IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: VACANCY BOARD OF OLD LYCOMING TOWNSHIP : CV-22-00885

OPINION AND ORDER

AND NOW, this 23rd day of September 2022, in consideration of the Expedited Motion for Reconsideration ("Motion for Reconsideration") and Request for Injunctive Relief Pursuant to Pa. R.C.P. 1531 ("Request for Injunction") filed by Old Lycoming Township Supervisor David Shirn ("Supervisor Shirn"), the Court hereby issues the following OPINION and ORDER.

INITIAL PETITION TO FILL VACANCY

On September 8, 2022, Phil Landers, Chairman of the Vacancy Board of Old Lycoming Township ("Chairman Landers"), filed a Petition of the Vacancy Board Chairman for Old Lycoming Township to Fill a Vacancy Pursuant to 53 P.S. § 65407(d) (the "Petition"). The Petition contained the following factual averments:

- Old Lycoming Township is a Township of the Second Class under Pennsylvania Law;
- Former Old Lycoming Township Supervisor Sam Aungst ("Former Supervisor Aungst") resigned from the Old Lycoming Township Board of Supervisors (the "Board of Supervisors") on April 12, 2022, and his resignation was accepted by the two remaining supervisors, Supervisor Shirn and Supervisor Linda Mazzullo ("Supervisor Mazzullo") (together, the "Remaining Supervisors");
- The Remaining Supervisors sought candidates for the vacancy;
- R. David Kay ("Acting Supervisor Kay") applied and was determined to be qualified under Pennsylvania law, and the Remaining Supervisors "ultimately agreed that R. David Kay would be appointed to serve as Supervisor and fill the vacancy";

- Acting Supervisor Kay signed an Oath of Office on April 29, 2022, and the Remaining Supervisors introduced him "as Supervisor" during the May 10, 2022 Board of Supervisors meeting;

- Although the Remaining Supervisors did not confirm him by a majority vote at a public meeting as is generally required, "there was no challenge to the appointment of R. David Kay at the public meeting on May 10, 2022, or any subsequent meetings";

- The failure to formally move for Acting Supervisor Kay's appointment and hold a vote "was recently brought to the Township's attention"; and

- The failure of either the Board of Supervisors or the Vacancy Board to formally fill the vacancy was due entirely "to an unnoticed procedural error."

In the Petition, Chairman Landers explained that when a vacancy arises on the Board of Supervisors of a Second Class Township, the board has thirty days to fill the vacancy; if it fails to do so, the Vacancy Board has fifteen days to fill the vacancy.[1] Should the Vacancy Board fail to fill the vacancy, the chair of the vacancy board may petition the Court of Common Pleas to fill the vacancy.[2] Thus, Chairman Landers filed the Petition seeking the official appointment of Acting Supervisor Kay as Supervisor. Chairman Landers averred in the Petition that "it is in the best interest of the Township of Old Lycoming for R. David Kay to continue as a Supervisor." He noted that Supervisor Mazzullo consents to Acting Supervisor Kay's appointment as Supervisor, but Supervisor Shirn "does not consent to this petition despite agreeing and introducing R. David Kay as a Supervisor on May 10, 2022."

---

[1] *See* 53 P.S. § 65407(c). This section and related statutes and cases are discussed in detail *infra*.

[2] 53 P.S. § 65407(d)

After reviewing the relevant law, in light of the representations of fact in the Petition – including the averments that the failure to confirm Acting Supervisor Kay as Supervisor was an "unnoticed procedural error" and two thirds of the Vacancy Board consented to his appointment – and mindful of the need to ensure Township business could continue, the Court granted the Petition on September 15, 2022.

MOTION FOR RECONSIDERATION AND REQUEST FOR INJUNCTION

The following day, September 16, 2022, Supervisor Shirn filed the Motion for Reconsideration and Request for Injunction. The Court will summarize these filings separately.

A. <u>Motion for Reconsideration</u>

The Motion for Reconsideration contained a handful of factual averments not included among, or at odds with, those in the Petition, including:

- "There was no interview process or other candidates [aside from Acting Supervisor Kay] considered to fill the vacancy" created by Former Supervisor Aungst's resignation; and

- Supervisor Mazzullo "introduced R. David Kay as a Supervisor" and "[n]o challenge was raised by [Supervisor] Shirn, because he was not made aware of the issue being something he could challenge."

Supervisor Shirn argues in the Motion for Reconsideration that although "the statute allows for the Chairman of the Vacancy Board to petition the court to appoint a candidate to fill the vacancy in the event that a proper appointment has not been made within the allotted time, proper procedures were not followed to get to that point." In particular, Supervisor Shirn appears to view the law as requiring the Vacancy Board to hold a meeting prior to either filling a vacancy or – in the event the Vacancy Board cannot agree to do so – petition the Court for an appointment; the

failure to do so, Supervisor Shirn argues, "short circuits the procedures designed to ensure public participation and due deliberation by elected officials."

Supervisor Shirn's Motion for Reconsideration avers that "Movant was notified of the meeting of the Vacancy Board the day of the meeting in violation of the requirement that there be public notice of at least 24 hours prior to a meeting, that the business of that meeting must be made known, and it must be open to the public"; the Motion for Reconsideration does not, however, state *when* this meeting was held.[3] Regardless of when it was held, Supervisor Shirn states that the improper notice prevented him from attending the meeting at which he "had planned to place two additional candidate resumes before the Vacancy Board for consideration as well as demand that the meeting be held publicly due to public policy concerns for the Township."

