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HOUSE OF REPRESENTATIVES
REPORT
117–28

DISMISSING THE ELECTION CONTEST RELATING TO THE OFFICE OF REPRESENTATIVE FROM THE FOURTEENTH CONGRESSIONAL DISTRICT OF ILLINOIS

MAY 11, 2021.—Referred to the House Calendar and ordered to be printed

Ms. LOFGREN, from the Committee on House Administration, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H. Res. 379]

The Committee on House Administration, having had under consideration an original resolution dismissing the election contest relating to the office of Representative from the Fourteenth Congressional District of Illinois, report the same to the House with the recommendation that the resolution be agreed to.

DISMISSING THE ELECTION CONTEST IN THE FOURTEENTH CONGRESSIONAL DISTRICT OF ILLINOIS

The Committee on House Administration, having had under consideration an original resolution dismissing the election contest in the Fourteenth Congressional District of Illinois, report the same to the House with recommendation that the resolution be agreed to.

COMMITTEE ACTION

On April 28, 2021, by a voice vote, a quorum being present, the Committee agreed to a motion to report the resolution favorably to the House.

COMMITTEE OVERSIGHT AND FINDINGS

In compliance with House Rule XIII, clause 3(c)(1), the Committee states the findings and recommendations of the Committee,

STATEMENT OF BUDGET AUTHORITY AND RELATED ITEMS

The resolution does not provide new budget authority, new spending authority, new credit authority, or an increase in revenues or tax expenditures and a statement under House Rule XIII, clause 3(c)(2), and section 308(a)(1) of the Congressional Budget Act of 1974 is not required.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with House Rule XIII, clause 3(c)(3), the Committee states with respect to H. Res. XXX, that the Director of the Congressional Budget Office did not submit a cost estimate and comparison under section 402 of the Congressional Budget Act of 1974.

STATEMENT OF FACTS

On January 4, 2021, James "Jim" Oberweis ("Contestant") filed a Notice of Contest with the Clerk of the House of Representatives pursuant to the Federal Contested Election Act (FCEA).[1] Contestant ran as the nominee of the Republican Party for the office of Representative to the United States Congress representing the Fourteenth Congressional District of the State of Illinois in the November 3, 2020, general election. The other principal candidate for the Fourteenth Congressional District was incumbent Democrat Lauren Underwood ("Contestee"). On December 4, 2020, the Illinois State Board of Elections certified the results as follows: Contestee received 203,209 votes (50.67%) and Contestant received 197,835 votes (49.33%), a margin of 5,347 votes. Contestant filed this Notice of Contest on January 3, 2021.

BASIS OF CONTEST

In his Notice of Contest, Contestant alleges that the official election results for the Fourteenth Congressional District of Illinois should be invalidated due to alleged violations of the Equal Protection Clause related to alleged unequal administration of the election by local authorities. Contestee further alleges a variety of violations of Illinois election law, fraud, and other irregularities. Contestant alleges that, but for the alleged fraud, irregularities and statutory and constitutional violations, Contestant would have won the November 3, 2020, election for the Fourteenth Congressional District. Contestant asks that, among other relief, the House order that all vote-by-mail ballots cast in the election be invalidated, a recount, and, in the alternative, deem the November 3 election "null and void" and order a new election pursuant to the authority of Article I, Section 5 of the United States Constitution.[2]

STANDING

To have standing under the FCEA, a contestant must have been a candidate for election to the House of Representatives in the last preceding election and claim a right to the Contestee's seat.[3] Contestant was the Republican nominee and his name appeared as a

[1] 2 U.S.C. §§ 381–396.
[2] *See generally* Notice of Contest, *Oberweis* v. *Underwood* ("Notice").
[3] 2 U.S.C. § 382(a).

candidate for the Fourteenth Congressional District on the official ballot for the November 3, 2020, election, thereby satisfying the standing requirement.

