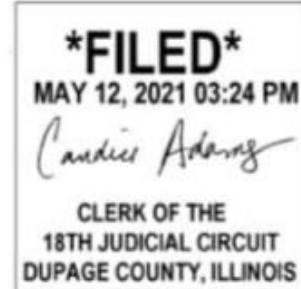


IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

BOB GROGAN,)
)
 Petitioner,)
)
 -vs-) No. 20 MR 1094
)
 WILLIAM "BILL" WHITE, *et al.*,)
)
 Respondents.)



MEMORANDUM OPINION & ORDER

Introduction

Petitioner, Bob Grogan, was the Republican Party's candidate for the office of DuPage County Auditor in the November 3, 2020 general election. Respondent, William "Bill" White, was the Democratic Party's candidate. On November 24, 2020, the DuPage County Clerk certified that 491,067 ballots were cast in the DuPage County Auditor's race and that White had won the election by 75 votes. Shortly thereafter, Grogan exercised his statutory right to examine for irregularities the ballots cast in a specified sampling of precincts. During this examination, it was discovered that, at a particular polling place in Downers Grove Township, none of the ballots that were cast had been initialed by an election judge, as required by the Illinois Election Code. According to Grogan, if these uninitialed ballots are declared invalid and not counted, Grogan will net an additional 82 votes, which exceeds White's slim margin of victory. Based on this, Grogan is now asking the court for a county-wide recount of the November 3, 2020 DuPage County Auditor's race. Whether he is entitled to that recount is the issue.

Analysis

This matter comes before the court on petitioner's motion for full recount. The standard for granting a recount petition is set forth in Section 23-23.2 of the Election Code (the Code),

which states that “[a] court hearing an election contest pursuant to this Article or any other provision of the law shall grant a petition for a recount properly filed where, based on the facts alleged in such petition, there appears a reasonable likelihood the recount will change the results of the election.” 10 ILCS 5/23-23.2 (West 2018). Here, paragraphs 12-15 of petitioner’s verified petition allege that: (1) in discovery proceedings authorized by section 5/22-9.1 of the Code (10 ILCS 5/22-9.1 (West 2018)), petitioner and his representatives learned that, in Downers Grove Township precincts 76, 118, and 130, a total of 436 uninitialed ballots were cast; (2) of those 436 uninitialed ballots, 259 contained votes cast for White and 177 contained votes cast for Grogan; and (3) if the uninitialed ballots are declared invalid and not counted, Grogan would net an additional 82 votes, which exceeds White’s 75-vote victory margin.

Given these allegations, the dispositive question is whether the uninitialed ballots identified in the discovery recount may be counted. Section 17-9 of the Code provides that, once a voter’s registration has been confirmed, “[o]ne of the judges shall give the voter one, and only one of each ballot to be voted at the election, *on the back of which ballots* such judge shall indorse his initials in such manner that they may be seen when each such ballot is properly folded.” (Emphasis added.) 10 ILCS 5/17-9 (West 2018). Section 24A–10.1 then provides that, “[i]f any ballot card or ballot card envelope is not initialed, it shall be marked on the back ‘Defective’, initialed as to such label by all judges immediately under the word ‘Defective’ *and not counted.*” (Emphasis added.) 10 ILCS 5/24A–10.1 (West 2018).

In construing the above provisions, the Illinois Supreme Court has been both explicit and resolute for more than a century: “ ‘statutes requiring election judges to initial ballots are mandatory, and *** uninitialed ballots may not be counted.’ ” *DeFabio v. Gummersheimer*, 192 Ill. 2d 63, 65-66 (2000), quoting *McDunn v. Williams*, 156 Ill. 2d 288, 311 (1993). This is true

even where the parties agree that there is no knowledge of fraud or corruption, and it is true even where election judges fail by mistake to initial *any* of the ballots cast in their polling place. *Id.* at 66, 68-69. According to *DeFabio*, the reason for both the initialing requirement and its strict enforcement is that:

“ [T]here must * * * in order to prevent fraud, be some method whereby illegally cast ballots may be distinguished and rejected. The initialing provision is the principal method chosen by the legislature for accomplishing this purpose since the judge who has indorsed his initials upon the ballot can thereafter identify that ballot as legally cast.” *Id.* at 66-67, quoting *Craig v. Peterson*, 39 Ill. 2d 191, 200-01 (1968).

To be sure, the Illinois Supreme Court has permitted relaxation of the mandatory initialing requirement under very limited circumstances – specifically, with respect to uninitialed *absentee* ballots that are easily distinguished from in-precinct ballots. See, e.g., *Pullen v. Mulligan*, 138 Ill.2d 21 (1990); *Craig v. Peterson*, 39 Ill. 2d 191 (1968). However, the Illinois Supreme Court “has *never* permitted relaxation of the mandatory initialing requirement for in-precinct ballots.” (Emphasis in original.) *DeFabio*, 192 Ill. 2d at 66. On the contrary, it “has repeatedly rejected such a notion.” *Id.*