Ultimately, Supervisor Shirn argues in the Motion for Reconsideration that "[e]ven if [he] had informally or implicitly consented to R. David Kay's service as an interim Supervisor, no formal vote was ever taken to ratify that decision," and that "as a duly elected and lawfully seated Township Supervisor [he] had an absolute legal right to provide input to the Vacancy Board on the appointment of the 3rd Supervisor." Supervisor Shirn states that "[t]he appointment [of R. David Kay] was made while the known dissenting voice was not present at a meeting which was not properly called in accordance with statutory law," including the Second-Class Township Code and the "Sunshine Act," and that the appointment was thus in

[3] Specifically, the Motion for Reconsideration does not state whether this meeting of the Vacancy Board was held during the 15-day period during which the Vacancy Board was statutorily permitted to appoint a Supervisor to fill the vacancy, or whether this meeting was a separate meeting concerning the filing of the Petition or other Vacancy Board business.

contravention of those laws and their purpose "to ensure that the citizens have a proper understanding of the goings on of their local government and are given an opportunity for their voices to be heard on important issues."

Ultimately, the Motion for Reconsideration asks that this Court vacate its Order appointing Acting Supervisor Kay as Supervisor "until after a public meeting of the Vacancy Board can be convened with proper public notice so that the issue can be debated and the people can voice their approval or concerns with candidates for the vacant seat prior to a formal vote by the Vacancy Board or petition to the court." Supervisor Shirn agrees that at this point the Court is the "final arbiter of who is to receive this appointment," but believes that "public input at a publicly held meeting of the Township" will bring to light "information... including other candidates, that would be of benefit to the Court in the Court rendering its determination" regarding who to appoint to fill the vacancy. Such a procedure, Supervisor Shirn argues, "will allow for procedure to be satisfied and public deliberation of the issue... ensur[ing] that the appointee is clearly the decision of the people and vacancy board of Old Lycoming Township and will not be perceived as the appointee of the Court."

B. <u>Request for Injunction</u>

Supervisor Shirn's Request for Injunction contains a factual background and general argument similar to that of the Motion for Reconsideration. The Request for Injunction further asks the Court to bar Acting Supervisor Kay from taking any action as Supervisor, whether in an acting or official capacity, until the Court makes a final decision in this case. In doing so, Supervisor Shirn argues that "[p]ermitting R. David Kay to serve as a Supervisor until proper appointment can be made would

subject the Township to the risk of entering binding contracts and other decisions which will not be easily reversed in the event that Kay is not ultimately appointed." Supervisor Shirn avers the "possibility of irrevocable harm to Old Lycoming Township" should Acting Supervisor Kay be permitted to act as Supervisor in any capacity until the Court ultimately appoints someone to fill the vacancy "in accordance with the procedures required by the Second-Class Township Code and the Sunshine Act."

CONFERENCE AND ARGUMENT

Following receipt of the Motion for Reconsideration and Request for Injunction, the Court scheduled a conference for September 22, 2022 to discuss the status of this case and the scheduling concerns facing the parties. Chairman Landers was represented by Christopher Kenyon, Esq., and Supervisor Shirn was represented by Douglas Engelman, Esq. and Blake Marks, Esq. The parties agreed that the Board of Supervisors is scheduled to meet on Wednesday, September 28, 2022. In light of the need for guidance from the Court prior to that date, the parties offered argument to clarify their respective positions.

Chairman Landers argued that as a threshold matter the only method to challenge the appointment of a government official, whether appointed or elected, is through a quo warranto action. Thus, Chairman Landers contended, the Request for Injunction is an improper legal vehicle for Supervisor Shirn to seek relief. Accordingly, Chairman Landers made an oral motion to dismiss the Request for Injunction as improper. Chairman Landers further noted that a quo warranto action

must typically be filed by either the Commonwealth or a District Attorney; thus, he averred, Supervisor Shirn does not have standing to file such an action.

Ultimately, Chairman Landers argued that the Court does not have jurisdiction to remand this case to any sort of hearing before the Vacancy Board, which had fifteen days to act and failed to do so. Because the Vacancy Board is no longer empowered by statute to take any action with respect to the vacancy, Chairman Landers argued, the only purpose of such a meeting would be to receive public input. Chairman Landers noted that, should the Court ultimately appoint someone other than Acting Supervisor Kay to fill the vacancy, Acting Supervisor Kay – as a person deprived of a specific office – *would* have an immediate right to file a quo warranto action as an exception to the general rule regarding who may file such actions.

In response, Supervisor Shirn first argued that, as a Township Supervisor, he is permitted to file a quo warranto action on the Commonwealth's behalf. Supervisor Shirn suggested that, even if the Vacancy Board was not statutorily required to have a hearing prior to asking this Court to appoint Acting Supervisor Kay, when it *chose* to have such a hearing it was required to comply with all laws regarding notice and public access; the failure to do, Supervisor Shirn alleges, renders any subsequent action invalid. Supervisor Shirn agreed that any past actions taken by Acting Supervisor Kay could not be retroactively undone, but argued that if indeed Acting Supervisor Kay is illegally seated he must be *prospectively* barred from acting as a Supervisor unless he is appointed in full accordance with the law. Supervisor Shirn noted that, under the law allowing the Court to fill a vacancy, the Court may consider

such factors as public input or any other relevant information. Thus, Supervisor Shirn argues, the failure of the Vacancy Board to provide him the opportunity to submit other candidates for the position, or to take public comment on the issue, deprives the Court of necessary information and renders the process to date inconsistent with the law.

