

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS**

In re Robin Marlin,
Complainant,

Administrative Hearing
No. 09-02

Re: Appeal of Board Decision
to Declare a Vacancy in the
Office of ANC SMD 7B05.

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections and Ethics on January 14, 2009. It is an appeal of the Board's determination to declare a vacancy in the office of Advisory Neighborhood Commissioner, Single Member District (ANC SMD) 7B05, pursuant to D.C. CODE § 1-1001.10(b)(1). The appeal was filed by Robin Marlin, a write-in candidate in the ANC SMD 7B05 contest. Chairman Errol R. Arthur and Board member Dr. Lenora Cole presided over the hearing. The Complainant appeared *pro se*.

Background

On November 3, 2008, Ms. Marlin properly declared her write-in candidacy with the Board pursuant to D.C. CODE § 1-1001.08(r)(3). Coincidentally, Mr. Daniel Malloy—a duly qualified ballot candidate—irrevocably withdrew his candidacy on the same day before the November 4th General Election pursuant to tit.3 D.C. Mun. Regs §1615.1. The Board attempted to give notice in the affected precincts by supplying signs that informed the voters of Mr. Malloy's withdrawal pursuant to 3 D.C.M.R. §1615.3. However, poll workers inadvertently failed to place the supplied notice signs up in the affected precincts on Election Day.

Mr. Malloy subsequently received the highest number of votes in the contest with a resounding 85.29% of the vote total. Although Mr. Malloy was qualified to hold the office, he officially withdrew his candidacy on the day before the General Election. Accordingly, the Board found Mr. Malloy to be ineligible to hold the office and declared no winner in the contest pursuant to D.C. CODE § 1-1001.10(b)(1).¹ Ms. Marlin contends that Mr. Malloy was not a candidate on Election Day due to his withdrawal, and that if the Board had properly alerted the electorate of this circumstance, she would have most likely won the contest. Ms. Marlin asserts that she was the only qualified candidate in the contest and that accordingly she had received the highest number of votes and should be declared the winner.

Ms. Marlin proceeded to obtain the results of her write-in candidacy in an effort to be declared the winner of the contest. She contacted the Board on November 6th 2008 to inquire when the write-in votes would be counted, and was instructed that the write-in tallies would be conducted after November 12, 2008, with results posted on December 1, 2008. On November 17, 2008, the Board's General Counsel called Ms. Marlin to confirm that the write-in votes for ANC SMD 7B05 would be counted. The Registrar of Voters e-mailed the results of her findings to Ms. Marlin and indicated that she had received 104 write-in votes while Mr. Malloy received 719 votes. Since Mr. Malloy, the candidate with the highest vote total, was found to be ineligible to hold office by virtue of his irrevocable withdrawal, the Board declared "no winner" and the seat remained vacant.

¹ D.C. CODE § 1-1001.10(b)(1) reads in relevant part: "If after the date of the election and prior to the certification of the election results, the qualified candidate who has received the highest number of votes. . . is found to be ineligible to hold office. . . the Board shall declare no winner, and the office shall become vacant as of the date of the beginning of the term of office for which the election was held."

Analysis

The Board relies on the American Rule of Elections which unequivocally prevents second-place finishers from securing elected office.

The candidate with the second highest vote total in the contest has been informed that she is not the winner because irrespective of Mr. Malloy's status as a candidate, he did receive the highest number of votes in the contest. In *Bates v. District of Columbia Bd. of Elections and Ethics*, 625 A.2d 891 (D.C. 1993), the Court of Appeals held that the Board was required to certify the candidate who received the highest number of votes as the winner in an Advisory Neighborhood Commission election, despite post-election, pre-certification notice from the winner that she was withdrawing because she no longer lived in district. Even though the candidate who received the most votes was ineligible to serve, the statute does not provide any qualification or exception.

This holding is consistent with the *American Rule* that holds that where the candidate receiving the most votes is deceased, disqualified, or ineligible, the runner-up candidate will *not* be deemed the winner of the election. In *Bates* the court rejected the Board's policy of certifying the second-place finisher in a contest where the candidate receiving the highest votes cannot serve:

[V]otes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards to other candidates. The result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes.

Bates, at 895.

Ms. Marlin counters that Mr. Malloy withdrew before the election, and he was not actually a candidate in the contest, and moreover, if the Board had supplied notice of his withdrawal to the electorate, she may have garnered the most votes in the contest. While

Ms. Marlin's argument does present a different set of circumstances than those described in *Bates*, the argument cannot eviscerate the will of the electorate to choose Malloy in an overwhelming majority. *Bates* is the only case in our jurisdiction where the *American Rule* has been applied. However, it is useful to view other jurisdictions' application of the doctrine to illustrate the rationale of the rule.

In *Merrill v. Dade County Canvassing Bd.*, 300 So.2d 28 (Fl. App. 1974), the petitioner was a third place candidate seeking a run-off election because the second-place contender was an unqualified candidate. Similar to the scenario in the instant case, the second-place applicant withdrew prior to the election, but her name was inadvertently left on the ballot. The Court decided that "the precise question presented is whether or not ALL votes cast in the election must be counted in order to correctly ascertain if a run-off election [] is required." *Merrill* at 28. The Court went on to distinguish between the *English Rule* and the *American Rule*:

The majority rule, the 'American rule', treats the knowledge of the voters in casting their ballots for a deceased or disqualified as immaterial. In determining the results of an election as regards the other candidates who are qualified, the American rule does not treat the votes received by a deceased or disqualified candidate as void or thrown away, but as counted, even if the voters knew of the death or disqualification.

The minority rule has been criticized because it requires the court to examine the knowledge of the voters of a candidate's death or disqualification, which from a practical standpoint may be very difficult. And, by throwing out certain votes, the English rule creates certain perils that either an incompetent or undeserving candidate may be elected.

Merrill at 28. The Court reasoned that even if following the minority "English Rule," there was no evidence to show that the electorate knew that the third candidate was disqualified and thus mandated a run-off election because the first-place finisher did not receive a majority of votes.

The *Merrill* case illustrates comprehensively why the votes for Malloy cannot be thrown out in the instant case. The *American Rule* gives great deference to the will of the electorate. Even in cases such as this where error on the part of the Board could have led to different results, the will of the electorate in choosing Mr. Malloy cannot be ignored. The electorate was exposed to a nominating campaign where Malloy undoubtedly shared his ideas with the electorate and garnered the requisite support for ballot access. Clearly, there is no guarantee that the electorate would have chosen Ms. Marlin if it had been aware of Mr. Malloy's withdrawal. The Board is not in a position to make such a judgment on behalf of the electorate. As stated in *Bates*, the Board will adhere to the *American Rule* and take the prudent measure of declaring a vacancy as opposed to awarding the seat to the second-place finisher: "[t]he result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes." *Bates* at 895.

January 28, 2009


Errol R Arthur
Chairman, Board of Elections and Ethics

Lenora Cole
Member, Board of Elections and Ethics

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing order was hand-delivered this 28th day of January, 2009 to Robin Marlin, 3350 Erie Street, SE, Washington, D.C. 20020.