On this point, it is worth noting that the facts of *DeFabio* are remarkably similar to the facts at hand. *DeFabio* involved the November 1996 election for Monroe County coroner. Two days after the election, the Monroe County Canvassing Board declared Julie Gummersheimer the winner by two votes over her opponent, Leonard DeFabio. *Id.* at 64. DeFabio then filed a petition for election contest alleging that (1) none of the 524 ballots cast in Monroe County’s second precinct was initialed by an election judge; (2) of those 524 uninitialed ballots, 290 contained votes cast for Gummersheimer and 212 contained votes cast for DeFabio; and (3) if the uninitialed

ballots were declared invalid and not counted, DeFabio would have won the election. *Id.*, at 64. In response to DeFabio's petition, Gummersheimer produced affidavits from the second precinct election judges stating that the absence of initials was due to mistake rather than to fraud or corruption, as well as affidavits from two second precinct voters stating that they had failed to notice that their ballots were not initialed. *Id.* at 65. Faced with these facts, and based on the legal principles summarized above, the Illinois Supreme Court held that the trial court properly invalidated all of the ballots cast in Monroe County's second precinct because "[n]one of these ballots contain the requisite initialing," "neither party argues that any of the uninitialed ballots can be distinguished or identified as absentee ballots," and "both section 24A-10.1 and more than 100 years of this court's jurisprudence compel the invalidation of those ballots." *Id.* at 68.

DeFabio notwithstanding, in their answers to the verified petition, both White and the County Clerk maintain that, even if the ballots at issue are not initialed, they are still valid and may be counted because an election judge's initials were recorded on an electronic Poll Pad at the time the ballots were given to the voters. According to White and the County Clerk, the initials recorded on the Poll Pad are the "functional equivalent" of initialing the ballot itself. Though White's answer does not explain why this is the case, the County Clerk insists that "the initials in either case are both designed and intended to ensure that the Voter receives the Official Ballot with the correct Ballot Style for said Voter." There are two problems with this argument. The first problem is the plain language of the Code, which irrespective of any intervening advances in polling place technology, continues to mandate that *the ballot itself* be initialed. 10 ILCS 5/17-9, 24A-10.1 (West 2018). Of course, the legislature is always free to amend this language if at any point it determines that the recording of initials on an electronic tablet is in fact the "functional equivalent" of initialing the ballot itself. In the meantime, the governing language is plain, and "[i]t is never

proper to depart from plain language by reading into a statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent.” *In re Michael D.*, 2015 IL 119178, ¶9. The second problem is that, contrary to the County Clerk’s argument, “ensur[ing] that the Voter receives the Official Ballot with the correct Ballot Style for said Voter” has never been the purpose of the initialing requirement. On the contrary, according to the Illinois Supreme Court, the purpose of the initialing requirement is to preserve the integrity of the election by allowing election judges, after the fact, to identify and separate legally cast in-precinct ballots from those that may have been cast illegally. See *DeFabio*, 192 Ill. 2d at 66-67. Neither White nor the County Clerk explains how this purpose is vindicated by having an election judge record his or her initials on an electronic tablet while leaving wholly uninitialed the ballot that is actually cast and counted.¹

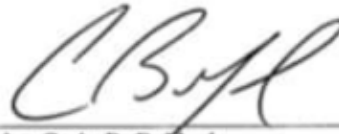
By definition, election recounts are conducted after the fact. In this case, for example, more than six months have passed since the November 3, 2020 election. Essential to the integrity of any ensuing recount is the assurance that the ballots being counted were in fact lawfully cast by a sanctioned voter on election day. An election judge’s pen-and-ink initials provide that assurance; a blank, uninitialed ballot does not. See *DeFabio*, 192 Ill. 2d at 66-67.

The bottom line is that, although much has changed in the 20 years since *DeFabio* was decided, nothing about the applicable law has changed. The relevant portions of sections 17-9 and 24A-10.1 read today exactly the same as they did then, and *DeFabio* remains the Illinois Supreme Court’s definitive construction of those statutes. Then, as now, uninitialed in-precinct ballots cannot be counted. Accordingly, this court concludes that, based on the facts alleged in petitioner’s

¹ Though it forms no basis for the court’s decision in this case, it is worth noting that, of all the in-precinct ballots examined during the discovery recount, it appears that only those cast in the single polling place covering Downers Grove Township precincts 76, 118, and 130 were found to be uninitialed, even though many other polling places utilized the Poll Pad. Moreover, during the hearing on White’s motion to dismiss, counsel for the County Clerk informed the court that DuPage County election judges are both trained and expected to initial the actual ballots, even in those polling places where a Poll Pad is used.

verified election petition, there appears a reasonable likelihood that the recount petitioner seeks will change the results of the November 3, 2020 election. Specifically, the verified petition alleges that the statutory discovery recount conducted in this case revealed that 436 uninitialed ballots were cast on election day in three Downers Grove Township precincts. If true, *DeFabio* mandates that these ballots be declared defective and not counted. As importantly, the verified petition alleges that, if the 436 ballots at issue are declared defective and not counted, petitioner would net an additional 82 votes, which exceeds his opponent's 75-vote victory margin and would swing the election results in petitioner's favor.

For these reasons, petitioner's motion for full recount is GRANTED, and this court hereby orders that a county-wide recount of the November 3, 2020 election for the office of DuPage County Auditor be conducted in accordance with the procedures set forth in the Agreed Recount Order, to be entered hereafter. During such recount, and in accordance with section 24A-10.1 of the Code, any in-precinct ballot that is not initialed shall be deemed defective and not counted.



Judge Craig R. Bofford

5-12-2021

Date