APPLICABLE LAW

Townships of the Second Class, such as Old Lycoming Township, are governed by Title 53, Part X of the Pennsylvania Statutes. Vacancies in a Second Class Township office are addressed by 53 P.S. § 65407, which reads in relevant part as follows:

> **§ 65407. Vacancies in general**
>
> (a) If... a vacancy occurs in [any] office by... resignation... the board of supervisors may appoint a successor who is a registered elector of the township and has resided in that township continuously for at least one year prior to their appointment.
>
> ...
>
> (c) If, for any reason, the board of supervisors refuses, fails, neglects or is unable to fill a vacancy within thirty days after the vacancy occurs, as under this section, the vacancy shall be filled within fifteen additional days by the vacancy board. The vacancy board shall consist of the board of supervisors and one registered elector of the township, who shall be appointed by the board of supervisors at the board's first meeting each calendar year or as soon thereafter as is practical. The appointed elector shall act as the chairperson of the vacancy board.
>
> (d) If the vacancy board fails to fill the position within fifteen days, the chairperson... shall petition the court of common pleas to fill the vacancy.
>
> ...

Notably, § 65407 does not provide any guidance by which the board of supervisors, vacancy board, or court is to determine who should be appointed to fill the vacancy. Only a few cases, and none of recent vintage, touch upon that question.[4]

Chairman Landers cited a number of cases in the Petition in support of various legal positions. He noted that, generally, the appointment of a supervisor to fill a vacancy "must first be confirmed by a majority vote of the Board [of Supervisors] at a public meeting."[5] Chairman Landers cited *Borough of Pleasant Hills v. Jefferson Tp.* for the proposition that, as Acting Supervisor, Kay was a "de facto officer[]... clothed with color of title...."[6] The Motion for Reconsideration and Request for Injunction do not dispute these positions.

---

[4] For instance, *In re Pittsfield Township Supervisor*, 33 Pa. D. & C.2d 740 (Warren Cnty. 1964), a case from the Warren County Court of Quarter Sessions, notes that as of 1964 there did not appear to be any appellate cases dealing with the issue. The *Pittsfield Township Supervisor* Court found a number of cases (which were old 60 years ago) indicating that "the court is responsible for making an investigation when petitioned to make an appointment to fill a vacancy," but did not address what sort of "investigation" is contemplated. The Court indicated that a non-precedential Northampton County case from 1900 suggested that "when there is a tie vote for supervisors in a township which is divided into districts for convenience of road supervision, the court, in a contest between the two candidates, other things being equal, will appoint the candidate from the district which has no representative on the board of supervisors." *Washington Township Supervisors*, 7 Northamp. 168 (1900). The *Pittsfield Township Supervisor* court noted that "[i]f either [of the two] petition[s before it] had been the sole petition filed, the court would be well satisfied to appoint the person named therein," as they were "Pittsfield Township residents of good character and standing" capable of "fulfilling the duties of the office of township supervisor in a satisfactory manner." Forced to decide between two competing petitions, the Court stated that the Northampton case "properly states the policy which should be followed," and thus appointed the petitioner from the district without representation to fill the vacancy. This Opinion discusses *In re Pittsfield Township Supervisor infra*.

[5] *Scheipe v. Orlando*, 739 A.2d 475 (Pa. 1999). *Scheipe* established that a majority of the *entire* board, rather than a majority of a smaller quorum *present* at a meeting, is required to effectuate such an appointment. In second class townships with five-member boards, this means that a vote of three supervisors is required to take action, regardless of whether three, four or five supervisors are present at the meeting. Here, because the Board of Supervisors has three chairs, a vote of the two remaining supervisors would typically be needed to fill a vacant third seat.

[6] *Borough of Pleasant Hills v. Jefferson Tp.*, 59 A.2d 697, 699 (Pa. 1948). In *Pleasant Hills*, certain borough officers were sworn in following a special election in 1947 which was

At argument, Chairman Landers made an oral motion to dismiss Supervisor Shirn's request for injunction as procedurally improper on the grounds that the sole vehicle available to challenge an elected or appointed official's service is a quo warranto action. The Supreme Court of *Pennsylvania has traced the routes of the quo warranto action to oust public officials as f*ollows:

> "Historically, Pennsylvania courts have held that the quo warranto action is the sole and exclusive method to try title or right to public office. Title cannot be tested by mandamus, injunction, or any other proceeding that is provided for by the common law. A quo warranto is addressed to preventing a continued exercise of authority unlawfully asserted, rather than to correct what has already been done under the authority. The gravamen of the complaint is the right to hold and exercise the powers of the office in contradistinction to an attack upon the propriety of the acts performed while in office."[7]

Such an action may typically be "instituted only by the Attorney General or by the District Attorney. A private person may not bring a quo warranto action to redress a public wrong when he has no individual grievance."[8]

In *Spykerman*, the Supreme Court of Pennsylvania noted that even when "public officials [are alleged to] have acted in bad faith, a quo warranto, and not an equitable remedy, is the appropriate means to try title to public office."[9] However,

---

mistakenly held earlier than permitted by statute. The Supreme Court of Pennsylvania stated that, between the time the election took place and the time it was legally supposed to take place, "the [officers] who were elected at the special election and duly sworn in were at least de facto officers and, as such, entitled to perform the duties and exercise the powers of their respective offices. A person in possession of an office and discharging its duties under the color of authority – that is, authority derived form an election or appointment however irregular or informal, so that the incumbent be not a mere volunteer – is a de facto officer, and his acts are good so far as respects the public...." Supervisor Shirn does not appear to disagree with Chariman Landers's assertion that Acting Supervisor Kay was at least a de facto officer, and thus his actions to this point "are good" and not subject to challenge or rescission.

