

**IN THE DISTRICT COURT OF COMANCHE COUNTY
STATE OF OKLAHOMA**

FILED
DISTRICT COURT
COMANCHE COUNTY, OKLAHOMA
September 5, 2024 3:16 PM
ROBERT MORALES, COURT CLERK
Case Number CJ-2024-419

DISTRICT ATTORNEY
KYLE A. CABELKA,

Petitioner,

Case No. CJ-2024-419

Denise Wilson

vs.

COMANCHE COUNTY
ELECTION BOARD;
AMY SIMS, ELECTION
BOARD SECRETARY;
COMANCHE COUNTY;
PAUL ZIRIAX, SECRETARY OF
THE STATE ELECTION BOARD

Respondents.

**RESPONDENTS' MOTION TO DISMISS WITH EMERGENCY REQUEST
FOR EXPEDITED ADJUDICATION**

Respondents Comanche County Election Board, Amy Sims, Election Board Secretary Comanche County, and Paul Ziriaux, Secretary of the State Election Board (collectively "Respondents"), by and through Assistant Attorney General, Evan J. Edler, move this Court for an expedited adjudication dismissing Plaintiff's Petition.

In support, Respondents state:

INTRODUCTION

District Attorney Kyle Cabelka's Petition asking this Court deny certification of the results of the August 27, 2024 Republican Primary Runoff Comanche County Sheriff Election must be dismissed. (*Petition* at 1) (citing 26 O.S. § 8-120). Moreover,

considering certain federal election requirements, Respondents request that this matter be scheduled for expedited adjudication.¹

As set forth in greater detail below, there are a multitude of defects with the Petition. First, Oklahoma law dictates that a petition such as this may only be brought by a candidate of the relevant election. 26 O.S. § 8-109; *see also* 26 O.S. § 8-118. Obviously, Cabelka is not a candidate. Second, Oklahoma law specifies that a petition alleging fraud or irregularity in an election must follow a particular process. 26 O.S. § 8-118. Cabelka has flagrantly disregarded these statutory requirements. Finally, notwithstanding the prior issues, the Petition fails to present allegations sufficient for the purposes of 26 O.S. § 8-120. For these reasons, the Petition should be dismissed.

STANDARD OF REVIEW

In Oklahoma, “the mathematical certainty of an election outcome is tested not by possibilities or probabilities but by simple arithmetic.” *Keltch v. Alfalfa Cnty. Election Bd.*, 1987 OK 8, 737 P.2d 908. “As a matter of public policy, the Court usually indulges every presumption in favor of the validity of an election.” *Cooper v. Dix*, 1989 OK 55, ¶ 5, 771 P.2d 614. “Where possible, the validity of an election will be sustained,

¹ The Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act, requires absentee ballots be sent to UOCAVA voters at least 45 days before the General Election—i.e., September 21, 2024. In order to comply with UOCAVA, the Comanche County Election Board must certify the results of the August 27, 2024 Runoff Primary Election for sheriff ***no later than September 13, 2024***. This is because the Comanche County sheriff race will be on the General Election ballot. Thus, Respondents respectfully request that this matter be set on an expedited schedule allowing for adjudication prior to September 13, 2024.

and an election which is not clearly illegal will be upheld.” *Id.* Absent instances of fraud or corruption, and “in the presence of merely statutory informalities,” election results are not to be disturbed. *Id.* These principals are based in the electorate’s interest in having its vote count and avoidance of the “expense involved in conducting a second election.” *Id.*

ARGUMENT AND AUTHORITY

I. *Cabelka has no legal basis to bring this Petition.*

Okla. Stat. tit. 26 § 8-109 provides that “any *candidate whose name appeared on a Primary, Runoff Primary or General Election ballot*” may “contest the announced results of said election by filing a written petition with the appropriate election board.” *Id.* (emphasis added). The section goes on to provide: “[n]othing in this section shall be construed to prohibit any proceedings in district court, which are authorized by law, alleging irregularities or fraud in an election.” *Id.*

At a glance, § 8-109’s latter clause may appear to authorize non-candidates to contest election results. However, this disclaimer contemplates direct-to-district court election contests, such as municipal election. *See e.g.* 11 O.S. § 16-310. In addition, 26 O.S. § 8-111 (which is referenced by § 8-109 as authorizing “any individual to request recount”) notes that only “a candidate whose name was printed on the ballot” may bring such a petition. In sum, § 8-109’s candidate requirement is not circumvented by any other applicable law.