TIMING/NOTICE

FCEA requires that a contestant "shall, within thirty days after the result of such election shall have been declared by the officer or Board of Canvassers authorized by law to declare such result, file with the Clerk and serve upon the contestee written notice of his intention to contest such election." [4] The Notice of Contest was filed with the Clerk of the House of Representatives on January 4, 2021, and was subsequently served upon Contestee. Contestee disputes whether Contestant timely served the Notice of Contest.[5]

RESPONSE BY CONTESTEE

On February 3, 2021, Contestee filed a Motion to Dismiss Contestant's Notice of Contest in response to Contestant's Notice of Contest challenging the results of the 2020 General Election for the Fourteenth Congressional District of the State of Illinois. Contestee maintains that the contest against her should be dismissed because Contestant failed to set forth with particularity, as required by 2 U.S.C. § 382(b), grounds sufficient to change the result of the election.[6]

STANDARD FOR GRANTING MOTION TO DISMISS

The House of Representatives has the constitutionally-vested power to judge its own elections.[7] The FCEA sets forth procedures under which an eligible losing candidate may bring a contest to the House of Representatives following certification of the election. Under the FCEA, the "burden is upon [the] contestant to prove that the election results entitle him to contestee's seat." [8] A contestant therefore "must proffer allegations that, if proven, would have altered the election outcome." [9] It is not sufficient for a contestant merely to allege irregularities or fraud in an election. The contestant must claim a right to the office.[10] To that end, the contestant must show that "through fraud, misconduct, mistake, or irregularities the results of the election would have been different." [11] Accordingly, to survive a motion to dismiss, the contestant must credibly allege that there are "a sufficient number of potential votes in actual contention to warrant the committee granting the relief sought." [12]

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[4] *Id.*

[5] Because the Committee determines that Contestant's claim warrants dismissal on the merits, the Committee exercises its discretion not to address Contestee's arguments regarding the alleged failure of timely service. *See Tataii* v. *Abercrombie*, H. Rep. 111–68, at 3 (2009).

[6] Pursuant to Committee Resolution 117–10, the Contestant filed a response in opposition to the motion to dismiss and the Contestee filed a reply in support of the motion to dismiss. *See* Contestant's Response to Contestee's Motion to Dismiss Notice of Contest ("Response"); Contestee's Reply in Support of Motion to Dismiss Contestant's Notice of Contest.

[7] U.S. Const. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.").

[8] 2 U.S.C. § 385.

[9] *Russell* v. *Brown-Waite*, H. Rep. 110–178, at 3 (2007).

[10] 2 U.S.C. § 385.

[11] *Young* v. *Mikva*, H. Rep. 94–759 (1975).

[12] *Tunno* v. *Veysey*, H. Rep. 92–626 (1971), at 3–4 (1971); see also Anderson v. Rose, H. Rep. 104–852, at 9–13 (1996) (dismissing contest where claims for which contestant provided specific

Continued

The FCEA standard for reviewing the allegations in a motion to dismiss blends "Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure."[13] As under Rule 12(b)(6), a contestant's allegations cannot merely be possible; they must at least be plausible. But a contestant must also provide "sufficient supportive evidence" to render the allegations credible, and cannot simply rely "on general, or disproven claims of fraud or irregularities."[14] This is "similar to the standard a judge would utilize in viewing the evidence at issue in a Rule 56 motion for summary judgment."[15]

ANALYSIS

The Committee finds that Contestant has failed to make a credible and specific claim that he is entitled to office. Contestant has not credibly alleged that a sufficient number of votes are in contention to place the result of the election in question.

Contestant first maintains that his equal protection claims are sufficient, by themselves, to overcome the 5,347-vote margin. The alleged violations of the Equal Protection Clause relate to the mailing and counting of vote-by-mail ballots. Contestant maintains that the Equal Protection Clause was violated because certain county clerks, for example the Kane County Clerk, allegedly mailed vote-by-mail applications to a larger universe of registered voters than other county clerks and allegedly counted vote-by-mail ballots that were not initialed by election judges, whereas other county clerks did not.[16] According to Contestant, if all vote-by-mail ballots in Kane County are invalidated, and the candidates' vote totals are "proportionately reduced," Contestant would prevail by over 9,300 votes.[17] Contestant makes no allegation as to the potential impact of these alleged equal protection violations on the vote totals from other counties in the Fourteenth Congressional District.