[7] *Spykerman v. Levy*, 421 A.2d 641, 648-49 (Pa. 1980) (internal citations omitted).

[8] *Id.*

[9] *Id.* at 650.

Pennsylvania courts have allowed a limited exception to the exclusivity of the quo warranto action "where the standing requirement of quo warranto would have precluded an issue of grave public concern from judicial scrutiny."[10] Additionally, a private individual *may* be able to bring a quo warranto action when he "has a special right or interest, as distinguished from the right or interest of the public generally, or he has been specially damaged...."[11]

ANALYSIS

The Court must ultimately address three issues. First, it must determine whether Supervisor Shirn has demonstrated grounds for this Court to reconsider its September 15, 2022 Order granting the Petition, or whether there are other legal grounds requiring reconsideration. If so, the Court must determine what actions are appropriate. Second, the Court must determine whether the Request for Injunction is procedurally proper. If it is, the Court must rule on it. If it is not, the Court must determine whether Supervisor Shirn may file a quo warranto action. Finally, regardless of the Court's ruling on the previous issues, it is necessary to explain the various parties' rights going forward, so that the record will be clear and the parties will be able to expeditiously challenge any adverse determination.

---

[10] *Id.*

[11] *Id.* at 649 (citing *Schermer v. Franek*, 166 A. 878 (Pa. 1933)). In *Schermer*, the Supreme Court of Pennsylvania strongly suggested that, unless "a judgment of ouster would... place [a private individual] in office," that private individual does not have "a special right or interest" sufficient to maintain a private quo warranto action. *Schermer*, 166 A. at 879. Because "[t]here was no vacancy to which Julius Schermer could be elected" when he filed his private quo warranto action, "he ha[d] no such right or interest as would warrant a judgment of ouster." *Id.* at 880.

A. Motion for Reconsideration

Supervisor Shirn contends that reconsideration is required because the appointment of Acting Supervisor Kay to the vacant Supervisor position "was not made in accordance with the procedures of either the Second-Class Township Code or the 'Sunshine Act.'"

Because 53 P.S. § 65407 delineates a specific procedure for filling a vacancy such as the one presently at issue, the Court will address each step of that procedure as it relates to the appointment of Acting Supervisor Shirn. As a threshold matter, the Court concludes that § 65407 clearly applies, as this case involves "a vacancy occur[ring] in the office [of supervisor] by... resignation...."

1. Eligibility

The first question is whether Acting Supervisor Kay is eligible to be appointed under § 65407.[12] Under § 65407(a), an appointee must be "a registered elector of the township [who] has resided in that township continuously for at least one year prior to their appointment." In the Petition, Chairman Landers averred that "R. David Kay was determined to be a qualified candidate in accordance with 53 P.S. § 65403 by the remaining supervisors," which similarly requires a supervisor to "reside in the township from which elected... continuously for at least one year before their election."[13] Supervisor Shirn has not disputed that Acting Supervisor Kay meets the eligibility requirements in § 65403 and § 65407. Regarding Chairman Landers's contention that Supervisor Shirn "determined... R. David Kay... to be a qualified

[12] Although neither party has explicitly raised this issue, due to the discrepancies between the parties' accounts of how Acting Supervisor Kay began serving in that capacity the Court believes it is necessary to address the issue of his eligibility for completeness

[13] 53 P.S. § 65403.

candidate," Supervisor Shirn has not explicitly disputed that contention but rather averred that he did not raise a challenge "because he was not made aware of the issue being something he could challenge." Ultimately, Supervisor Shirn has never suggested that Acting Supervisor Kay is ineligible to be appointed as Supervisor, or even that it would be improper to *ultimately* appoint him. Rather, his contention is that any such appointment must be made according to a different *procedure* than what was followed in this case.

2. Step One: Board of Supervisors

At the first step of the process, it is clear that the Board of Supervisors' failure to officially appoint Acting Supervisor Kay to the open supervisor position was not a violation of statute. Section 65407(a) clearly states that "the board of supervisors *may* appoint a successor" to an official who has resigned; therefore, the power of the board of supervisors to fill an open position is permissive rather than mandatory. This is reinforced by the introductory clause of § 65407(c), which provides that the second step of the process – the vacancy board phase – applies "[i]f, *for any reason*, the board of supervisors *refuses, fails, neglects or is unable to* fill a vacancy within thirty days..." (emphasis added). It is thus apparent that, at least at the first step during which the board of supervisors has the initial opportunity to fill the vacancy, § 65407 does not *require* the board of supervisors to take any action. Ultimately, the statute is not concerned with *how* or *why* the board of supervisors failed to fill the vacancy. Rather, the only question is *whether* the board of supervisors filled the vacancy.

3. Step Two: Vacancy Board

Upon the failure, for any reason, of the board of supervisors to fill a vacancy, § 65407 moves to step two, providing the vacancy board the opportunity to fill the vacancy. Unlike § 65407(a), which states the board of supervisors *may* fill the vacancy, § 65407(c) states that "the vacancy *shall* be filled within fifteen additional days by the vacancy board." This suggests that, unlike with the board of supervisors, the law directs the vacancy board to act to fill the vacancy. However, this is not explicitly stated, and there is nothing in the statue that states *which* actions, if any, the vacancy board must take. Notably, the statue does not require the vacancy board to hold a public meeting or otherwise solicit applications or comments.[14] Further, the first clause of § 65407(d) contemplates situations in which "the vacancy board *fails to fill the position*," rather than specifying situations in which the vacancy board "fails to agree," "is deadlocked," or otherwise has acted in some specific manner. Finally, § 65407 does not describe any remedies – beyond the vacancy board being divested of its ability to act – available for a failure of the vacancy board to fill a vacancy.