As applied here, only a candidate of the August 27, 2024 Runoff may file a petition contesting the results thereof. 26 O.S. § 8-109. Obviously, Cabelka does not

fall within this category of individuals. Given the absence of this foundational requirement, the Petition must be dismissed.

II. *Cabelka failed to follow the appropriate procedure for contesting the results of the August 27, 2024 Runoff.*

The Oklahoma Legislature set out a clear path for contesting election results. Specifically, such a contest shall be initiated by “filing a written petition with the appropriate election board.” *Id.* The appropriate election board is the board “with whom the candidate filed [his or her] declaration of candidacy, unless otherwise provided by law. *Id.* From there, 26 O.S. § 8-118 explains that “the secretary of the election board receiving the petition shall set a hearing in the same manner as provided for recounts.”

Cabelka now attempts to circumnavigate this process wholesale by bringing the Petition before this Court rather than filing it with “the appropriate election board” as required by 26 O.S. § 8-109. This comes as no surprise—there is no “appropriate election board” because Cabelka never filed a declaration of candidacy because *he is not a candidate* as required by § 8-109. As a result, the Petition should be dismissed for failure to comply with 26 O.S. §§ 8-109 and 8-118.

III. *Petition fails to meet the standard set forth in 26 O.S. § 8-120.*

Even if Cabelka had standing to maintain this contest and had followed the appropriate statutory procedure, dismissal would still be necessary here because the Petition falls well short of the standard required by Oklahoma law to stop certification of an election.

To illustrate, 26 O.S. § 8-120 requires that such a petition “allege a sufficient number of irregularities and of such a nature as to: (1) prove that the contestant is lawfully entitled to be certified the party’s nominee . . . or (2) [p]rove that it is impossible to determine with mathematical certainty which candidate is entitled to be certified as the party’s nominee . . .” Moreover, any petition which neglects to make such allegations “shall be deemed frivolous by the presiding judge and be dismissed.” 26 O.S. § 8-120(2).

First and obviously, no allegation has been made that the Petitioner is entitled to be certified as nominee. Second, the Oklahoma Supreme Court discussion of the latter requirement makes it abundantly clear that the Petition falls well below the bar § 8-120 sets:

To so impeach the precinct returns a contestant must, at least, make a showing either *illegal* votes were cast or votes were cast by legal voters that should have been counted, but were not, or were counted incorrectly, *in sufficient numbers*, to eliminate his opponents margin of victory.

Jackson v. Maley, 1991 OK 7, ¶ 6, 806 P.2d 610 (citing *Hembree v. City of Stillwell*, 597 P.2d 1218, 1220 (Okla. 1979); *Helm v. State Election Board*, 589 P2d 224, 226 (Okla. 1979) (emphasis original).

In this instance, 6,562 total votes were cast, in the August 27, 2024 Comanche County Sheriff Republican Runoff Primary. The winner of the Runoff carried the vote by 628 votes. *Petition*, at 1. Therefore, in order to “eliminate his opponent’s margin of victory,” *Jackson*, 1991 OK at ¶ 6, a properly filed petition would have to allege *at least* 628 irregularities. Obviously, the Petition at issue here does nothing of the sort.

Indeed, the Petition appears to allege irregularities occurred with regard to five (5) individual ballots. *Id.* 1–3. Needless to say, that number does not even begin to approach the figure required to establish an impossibility to mathematically determine the Runoff’s winner. Even further, the Petition relies heavily upon pure speculation. In doing so, it contravenes established caselaw. *See id.* (“we will not engage in such speculation and void this election merely because irregularities are shown. The irregularities must be shown . . . to make it impossible to determine . . . who is entitled to a certificate of election.”) As a result, the Petition must be dismissed for failure to meet the standards set forth in 26 O.S. § 8-120.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court expeditiously dismiss the Petition and award any other relief it deems appropriate. Failure to act in a timely manner could interfere with the ability the country’s military service members who are dispatched overseas to exercise their right to vote, in addition to disenfranchising the informed decisions of thousands of Comanche County voters.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 5th day of September 2024 a true and correct copy of the foregoing document was sent via facsimile and U.S. Mail, postage prepaid to:

Kyle Cabelka *Via Facsimile: 580.585.4435*
Comanche County District Attorney
315 SW 5th St., Ste. 502
Lawton, OK 73501



EVAN J. EDLER