Even assuming Contestant's equal protection claims are cognizable—a factual and legal question this Committee need not, and does not, reach—Contestant would not be entitled to the relief he seeks because, as a general matter, the constitutionally appropriate remedy for alleged inequities in the administration of elections is not to invalidate votes.[18] The constitutional presumption against invalidation of votes as a remedy for alleged equal protection violations premised on inconsistencies in the administration of election

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and credible allegations of irregularities did not impact sufficient number of votes to alter the election outcome); *McCuen* v. *Dickey,* H. Rep. 103–109, at 7 (1993) (dismissing contest where contestant failed to present "credible evidence of irregularities sufficient to change the result of the election"); *Peterson* v. *Gross*, H. Rep. 89–1127, at 4 (1965) (dismissing contest where "even if the alleged . . . irregularities had . . . existed[,] there is no proof the results of the election would have been different" (quotation omitted)).

[13] Dornan v. Sanchez, H. Rep. 105–416, at 8 (1998).

[14] T*unno* v. *Veysey*, H. Rep. 92–626, at 3 (1971); accord Anderson v. Rose, H. Rep. 104–852, at 6–7 (1996).

[15] *Dornan* v. *Sanchez*, H. Rep. 105–416, at 9 (1998); *see also Anderson* v. *Rose*, H. Rep. 104–852, at 7 (1996) ("[T]he standard balances the need of the House to allow for [meaningful] discovery while recognizing that mere notice pleading is insufficient in the face of credible contrary evidence.").

[16] *See* Notice 25; Response at 25–26.

[17] Notice 25.

[18] *King* v. *Whitmer*, ——F. Supp. 3d ——, 2020 WL 7134198, at *9 (E.D. Mich. Dec. 7, 2020) (holding that "de-certifying" facially valid votes is not a proper remedy for an equal protection claim premised on alleged irregularities in the processing and tabulation of votes by election officials); *Donald J. Trump for President, Inc.* v. *Boockvar*, ——F. Supp. 3d——, 2020 WL 6821992, at *1–2,*12 (M.D. Pa. Nov. 21, 2020) (holding that "invalidat[ing]" facially valid votes is not a proper remedy for equal protection claim premised on alleged inconsistencies in the administration of state election laws), aff'd 830 Fed. App'× 377 (3d Cir. 2020).

laws is consistent with this Committee's longstanding practice of counting all ballots validly cast by eligible voters where the voters' intent is clear.[19]

Contestant makes no allegation that the intent of the thousands of vote-by-mail voters whose ballots Contestant seeks to invalidate is unclear. Because the remedy Contestant seeks would improperly disenfranchise voters based on alleged administrator error alone, these allegations cannot help him carry his burden to plead grounds "sufficient to change [the] result of [the] election."[20] Contestant offers no reason why the county election officials' alleged inconsistencies in disseminating vote-by-mail applications and processing vote-by-mail ballots warrant denying the franchise to the thousands of voters whose votes Contestant seeks to invalidate. Accordingly, the Committee concludes that Contestant has not made a credible and specific claim that the alleged equal protection violations would lead to any reduction in the 5,347-vote margin.

Contestant further alleges several violations of Illinois law, fraud, and other irregularities. In particular, Contestant alleges, among other theories, that certain individuals not legally residing within the Fourteenth Congressional District voted in the election, that certain individuals were improperly denied the right to vote provisionally, that certain vote-by-mail ballots were improperly stored in unsealed boxes, that certain vote-by-mail ballots were counted even though they were requested or cast outside of statutory deadlines, and that, in one county, more ballots were cast than voters who voted. Even assuming Contestant's additional claims are valid—again, a factual and legal question this Committee need not, and does not, reach—Contestant concedes that the aggregate number of votes in contention related to these remaining claims are insufficient, by themselves, to change the outcome of the election.[21]

Because Contestant has not alleged that the number of votes legally in dispute is sufficient to alter the outcome of the election, the Committee finds that Contestant has failed to make a credible and specific claim that he is entitled to office.