Here, there is an additional difficulty. The parties agree that Former Supervisor Aungst validly resigned on April 12, 2022. Thus, the thirtieth day after his resignation, after which the Board of Supervisors could not fill his position, was May 12, 2022. Because the Board of Supervisors did not fill the position, the fifteen day

[14] Presumably, the vacancy board would fill a vacancy through a vote of its members at a meeting. This is what occurred in *Scheipe v. Orlando*, in which the board of supervisors "concluded that there remained a vacancy on the board and a 'vacancy board' meeting was convened" with three days' notice. *Scheipe*, 739 A.2d at 476. At that meeting, the chairman of the vacancy board and three of the four remaining supervisors voted; the Court did not note whether the vacancy board meeting was open to the public. *Id.*

period during which the vacancy board was permitted to fill the position began on May 13, 2022 and ended on May 27, 2022. Neither party disputes, however, that the failure to properly appoint Acting Supervisor Kay was only recently discovered.[15] Thus, it is apparent that, even if the vacancy board was technically required to act by May 27, 2022, it could not have done so, as it was unaware that there was a vacancy that needed to be filled until after the period of time during which it was empowered to act had passed.

The Court concludes that in light of the foregoing factors, even if the vacancy board technically violated the law by failing to fill the Supervisor vacancy created by Former Supervisor Aungst's resignation, there is no remedy available to Supervisor Shirn (or any party) other than to divest the Vacancy Board of its ability to act. Whereas § 65407 provides that the process to fill a vacancy proceeds to the third step "[i]f the vacancy board fails to fill the position within fifteen days," it does not include any provision allowing the Court to remand to the second step or extend the time in which the vacancy board may act. The Court declines to read such a provision into the conspicuously silent statute.

4. Step Three: Petition to the Court of Common Pleas

Because the Vacancy Board "fail[ed] to fill the [vacant] position within fifteen days," the procedure appropriately moved to step three, at which point "the chairperson... of the vacancy board shall petition the court of common pleas to fill the vacancy." That is what occurred here: Chairman Landers filed the Petition, which this Court granted.

---

[15] The parties clarified at argument that this discovery was made well after the 45-day period ending on May 27, 2022.

Supervisor Shirn contends that allowing this to occur "short circuits the democratic process" and contravenes "[t]he purpose of the procedures outlined in the Township Code and the Sunshine Act," which "are to ensure that the citizens have a proper understanding of the goings on of their local government and are given an opportunity for their voices to be heard on important issues." While there is no doubt that this principle animates Pennsylvania municipal law generally, Supervisor Shirn has not pointed to any provision of law requiring a public meeting before the vacancy board chairperson petitions the court of common pleas to fill a vacancy. Additionally, other principles of good governance are also at play, such as the need to prevent a vacancy from causing municipal governance to grind to a halt. The legislature could have easily required a public meeting, with opportunity for comment and the submission of additional applications, before permitting a vacancy board chairperson to file a petition, but it did not. Rather, the clear language of the statue allows the chairperson of the vacancy board, in situations where a vacancy has necessarily lasted for at least forty-five days, to submit a petition for the Court's consideration. Because Chairman Landers's submission of the Petition was precisely as allowed by § 65407, there is no procedural violation.

5. Sunshine Act

Supervisor Shirn makes one additional argument. He contends that even if the Vacancy Board was not required to hold a meeting before Chairman Landers submitted the Petition, when it *chose to* hold that meeting it was required to do so in accordance with the "Sunshine Act," and the failure to comply with this Act renders

the appointment procedurally invalid. The Court will first review the Act's contents and requirements, and then apply it to the instant situation.

a. The Sunshine Act Generally

The Sunshine Act[16] was enacted in 1986 to reflect Pennsylvania's "policy... to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon...." Under the Sunshine Act, "agency" is defined to include "[t]he body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of... any board, council, authority or commission of... any State, municipal, township, or school authority...."[17] The Vacancy Board is "the body of... [a] board... of [a] township... authority," and is therefore an "agency" for the purposes of the Sunshine Act.

The Sunshine Act provides that, generally, "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public" unless a specific exception applies.[18] "Official Action" includes "[r]ecommendations made by an agency pursuant to statute, ordinance or executive order... [t]he establishment of policy by an agency... [t]he decisions on agency business made by an agency... [and] [t]he vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order."[19] "Deliberation" is defined as "[t]he discussion of agency business held for the purpose of making a

---

[16] Title 65, Chapter 7, Pennsylvania Consolidated Statutes.
[17] 65 Pa. C.S. § 703.
[18] 65 Pa. C.S. § 704.
[19] 65 Pa. C.S. § 703.

decision."[20] "Agency business" is defined as "[t]he framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action."[21] "Administrative action" is "[t]he execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency...."

The Act includes various notice requirements, including the requirement that an agency "give public notice of each special meeting... at least 24 hours in advance of the time of the convening of the meeting...."[22] At any regular or special meeting, with limited exceptions, "the board or council... shall provide a reasonable opportunity at each advertised regular meeting and advertised special meeting for residents... or for taxpayers... to comment on matters of concern, official action or deliberation... prior to taking official action."[23]

Section 713 of the Sunshine Act provides the following remedy for a violation of the Act:

> "A legal challenge... shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open.... The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached. Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid."[24]

---

[20] *Id.*
[21] *Id.*
[22] 65 Pa. C.S. § 709.
[23] 65 Pa. C.S. § 710.1(a).
[24] 65 Pa. C.S. § 713.

