

Remedy for a Ballot Printing Error

Bennett v. Mollis (William E. Smith, D.R.I. 1:08-cv-468)

Because of a printing error, some ballots included the name of a candidate that had withdrawn from the race. After a mathematical analysis of how many votes the error could have cost the plaintiffs' candidate, with the help of a political science professor as a technical advisor, the district judge denied the plaintiffs relief.

Subject: Voting irregularities. *Topics:* Election errors; special master; enjoining certification; intervention.

On the day before Thanksgiving, three weeks after the 2008 general election, four voters in the election for town council in Smithfield, Rhode Island, filed a federal class action to enjoin certification of the election results.¹ Thirteen candidates were up for five seats, and voters could vote for as many as five candidates.² On September 30, one of the candidates withdrew; on October 1, the ballot printer received notice of the change.³ Because of an error by a printer employee, sample and mail ballots reflected the change, but the ballots used on election day did not, until the error was quickly corrected mid-day.⁴ There were 570 votes for the withdrawn candidate.⁵ The plaintiffs supported the candidate who came in sixth, and he trailed the fifth-place candidate by thirty-nine votes.⁶

The court assigned the case to Judge William E. Smith.⁷ It was his practice in emergency cases to quickly assemble the parties for a conference and work toward stipulated facts.⁸ He held a conference in chambers at 3:00 p.m. on the day of filing, and he issued a temporary restraining order to preserve the status quo, enjoining certification of the election until December 5.⁹ On December 1, he granted the fifth-place candidate's motion to intervene.¹⁰

On December 3, Judge Smith held a preliminary-injunction evidentiary hearing.¹¹ On December 12, he denied the preliminary injunction.¹² Of the

1. Complaint, *Bennett v. Mollis*, No. 1:08-cv-468 (D.R.I. Nov. 26, 2008), D.E. 1; *Bennett v. Mollis*, 590 F. Supp. 2d 273, 275 (D.R.I. 2008).

2. *Bennett*, 590 F. Supp. 2d at 276.

3. *Id.*

4. *Id.* at 276–77.

5. *Id.* at 277.

6. *Id.* at 276; see Gina Macris, *Board Nixes Bid for New Election for Smithfield Council*, *Providence J. Bull.*, Nov. 25, 2008.

7. Docket Sheet, *Bennett v. Mollis*, No. 1:08-cv-468 (D.R.I. Nov. 26, 2008).

Tim Reagan interviewed Judge Smith for this report by telephone on May 23, 2012.

8. Interview with Hon. William E. Smith, May 23, 2012.

9. Docket Sheet, *supra* note 7; *Bennett*, 590 F. Supp. 2d at 275.

10. Docket Sheet, *supra* note 7; see Intervention Motion, *Bennett*, No. 1:08-cv-468 (D.R.I. Dec. 1, 2008), D.E. 7.

11. Transcript, *Bennett*, No. 1:08-cv-468 (D.R.I. Dec. 3, 2008, filed Jan. 27, 2009), D.E. 48; *Bennett*, 590 F. Supp. 2d at 276.

12. Opinion at 16, *Bennett*, No. 1:08-cv-468 (D.R.I. Dec. 11, 2008), D.E. 29, *amended*, *Bennett*, 590 F. Supp. 2d at 281.

570 defective ballots, 458 included votes for the plaintiffs' candidate, leaving 112 ballots that might have had votes for him if the withdrawn candidate had not been included.¹³ Eleven of these ballots had fewer than five votes, suggesting that the voters had decided not to vote for the plaintiffs' candidate.¹⁴ In addition, there were two ballots with too many votes and not one for the plaintiffs' candidate, leaving ninety-nine ballots that might have included the plaintiffs' candidate if the withdrawn candidate had not been included.¹⁵ He would have to have received votes on 40% of those ballots to have prevailed, but Judge Smith, with the assistance of a technical advisor, determined that this was nearly impossible based on his performance on accurate ballots.¹⁶

The technical advisor was a Brown University political-science professor,¹⁷ whom Judge Smith had previously met at a conference.¹⁸ She provided assistance to the court without compensation.¹⁹

On July 2, 2009, the court of appeals denied an appeal.²⁰ The parties filed a stipulated dismissal on July 23.²¹

13. *Bennett*, 590 F. Supp. 2d at 277.

14. *Id.*

15. *Id.*

16. *Id.* at 279–88.

17. *Id.* at 280–81.

18. Interview with Hon. William E. Smith, May 23, 2012.

19. *Id.*

20. Judgment, *Bennett v. Mollis*, No. 09-10083 (1st Cir. July 2, 2009).

21. Stipulation, *Bennett v. Mollis*, No. 1:08-cv-468 (D.R.I. Dec. 11, 2008), D.E. 58.