa.

2023) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986)). To defeat a motion for summary judgment, the nonmovant must cite admissible evidence only. Id.

B. No Federal Constitutional Deprivation Occurred and Principles of Federalism Warrant Granting Defendants' Summary Judgment Motion.

Plaintiffs allege that Defendants violated several provisions of the Pennsylvania Election Code during the November 8, 2022 general election. See (Doc. 1 at ¶¶ 60-68). However, even if true, violations of state election law "do not give rise to federal constitutional claims except in unusual circumstances." See Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 391 (W.D. Pa. 2020) (citing Shipley v. Chicago Bd. of Election Commissioners, 947 F.3d 1056, 1062 (7th Cir. 2020)).

Elections should be free of "purposeful tampering" but not "free of error." Acosta v. Democratic City Comm., 288 F. Supp. 3d 597, 644 (E.D. Pa. 2018) (citing Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970)). In Hennings v. Grafton, 523 F.2d 861, 863 (7th Cir. 1975), the court held that § 1983 and the due process clause are not implicated where "[v]oters alleged that mechanical difficulties with voting machines occurred, votes were not recorded properly, and election officials failed to provide substitute paper ballots." Acosta, 436 F.2d at 90 (emphasis added) (citing Hennings, *supra*). The Hennings court elaborated that "irregularities caused by

mechanical or human errors and lacking in invidious or fraudulent intent" do not rise to the level of constitutional violations. Id. at 91. Here, no election officials, employees, poll workers, or volunteers engaged in purposeful or fraudulent conduct to prevent Plaintiffs from voting on November 8, 2022. Furthermore, the irregularity of a widespread paper shortage was caused by human error and not "invidious or fraudulent intent." Id.

It "is important for federal courts to be exquisitely sensitive to interfering in state and local elections because, as the Supreme Court has noted, states have the power to regulate the elections of their own officials." Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 915 (E.D. Va. 2018). While federal intervention in state election matters is not prohibited across the board, "it does underscore that federal courts should not do so absent thorough consideration of both the merits of the claims and the implications of intervention." Id. (emphasis added).

Federal court intervention in cases of "accidental mistakes on the part of election officials in administering an election…would effectively transform any inadvertent error in the administration of state and local elections into a federal equal protection violation." Id. at 919. Federal courts are not authorized to become "state election monitors" and "if every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures…would be superseded

by a section 1983 gloss." See Gamza v. Aguirre, 619 F.2d 449, 453-54 (5th Cir. 1980).

The "constitutional right established in Reynolds v. Sims, however, is not absolute and is properly limited by respect for the political and federal framework established by the Constitution." Id. at 453. Federal courts should decline to intervene and grant injunctive and/or declaratory relief when "episodic events" or "isolated events that adversely affect individuals" occur during the administration of an election because such instances are "not presumed to be a violation of the equal protection clause." Id.; also Welker v. Clarke, 239 F.3d 596, 597 n.3 (3d Cir. 2001) (overruled by statute on other grounds) ("If Welker's claims were only that officials negligently maladministered the election by not properly enforcing Pennsylvania residency requirements as interpreted by Welker, we would hesitate to intervene.")

This bedrock principle of our federalist system is particularly acute in this case where Plaintiffs seek not just declaratory judgment regarding the November 8, 2022 general election but prophylactic and permanent injunctive relief in all future elections (both state and federal). Specifically, Plaintiffs seek an order from this Court compelling Defendants to adopt policies and procedures regarding election administration, procuring and providing voting supplies, and training of local election officials. (Doc. 1, pp. 24-26). If the Court granted such relief, it would effectively install itself as a federal monitor over elections in Luzerne County. See

Gamza, 619 F.2d at 453-54; also Rizzo v. Goode, 423 U.S. 362, 378, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) ("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.") (reversing district court's order compelling Philadelphia Police Department to revise its internal affairs procedures).

All citizens, including Plaintiffs, should be able to vote in an election free of error; however, errors do occur, and Defendants make no excuses for the errors that occurred during the November 8th general election. The paper shortage should never have occurred and it was avoidable; however, it remains an "isolated" and "episodic event" and Plaintiffs are not entitled to constitutional relief merely because errors were made during the administration of an election. Furthermore, the permanent and injunctive relief sought by Plaintiffs would require federal intrusion into local administration of elections. Accordingly, Defendants' motion for summary judgment should be granted.

C. Plaintiffs Have Failed To Demonstrate *Monell* Liability and Defendants Are Entitled To Summary Judgment In Their Favor.

In Count I, Plaintiffs allege that Defendants infringed upon and deprived them of their right to vote by failing to provide an adequate supply of paper for all of the County's electronic voting machines during the November 8, 2022 general election.