In light of the permissive rather than mandatory language of Section 713, "[a] court's decision to invalidate an agency's action is discretionary, not obligatory."[25] Even if a court finds that an official action is invalid due to a violation of the Sunshine Act, in the absence of fraud, a "Sunshine Act infraction [can be] cured by subsequent ratification at a public meeting."[26] Generally, "where a violation of the Sunshine Act... is curable" by subsequent ratification, "it is appropriate for a trial court to exercise its discretion not to invalidate that agency's action" and instead to provide the agency the opportunity to hold a valid public meeting to ratify the action and thereby cure the violation.[27]

As Supervisor Shirn notes, the Second Class Township Code incorporates the Sunshine Act via § 65604, which provides that "[u]pon call of the chairman or by agreement of a majority of its members, the board of supervisors may schedule special meetings of the board of supervisors after notice required under... the 'Sunshine Act.' Notice of a special meeting shall state the nature of the business to be conducted at the meeting."

b. Instant Case

As noted above, Supervisor Shirn initially avers that "[t]he vacancy board did not convene to review applicants" for appointment to the open position vacated by Former Supervisor Aungst.[28] Supervisor Shirn contends in the alternative, however, that "[i]f such meeting occurred, [Supervisor Shirn] was not properly notified and was

---

[25] *Borough of East McKeesport v. Special/Temporary Civil Service Com'n of Borough of East McKeesport*, 942 A.2d 274, 280 (Pa. Cmwlth. 2008).
[26] *Lawrence County v. Brenner*, 582 A.2d 79, 84 (Pa. Cmwlth. 1990).
[27] *Borough of East McKeesport*, 942 A.2d at 280-81.
[28] This is presumably because the Vacancy Board did not realize Acting Supervisor Fry had not been validly appointed by the Board of Supervisors.

not present" and "[n]o notice was given in accordance with the Sunshine Act." Later, Supervisor Shirn contends that he "was notified of the meeting of the Vacancy Board the day of the meeting in violation of the requirement that there be public notice of at least 24 hours prior to a meeting, that the business of that meeting must be made known, and it must be open to the public." He ultimately avers that he "was not present for the meeting of the Vacancy Board due to a snap meeting being held without him." The Court understands Supervisor Shirn to be contending that the Vacancy Board did not hold an initial meeting between May 13, 2022 and May 27, 2022 to accomplish its duty to fill the vacancy,[29] but did hold a meeting – without proper notice or public participation – after the Board of Supervisor's failure to fill the vacancy was discovered. It is this second meeting that Supervisor Shirn avers was held in violation of the Sunshine Act, requiring – at a minimum – remand to the Vacancy Board to hold the meeting in accordance with the Sunshine Act and ratify any actions that took place.

For the purposes of this analysis, the Court accepts all of Supervisor Shirn's factual averments concerning this meeting as true.[30] Because the Vacancy Board is an agency under the Sunshine Act, its meetings are required to comply with that Act. Assuming *arguendo* that the Vacancy Board held a meeting that violated the Sunshine Act, the remedy would be for the Court, in its discretion, to "find that any or all official action taken at the meeting shall be invalid."

---

[29] Or, in the alternative, if it did, it provided no notice and did not include Supervisor Shirn.
[30] Again, Supervisor Shirn did not state the specific date on which this meeting allegedly took place. For the purposes of this analysis, however, the fact that the meeting took place some time after May 28, 2022 is sufficient.

Supervisor Shirn does not aver that any "official action" took place at the Vacancy Board meeting, presumably because he was not in attendance and therefore does not know exactly what took place. However, the Court believes that, as a matter of law, there was no "official action" that the Vacancy Board did take or could have taken that would require injunction or remand. This is because the Second Class Township Code empowers the Vacancy Board to accomplish a single task: fill a vacancy between the thirty-first and forty-fifth day after which it arose, pursuant to § 65407. Here, the forty-fifth day had long since passed, and thus the Vacancy Board had no ability to fill the vacancy or, indeed, take any action.

Rather, § 65407(d) empowers the chairperson of a vacancy board to petition the court of common pleas to fill the vacancy. Here, the Petition does not indicate that the Vacancy Board has – as an agency – recommended to the Court, established a policy concerning, made any decision about, or taken any vote regarding the appointment of Acting Supervisor Kay to the open position. Rather, the Petition indicates that Chairman Landers and Supervisor Mazzullo each believe the appointment of Acting Supervisor Kay to be in the best interest of Old Lycoming Township, and therefore two thirds of the Vacancy Board consent, individually, to said appointment. The filing of the Petition was an action taken – as statutorily authorized – by Chairman Landers. It was not an action taken by the Vacancy Board at its meeting, and thus the Court does not have the power to invalidate it pursuant to the Sunshine Act even if the meeting was held in violation of the Act.

Ultimately, the Court does not believe Supervisor Shirn is entitled to the rescission of, or the remand for a public meeting on, any action taken by any party or

agency during the events underlying the Petition. Even if the Court did have the discretion to remand for a new meeting of the Vacancy Board, said meeting would be at best purely advisory, as the Board would not be empowered to take any official action. Given the need for a timely adjudication of this issue, the Court would exercise its discretion to decline to remand this matter for such a hearing.