CONCLUSION

For the reasons discussed above, the Committee concludes that this contest should be dismissed.

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[19] *See Roush or Chambers*, H. Rep. 87–513, at 22–28 (1961); *Kyros* v. *Emery*, H. Rep. 94–760, at 5 (1975); *Tunno* v. *Veysey*, H. Rep. 92–626, at 4–10 (1971) (collecting treatises, cases); *In reAlford,* H. Rep. 86–1172 (1959).

[20] *See* 2 U.S.C. § 383(b)(3).

[21] Notice 24 & n.2, 29 (proposed reductions to remedy all allegations of voter fraud would net fewer than 2,000 votes).

MINORITY VIEWS

The Minority disagrees with the Majority's decision to proceed immediately to an analysis of the merits[1] despite clear procedural defect and would dismiss the contest solely on procedural grounds without reaching consideration of the merits.

DISMISSAL OF COMPLAINT ON PROCEDURAL GROUNDS

The Federal Contested Elections Act (FCEA) requires a Contestant to file a Notice of Contest with the Clerk of the House of Representatives and to serve the Contestee within 30 days of the state certification of the election. The FCEA permits five methods of service: (1) by delivering a copy to contestee personally; (2) by leaving a copy at contestee's house or usual place of abode; (3) by leaving a copy at contestee's "principal office or place of business with some person then in charge thereof;" (4) "by delivering a copy to an agent authorized by appointment to receive service of such notice;" and (5) "by mailing a copy by registered or certified mail addressed to contestee at his residence or principal office or place of business. Service by mail is complete upon mailing."[2]

In this case, there is no dispute that Contestant's Notice of Contest was filed properly and timely with the Clerk of the House on January 4, 2021, and that the FCEA required Contestant to complete proper service of process on the Contestee no later than January 4, 2021. However, Contestant's service of the Notice of Contest upon Contestee was not timely and failed to qualify as an acceptable method of service pursuant to the FCEA.

ANALYSIS

In response to Contestee's Motion to Dismiss, Contestant argues that service of process was effected on January 4, 2021, in accordance with the FCEA in one of following three ways: (1) by leaving a copy of the Notice of Contest with the Clerk of the House for Contestee; (2) by leaving a copy of the Notice of Contest under Contestee's office door in the Longworth House Office Building; or (3) by mailing a copy of the Notice of Contest to Contestee's office in Washington, D.C.[3] Finally, despite Contestant's contention that service was proper and timely, Contestant also argues in the alternative that any alleged defect in service upon Contestee should be waived by the Committee and the contest be decided solely on the merits. However, Contestant's claims clearly fall short of the requirements for proper service in the FCEA.

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[1] The Minority does not adopt or join the Majority's analysis of the merits of the Contest.

[2] Federal Contested Election Act, 2 U.S.C. § 382 (1996).

[3] Service of the notice of contest upon a contestee may also be effected by: (1) by delivering a copy to him personally; or (2) by leaving a copy at his dwelling house or usual place of abode with a person of discretion not less than sixteen years of age then residing therein. 2 U.S.C. § 382(c).

1. Leaving a copy of the Notice of Contest with the Clerk of the House for Contestee

On January 4, 2021, the Contestant's agent delivered a Notice of Contest, addressed to Lauren Underwood, Washington, D.C., Office, 1118 Longworth House Office Building, Washington, D.C. 20515, to Clerk of the House Cheryl Johnson. While the Longworth House Office Building (Longworth) and the Capitol Complex are places of business for Members of Congress, the Clerk of the House's office is not Contestee's principal office, nor is the Clerk of the House the "person in charge"[4] of Contestee's principal office in Longworth. Finally, the Clerk of the House has not qualified as an agent of Contestee. Therefore, delivery of the Notice of Contest to the Clerk of the House is not proper service of process pursuant to the FCEA under any proffered theory.