In Count II, Plaintiffs allege that their right to vote was infringed upon and denied by Defendants' "inadequate and non-existent training of election officials, including the unqualified and inexperienced director of elections, and poll workers." (Doc. 1, ¶ 114). In Count III, Plaintiffs have alleged an equal protection violation asserting that Defendants have a policy or custom in place to deprive certain polling locations within the County of adequate paper supply to support the electronic voting machines in use in November of 2022. (Doc. 1 at ¶¶ 121-131).

Plaintiffs allege that they were disenfranchised by Defendants because they failed to hire, train, and/or supervise Bureau of Elections personnel as well as substantially burdened their ability to vote on November 8th due to maladministration of the election by not procuring a sufficient amount of ballot paper prior to Election Day. However, negligence and even maladministration are not cognizable under § 1983.

First, "local governments are responsible only for their own illegal acts." Connick v. Thompson, 563 U.S. 51, 131 S.Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011)(internal citation omitted). Governments cannot be held "vicariously liable under § 1983 for their employees' actions." Id. Instead, a local government may only be liable if "action pursuant to official municipal policy" deprived an individual of a constitutional right. Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

Currently, the Supreme Court "has recognized four kinds of municipal policies—(1) formally approved rules, (2) unofficial widespread customs, (3) actions of municipal policymakers, and (4) deliberate indifference by the municipality." Figueroa v. Moyer, 2023 U.S. Dist. LEXIS 190844 *12 (M.D. Pa. 2023) (internal citations omitted).

Municipal actors are not liable, pursuant to § 1983, for single-incident occurrences caused "by a lower-level employee acting under color of law" because such evidence is insufficient to establish either an official policy or custom of the municipality itself. Fletcher v. O'Donnell, 867 F.2d 791, 793 (3d Cir. 1989). Here, Ms. Cook texted Ms. Gilbert that the County's ballot paper supply was running low, which not only did Ms. Gilbert acknowledge she replied that she would order it. Ms. Gilbert's failure to do so—a single act—is not imputed to the County under *Monell*. In fact, "proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." Oklahoma City v. Tuttle, 471 U.S. 808, 824, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

The ballot paper shortage was a fluke occurrence and not an intentional act. The shortages experienced on November 8, 2022 had never happened before—or since—in Luzerne County. Contrary to Plaintiffs' assertion in the Complaint that

"Defendants [had] an official policy to order an insufficient number of ballots for at least 40 election districts, to order a different number of ballots for each election district, and to order a number of ballots less than what was required under the Pennsylvania Election Code," there is no evidence in the record – aside from this conclusory statement in the Complaint – to support such a sweeping characterization that such a deliberate, official governmental policy existed in Luzerne County. (See Doc. 1 at ¶ 108).

Under a failure to train theory of *Monell* liability, "an institutional defendant may … be liable for constitutional violations resulting from inadequate training or supervision of its employees if the failure to train amounts to a custom of the municipality." Grayson v. Dewitt, 2016 U.S. Dist. LEXIS 138189 *11-12 (M.D. Pa. 2016). Moreover, "failure-to-train claims…must meet precise and demanding legal criteria." Colburn v. Upper Darby Township,946 F.2d 1017, 1028 (3d Cir. 1991) (citing City of Canton v. Harris, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L. Ed. 2d 412 (1989)) (emphasis added). § 1983 liability for failure-to-train claims are "especially difficult," Grayson, *supra*, and a plaintiff must establish that "the failure to train amounts to deliberate indifference to the rights of persons with whom [a municipal employee] come[s] into contact." Reitz v. County of Bucks, 125 F.3d 139, 145 (3d Cir. 1997) (citation and internal quotation marks omitted). In addition, the failure-to-train "must be closely related to the ultimate constitutional injury."

Woloszyn v. County of Lawrence, 396 F.3d 314, 325 (3d Cir. 2005) (internal citations omitted). Indeed, "not all failures or lapses in training will support liability under § 1983." Id. Furthermore, a plaintiff must demonstrate that "the municipality had notice of that deficiency and chose to ignore it." Figueroa, 2023 U.S. Dist. at *19 (citing Connick v. Thompson, 563 U.S. 51, 62, 131 S. Ct. 1350, 179 L. Ed. 2D 417 (2011)).

In order to sustain their burden of proof, plaintiffs must generally show a "pattern of underlying constitutional violations" and although theoretically possible, "proving deliberate indifference in the absence of such a pattern is a difficult task." Id. (citing Carswell v. Borough of Homestead, 381 F.2d 235, 244 (3d Cir. 2004)).

Deliberate indifference is proven where "(1)…lawmakers know that employees will confront a similar situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." Carter v. City of Phila., 181 F.3d 339, 357 (3d Cir. 1999) (emphasis added). Deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action," such that "policymakers are on actual or constructive notice that a particular omission in their training program causes…employees to violate citizens' constitutional rights." Tuttle, 471 U.S. at 822-23.

A municipal actor's "culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Connick, 563 U.S. at 61. The Third Circuit has held "that a failure to train, discipline, or control can only form the basis for section 1983 municipal liability if the plaintiff can show both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Montgomery v. DeSimone, 159 F.3d 120, 126-27 (3d Cir. 1998).