6. Court's Appointment of Acting Supervisor Kay

Although neither party has suggested that the Court did not have the power to appoint Acting Supervisor Kay to fill the vacancy in the September 15, 2022 Order, the Court believes a brief review of that Order is appropriate. As noted in footnote 4 above, courts have spoken of the need for an "investigation" when petitioned to fill an appointment. This Court has been unable to locate any sources of positive law describing with particularity the standards it must adhere to when completing such an investigation, save for a handful of ad hoc suggestions. Presumably, if there are multiple applicants for a position, the Court must choose among them; if there is a single applicant, the Court must determine if that applicant is eligible and appropriate for the position.

Here, the Petition, which was verified by Chairman Landers, averred that:

- The Remaining Supervisors sought applications to fill the vacancy, and received only one;
- Acting Supervisor Kay met eligibility requirements, signed an Oath of Office, and was introduced by the Remaining Supervisors as a Supervisor; and
- The Remaining Supervisors believed for months that Acting Supervisor Kay had been validly appointed, without objection or challenge, and during this time Acting Supervisor Kay had "served as Supervisor with fidelity and in the best interest of the electors...."

Notably, Supervisor Shirn does not contest Acting Supervisor Kay's eligibility, or that he was the only applicant for the position. Supervisor Shirn does not contend that he challenged or objected to what he believed was a valid appointment of Acting Supervisor Kay to the open position; rather, he avers that he "was not made aware of the issue being something he could challenge."[31] Rather, Supervisor Shirn essentially wishes to take advantage of a procedural defect to submit new applicants to the position and hold a public meeting and debate concerning these applicants. Because Supervisor Shirn agrees that due to the passage of time only the Court has the power to fill the vacancy pursuant to § 65407, the ultimate remedy he seeks is to have the Court make a decision between Acting Supervisor Kay and as-yet unnamed applicants, with the averments contained in the Petition supplemented by whatever record of public input, deliberation, and additional information occurs at the meeting.

The Court believes that, under the circumstances, in light of 1) Acting Supervisor Kay's service as *de facto* supervisor for four months; 2) the belief of the parties that Acting Supervisor Kay had been validly appointed Supervisor; 3) the absence of any other applications for the position or any challenge either prior or subsequent to Acting Supervisor Kay's procedurally defective appointment; 4) the agreement of two of the three voting members of the Vacancy Board; and 5) the need for a quick resolution of this issue so as to enable the functioning of the Old

[31] The Court believes that a Supervisor generally has the duty to become informed regarding his powers and duties, rather than passively waiting to be "made aware of" the things he may or may not do under the Second Class Township Code.

Lycoming Township government, the Court's decision to appoint Acting Supervisor Kay as Supervisor was appropriate and sufficiently supported.

7. Summary

The Court finds that there are only two potential defects[32] in the procedure beginning with Former Supervisor Aungst's resignation on April 12, 2022 and culminating in its appointment of Acting Supervisor Kay as Supervisor in the September 15, 2022 Order: the failure of the vacancy board to appoint a successor to Former Supervisor Aungst pursuant to § 65407(c), and the arguable failure of the Vacancy Board meeting to comply with the Sunshine Act.

Regarding the first of these defects, the Court concludes that the only remedy available for the failure of the Vacancy Board to appoint a successor is the loss of the Vacancy Board's ability to do so. Here, the Court finds that the Vacancy Board has failed to appoint a successor. Therefore, when the forty-fifth day after Former Supervisor Aungst's resignation passed without any such appointment, the Vacancy Board lost any statutory authority to fill the vacancy.

Regarding the second defect, the failure to comply with the Sunshine Act, the record is clear that any non-compliant meeting occurred after the Vacancy Board had lost its authority to take official action to fill the vacancy. Therefore, there was no "official action taken at the meeting" of the vacancy board for this Court to invalidate under the Sunshine Act. Rather, the action Supervisor Shirn attacks – the filing of the Petition – was taken by Chairman Landers individually in his capacity as chairperson. Alternatively, even if there was some "official action taken at the

[32] In addition to the Board of Supervisors' initial failure to validly appoint Acting Supervisor Kay.

meeting" of the vacancy board that this Court is permitted to invalidate, the Court would exercise its discretion to decline to do so in light of the circumstances detailed above.

Finally, the Court concludes that its Order of September 15, 2022 was appropriate.

For these reasons, the Court will DENY Supervisor Shirn's Motion for Reconsideration.

B. Request for Injunction and Motion to Dismiss

The Court must also address Supervisor Shirn's Request for Injunction and Chairman Landers's oral motion to dismiss the Request for Injunction. As a threshold matter, Chairman Landers contends that an injunction is improper in this case, because the sole means of challenging an appointed or elected official's service is by a quo warranto action, which typically must be brought by the Attorney General or District Attorney.

The Court agrees that the Request for Injunction is not an appropriate vehicle by which Supervisor Shirn may seek his desired relief. The Supreme Court of Pennsylvania has noted that, with few exceptions, "the quo warranto action is the sole and exclusive method to try title or right to public office," and such title "cannot be tested by mandamus, injunction, or any other proceeding that is provided for by the common law."[33] Thus, in order for an injunction directing that "R. David Kay cannot act as a de facto or de jure Supervisor" to be permissible, an exception to this general principle must apply.

[33] *Spykerman v. Levy*, 421 A.2d at 648-49.

Such an exception has been found "where the standing requirement of quo warranto would have precluded an issue of grave public concern from judicial scrutiny."[34] Here, Supervisor Shirn has not averred that Acting Supervisor Kay is *ineligible* to serve as Supervisor; rather, the sole ground for his injunction is that the *procedure* by which Acting Supervisor Kay was ultimately appointed to fill the vacancy on September 15, 2022 was defective. This issue has not been shielded from judicial scrutiny; rather, this Court has addressed this contention in detail in this Opinion.

