

Serving in the Army Reserves While Running for Office

Neel v. Pippy (Arthur J. Schwab, W.D. Pa. 2:03-cv-302)

Eight days before a special election to fill a vacancy in Pennsylvania's senate, three voters filed a federal complaint to block the election of a candidate who was a reserve officer recently called to active duty, claiming that the candidacy violated the Military Code. The district court ordered immediate briefing and held a hearing three days later, after which the court concluded that the Military Code did not afford the plaintiffs a private right of action for their case. The military granted the candidate a waiver, and he won.

Subject: Getting on the ballot. *Topics:* Getting on the ballot; intervention.

On March 3, 2003, eight days before a special election to fill a vacancy in Pennsylvania's senate, three voters filed a federal complaint in the Western District of Pennsylvania seeking to block the election or the candidacy of the Republican nominee, alleging that section 973 of the Military Code forbade reserve officers on active duty, such as the candidate, from holding office, such as the candidate was seeking.¹ With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.²

The senate district at issue included southern communities in Allegheny County and parts of Washington County.³ The Republican candidate was already serving in Pennsylvania's house of representatives.⁴ A captain, he was called to active duty in February, shortly after he was named the Republican nominee.⁵

The court assigned the case to Judge Arthur J. Schwab, who issued a scheduling order the next day.⁶ Defendants' briefs were due on the afternoon of March 5, a reply brief was due on the morning of March 6, and the hearing was set for the afternoon of March 6.⁷ Judge Schwab directed the parties to brief the court's jurisdiction over the controversy.⁸

1. *Neel v. Pippy*, 247 F. Supp. 2d 707, 708 (W.D. Pa. 2003); Docket Sheet, *Neel v. Pippy*, No. 2:03-cv-302 (W.D. Pa. Mar. 3, 2003); see 10 U.S.C. § 973; see also Vince Guerrieri, 3 *Voters Sue to Stop 37th District Election*, Pittsburgh Trib. Rev., Mar. 4, 2003.

2. *Neel*, 247 F. Supp. 2d at 708; Docket Sheet, *supra* note 1.

3. See Guerrieri, *supra* note 1.

4. See *id.*

5. See *id.*; Vince Guerrieri, *Pippy Likely to Stay in Race*, Pittsburgh Trib. Rev., Mar. 6, 2003 [hereinafter *Pippy Likely*].

6. Docket Sheet, *supra* note 1; Interview with Hon. Arthur J. Schwab, Oct. 23, 2012 (noting that the case must have been filed late in the day, because otherwise he would probably have issued his scheduling order on the day that the case was filed).

Tim Reagan interviewed Judge Schwab for this report by telephone.

7. *Neel*, 247 F. Supp. 2d at 708–09; Docket Sheet, *supra* note 1; see Guerrieri, *Pippy Likely*, *supra* note 5.

8. Interview with Hon. Arthur J. Schwab, Oct. 23, 2012.

The case was filed during Judge Schwab's first year on the bench, but his private practice had included extensive experience with injunctions.⁹ It was his practice as a judge to implement procedures to join the issues quickly.¹⁰

The president pro tempore of Pennsylvania's senate moved to intervene or appear as an amicus curiae, and Pennsylvania's attorney general moved to appear as an amicus curiae.¹¹ Judge Schwab allowed both to appear as amici.¹² After the hearing, Judge Schwab ruled that the Military Code did not afford the plaintiffs a right of action for the relief sought.¹³ Judge Schwab determined that it was not for his court to declare whether the candidate had to choose between the army reserves and Pennsylvania's senate or which the candidate had to choose.¹⁴ The plaintiffs decided not to appeal.¹⁵

The defense department granted the candidate a waiver from the requirements of section 973, so long as he did not actively campaign,¹⁶ and he won the election.¹⁷

9. *Id.*

10. *Id.* (noting that it was also important to minimize the court's part in the election story).

11. *Neel*, 247 F. Supp. 2d at 708–09; Docket Sheet, *supra* note 1.

The attorney general, D. Michael Fisher, is now a circuit judge in the Third Circuit. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

12. *Neel*, 247 F. Supp. 2d at 709; Docket Sheet, *supra* note 1.

13. *Neel*, 247 F. Supp. 2d 707; see Mark Belko, *Pippy Clears Final Legal Hurdle*, Pittsburgh Post-Gazette, Mar. 7, 2003, at B13.

14. *Neel*, 247 F. Supp. 2d at 714.

15. See *Three to Abide by Ruling on Pippy's Eligibility*, Pittsburgh Trib. Rev., Mar. 8, 2003.

16. See Belko, *supra* note 13.

17. See James O'Toole, *Pippy Soldiers on to Victory*, Pittsburgh Post-Gazette, Mar. 12, 2003, at B1.