Here, there were no prior incidents of ballot paper shortages such that Defendants had "knowledge of a prior pattern" or "a history of employees mishandling" such that it needed to be corrected through additional training. In all respects, the events of November 8th 2022 were avoidable; however, the ballot paper shortage did not result from a policy or custom of Defendants or their failure to train their employees. Indeed, the fateful text exchange between Ms. Cook and Ms. Gilbert in October of 2022 demonstrates that County election officials had sufficient enough training to identify their supply needs, determine that more paper would need to be ordered, and alert the Director of Elections, with procurement authority. Although Ms. Cook, in hindsight, incorrectly assessed that the County had enough ballot paper for the upcoming general election, this miscalculation--compounded by

Ms. Gilbert not ordering the ballot paper—does not prove the lack of a training program.

In Count III, Plaintiffs do not challenge any state law or regulation or any policy or procedure of the County and/or the Board. (Doc. 1 at ¶¶ 121-131). Instead, Count III rehashes and recasts their First Amendment claim as an equal protection violation. However, Plaintiffs were not the victim of arbitrary and capricious governmental action as "a result of specific election procedures." Democratic Cong. Campaign Comm. v. Kosinski, 614 F. Supp. 3d 20, 54 (S.D.N.Y. 2022) (holding that the difference in treatment of two voters is not an equal protection violation pursuant to Bush v. Gore, 531 U.S. 98 (2000) if not the result of specific election procedures); also Gamza, 619 F.2d at 454 ("In the absence of evidence that the alleged maladministration of the local election procedures was attended by the intention to discriminate against the affected voters or motivated by a desire to subvert the right of the voters to choose their school board representative, we cannot conclude that the error constituted a denial of equal protection of the laws.") At best, Plaintiffs may have encountered voting irregularities that occurred in less than 20 of 186 voting precincts in Luzerne County on November 8th; however, this cannot be construed as disparate treatment resulting from "specific election procedures."

D. Defendant Luzerne County Board of Elections and Registration Has No Power To Hire, Supervise, or Train Employees and Cannot Be Liable to Plaintiffs Pursuant to § 1983 and *Monell*.

Plaintiffs' present various legal theories as to how Defendants are liable, collectively, for the alleged violations of their right to vote: *i.e.* failure to supply ballot paper as well as failure to hire, train, and/or supervise Bureau of Election employees and more specifically, the Director of Elections. However, it is an undisputed material fact that the Board does not have the power—under the Luzerne County Charter—to perform any of those tasks. The Board is empowered to provide general supervision and oversight of the administration of elections, but it cannot hire, fire, discipline, and/or train employees of the Bureau of Elections.

Therefore, the Board cannot be liable for allegedly failing to do what it is legally precluded from doing by the Home Rule Charter. Unlike boards of elections in most of Pennsylvania's 67 counties, here, the Board's role is limited to making recommendations to the County on personnel matters. It cannot force its will upon the County administration if they are at odds on a particular personnel issue. The Board's Chairperson, Denise Williams, testified during her deposition that the Board has no authority to procure supplies for an election and while it is consulted on hiring the Director of Elections, the Board has no power to approve or veto the County Manager's selection. (Doc. 48, ¶¶ 11-16). Indeed, the Board can recommend that

Bureau of Elections personnel attend training; however, it cannot order them to go or discipline employees who fail to do so.

Accordingly, there is no genuine dispute of material fact that the Board lacked the authority to hire, train, and supervise employees since the Board, as a matter of law, has no employees. Even if the Court denies the motion for summary judgment as to the County, no reasonable fact finder could render a verdict that the Board is liable to Plaintiffs pursuant to a failure to hire, train, and/or supervise theory under *Monell* and its progeny. Equally, the Board is not empowered to procure ballot paper for any election, which is an administration task. As such, the Board's motion for summary judgment, at minimum, should be granted.

V. Conclusion

For any or all of the foregoing reasons, Defendants' motion for summary judgment should be granted in its entirety.

Respectfully submitted,

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DATED: April 29, 2024

WORD COUNT CERTIFICATION

In accordance with Local Rule 7.8, undersigned counsel for Defendants Luzerne County and Luzerne County Board of Elections and Registration hereby certify that the foregoing brief in support contains less than 5,000 words. Specifically, relying upon the word count feature of the word processing system, the foregoing brief contains 4,108 words.

IN THE UNITED STATES DISTRICT COURT
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	:	**(Judge Mannion)**
v.	:	
COUNTY OF LUZERNE, LUZERNE COUNTY BOARD OF ELECTIONS and REGISTRATION,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Drew P. McLaughlin, hereby certify that I have caused to be served on this day, a true and correct copy of Defendants' brief in support of their motion for summary judgment upon all counsel of record via ECF filing as follows:

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DATED: April 29, 2024