Additionally, although Supervisor Shirn suggested that as a Supervisor he may be able to bring a quo warranto action "on behalf of" the Commonwealth, such actions may be filed only by the Attorney General, a District Attorney, or a private citizen who "has a special right or interest, as distinguished from the right or interest of the public generally, or... has been specially damaged...."[35] The Supreme Court of Pennsylvania has strongly suggested that such a "right or interest" only occurs when "a judgment of ouster would... place [a private individual] in office...."[36]

Ultimately, the question of whether a quo warranto action could oust Acting Supervisor Kay from his role as Supervisor, whether filed by the Attorney General, District Attorney, or Supervisor Shirn, is not before the Court. What is before the Court are the questions of whether the Request for Injunction is even permissible, and if so whether it is meritorious. For the reasons stated above, the only action permissible to challenge Acting Supervisor Kay's title to the office of Supervisor is a

---

[34] *Id.* at 650.
[35] *Id.* at 649.
[36] *Schemer*, 166 A. at 879; see footnote 11 *supra*.

quo warranto action. For this reason, the Court will DISMISS Supervisor Shirn's Request for Injunction. The Court notes that, to the extent it has found that Acting Supervisor Kay has been validly appointed to the position of Supervisor, any action – be it a request for injunction or quo warranto action – premised solely on the contention that Acting Supervisor Kay's appointment as supervisor was procedurally defective is without merit.

C. Appellate Rights

Because this Opinion and Order disposes of all claims and all parties at this docket, it is a final order pursuant to Rule of Appellate Procedure 341 and is thus immediately appealable. Typically, "the Commonwealth Court [has] exclusive jurisdiction of appeals from final orders of the courts of common pleas in... [a]ll actions or proceedings arising under any municipality code... or where is drawn in question the application, interpretation or enforcement of any... statute regulating the affairs of political subdivisions, municipality and any other local authorities... or of the officers... thereof...."[37] However, the Judicial Code vests the Supreme Court of Pennsylvania with "exclusive jurisdiction of appeals from final orders of the courts of common pleas in... cases [involving] [t]he right to public office."[38] As explained by the Commonwealth Court in *Rastall v. DeBouse*:

> "In *Appeal of Bowers*, our Supreme Court examined its appellate jurisdiction as it relates to the right to hold public office. The Court delineated two requirements necessary to fit within this section of the Judicial Code. First, a litigant must demonstrate that an issue concerning the right to public office exists. Although the Court did not expressly indicate every situation that could come within this area, the Supreme Court wrote as follows:

[37] 42 Pa. C.S. § 762(a)(4)(i)(A).
[38] 42 Pa. C.S. § 722(2).

> The 'right' to office undoubtedly includes questions of qualification, eligibility, regularity of the electoral or appointive process and other preconditions to the holding of public office. We think 'right' should not normally include an appraisal of the sufficiency of or ruling upon evidence or other allegedly irregular aspects of the proceedings before a hearing tribunal resulting in an officeholder's discharge from his position.

As to what constitutes a 'public office,' the Court explained as follows:

> 'Public office', in turn, we take to mean an elective or appointive position in which the incumbent is exercising a governmental function which involves a measure of policy making and which is of general public importance."[39]

Any order of a court of common pleas in a case satisfying those two requirements is thus only appealable directly to the Supreme Court of Pennsylvania under 42 Pa. C.S. § 722(2).

Under the Supreme Court of Pennsylvania's definition in *Appeal of Bowers*, the office of Township Supervisor is clearly a "public office." Additionally, this case involves – and its resolution turns directly upon – "questions of qualification, eligibility regularity of the electoral or appointive process and other preconditions to the holding of public office." Therefore, this Court concludes that the Supreme Court of Pennsylvania, and not the Commonwealth Court, possesses exclusive jurisdiction over any appeal from this Order.

Supervisor Shirn may appeal from this Order to the Supreme Court of Pennsylvania within thirty (30) days after entry of this Order. Any appeal filed must comply with the Pennsylvania Rules of Appellate Procedure.

---

[39] *Rastall v. DeBouse*, 736 A.2d 756, 758 (Pa. Cmwlth 1999) (quoting *Appeal of Bowers*, 269 A.2d 712, 716-17 (Pa. 1970)) (internal citations omitted).

ORDER

AND NOW, this 23rd day of September 2022, for the foregoing reasons, the Court hereby ORDERS as follows:

- The Motion for Reconsideration of this Court's September 15, 2022 Order appointing Acting Supervisor Kay to the office of Supervisor of Old Lycoming Township, filed by Supervisor Shirn, is DENIED;

- The Request for Injunction, filed by Supervisor Shirn, is DISMISSED as an improper vehicle to obtain the ouster of Acting Supervisor Kay from the office of Supervisor of Old Lycoming Township.

This Court's September 15, 2022 Order ordering and directing that R. David Kay shall be officially appointed and continue to serve on the Board of Supervisors for Old Lycoming Township for the remainder of the term in accordance with 53 P.S. § 65407 remains in full effect.

Pursuant to the Pennsylvania Rules of Appellate Procedure, this Order is a final order and is thus immediately appealable. Any appeal must be filed within thirty days of the filing of this Order. Pursuant to 42 Pa. C.S. § 722(2), because this Order relates to "the right to hold public office," the Supreme Court of Pennsylvania possesses exclusive jurisdiction over any appeal.

IT IS SO ORDERED.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/jcr
cc: Christopher H. Kenyon, Esq.
Douglas N. Engelman, Esq. and Blake C. Marks, Esq.
Gary Weber, Esq. (Lycoming Reporter)