2. Leaving a copy of the Notice of Contest under Contestee's office door in Longworth House Office Building

Contestant argues that, on January 4, 2021, after knocking and receiving no answer at the door of Contestee's office in Longworth House Office Building, Contestant's agent attempted to complete service by leaving a copy of the Notice of Contest under Contestee's office door. However, the language of the FCEA is clear that, for service of process to be proper using this method, the Notice of Contest must be left with an individual in charge of the office, such as the Chief of Staff or the Office Manager. Placing a copy of the Notice of Contest under the door of an empty office is not sufficient to fulfill the requirements prescribed by the FCEA and therefore does not qualify as proper service of process.

3. Mailing a copy of the Notice of Contest to Contestee's Washington, D.C., office

In an affidavit, Contestant's agent stated that she placed a copy of the Notice of Contest, addressed to Lauren Underwood, Washington, D.C., Office, 1118 Longworth House Office Building, Washington, D.C. 20515, in a post office collection box in Waukegan, Illinois, on January 4, 2021. However, the postmark on the outer envelope of the Notice of Contest depicts a date of January 5, 2021, one day after the service of process deadline.[5]

Contestant explains that mail deposited with post office collection locations in rural areas of northern Illinois is transported the next day more than fifty miles to Carol Stream, Illinois, for postmarking and processing. Nevertheless, postmarks are the widely accepted evidence for determining the date and time of mailing. Therefore, despite assertions to the contrary by Contestant, a mailing with a January 5, 2021, postmark does not constitute timely service upon Contestee.

4. Any alleged defect should be waived by the Committee

Lastly, Contestant contends that if the Committee determines that the service of the Notice of Contest upon Contestee was not proper, the Committee should elect to waive that defect and move

[4] Id.
[5] *See* Pomales Aff. (Contestant's Ex. B.)

immediately to consideration of the merits of the election contest. Specifically, Contestant claims that he has demonstrated "good cause" for waiver because he attempted to leave a copy of the Notice of Contest with someone in charge at Contestee's Longworth office, yet was unable to do so because House Offices were vacant due to COVID–19 protocols. He further states that "if a global pandemic, emptying House chambers of personnel who would ordinarily accept service is not 'good cause' for a 48-hour delay in service, then nothing is."[6]

In support of his argument for waiving his defect in service, Contestant relies on an election contest filed with the House in the 111th Congress in which the Committee decided to evaluate the merits of the Contestant's claims even though the Notice of Contest was served untimely. In that contest, it appears that the Contestant may have received inaccurate advice with respect to the filing deadline.[7] While Contestant is correct that most House Offices (perhaps even Contestee's) were then vacant due to the COVID–19 protocols, this mere fact does not warrant the Committee waiving the deadline for timely and proper service. There is no doubt that physical presence in the House Office buildings was significantly limited on January 4, 2021. However, leaving a copy of a Notice of Contest at the Contestee's principal office or place of business with a person then in charge thereof was not the only method of service available to Contestant. Despite the difficulties described, this method is the one that he, to his own legal detriment, chose to use.

CONCLUSION

Contestant failed to effect proper and timely service of process on Contestee, a fatal procedural error. Contestant could have used any of the five methods of service of process provided under the FCEA to effect proper and timely service upon Contestee.[8] He chose to attempt service by delivering a copy of the Notice of Contest to the Contestee's principal office or place of business in the care of a person in charge; however, the Contestant failed in this attempt. None of Contestant's other legal theories is sufficient to cure this clear procedural defect. Finally, the Minority notes that other Contestants who filed election contests with the House for the 117th Congress did not suffer such issues with completing proper and timely service of process upon the relevant Contestees.

For the reasons stated above, the Minority would dismiss the Notice of Contest solely on procedural grounds without reaching consideration of the merits.

RODNEY DAVIS,
Ranking Member,
Committee on House Administration.

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[6] *See* Contestant's Response to Contestee's Motion to Dismiss Notice of Contest, *Oberweis v. Underwood*, at 8.
[7] *Tataii v. Abercrombie*, H. Rept. 111–68 (2009).
[8] 2 U.S.C. § 382.