

**UNITED STATES DISTRICT COURT  
IN THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

ROBERT DASCOLA,  
Plaintiff,

vs.

Case No. 2:14-cv-11296-LPZ-RSW  
Hon. Lawrence P. Zatkoff  
Magistrate Judge R. Steven Whalen

CITY OF ANN ARBOR and  
JACQUELINE BEAUDRY,  
ANN ARBOR CITY CLERK,  
Defendants,

**CITY DEFENDANTS' BRIEF  
IN RESPONSE TO COURT'S  
ORDER TO SHOW CAUSE  
ISSUED JULY 16, 2014**

And

SECRETARY OF STATE  
RUTH JOHNSON,  
Intervenor-Defendant.

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**STATEMENT OF ISSUE PRESENTED**

Should the Defendants City of Ann Arbor and the Ann Arbor City Clerk be found in contempt of court for the mailing by the City Clerk of 392 absentee ballots which did not contain Plaintiff's name?

Defendants' Answer: No

**INDEX OF AUTHORITIES**

*Elec. Workers Pension Trust Fund of Local Union \u008758, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003).....7

*Glover v. Johnson*, 199 F.3d 310, 312 (6th Cir. 1999) .....7

**TABLE OF CONTENTS**

STATEMENT OF ISSUES PRESENTED.....i

INDEX OF AUTHORITIES.....i

INDEX OF EXHIBITS ..... iii

I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS.....2

III. DISCUSSION .....6

IV. CONCLUSION.....9

**INDEX OF EXHIBITS**

- Exhibit 1: Affidavit of Jacqueline Beaudry, Ann Arbor City Clerk
- Exhibit 2: Email dated May 21, 2014 and Affidavit of Identity
- Exhibit 3: Email dated May 23, 2014, to City Clerks regarding Washtenaw County Ballot Order and Proofing Notice
- Exhibit 4: Proof Ballot
- Exhibit 5: Proof Ballot Review Form
- Exhibit 6: Minutes of meeting June 9, 2014 of Washtenaw County Election Commission
- Exhibit 7: Ballot in Sleeve
- Exhibit 8: Folded Ballot with Numbers
- Exhibit 9: Return Envelope
- Exhibit 10: Affidavit of Jennifer Alexa, Deputy City Clerk
- Exhibit 11: Affidavit of Miriam Quinzy, Clerk’s Office Election Worker
- Exhibit 12: Affidavit of Edward Golenbiewski

## INTRODUCTION

On May 20, 2014, this Court ordered the Defendants City of Ann Arbor and Ann Arbor City Clerk to accept and process any nomination petitions submitted by Plaintiff. The City Clerk accepted the nomination petitions, processed the nomination petitions and determined the Plaintiff to be eligible to be a candidate for councilmember in the Third Ward democratic primary. The City Clerk also, pursuant to the Court Order, determined Plaintiff to be eligible “without regard to the voided provisions of Section 12.2 of the Charter of the City of Ann Arbor.

After following the immediate requirements of the May 20, 2014 Order, the City Clerk took the steps required by the Washtenaw County Clerk’s Office to put Plaintiff on the ballot that the County Clerk’s Office was responsible for preparing. The City Clerk sent to the County Clerk Plaintiff’s Affidavit of Identity and then reviewed and approved the ballot proofs containing Plaintiff’s name on the Third Ward ballot. Despite the ballot being approved with Plaintiff’s name on it, the County Clerk’s Office and the County Election Commission approved the Third Ward ballot without Plaintiff’s name on it.

The City Clerk’s office mailed 392 of the incorrect ballots out to absentee voters. The City Clerk’s office sent the ballots out based on the City Clerk’s sincere belief that they contained the name of Plaintiff as printed on the ballot proof, and as had been the City Clerk’s practice. This mailing was never intended

to violate any Court Order or harm Plaintiff or the other candidates in any way. Because a contempt order is fact specific, the undisputed facts are set forth below. They are not set forth to assign blame, but to describe the bizarre, unprecedented, and unforeseeable events that led up to the mailing of the ballot. They are set forth to assure the court of the complete lack of knowledge of the City Clerk and her staff of any errors on the ballot and her reason for mailing out ballots that have been approved at multiple levels without further review.

The City and the City Clerk were as dismayed as the Plaintiff that this happened. Despite the explanation of what happened, the City Clerk accepts responsibility for the mailing of the ballots and has worked diligently to minimize any harm from this mailing and restore the trust of the voters. The Defendants ask that the Court not hold them in contempt for the mailing of the ballots because the facts and the legal standards do not warrant it for the reasons set forth below.

### **STATEMENT OF FACTS**

The following undisputed facts are put forth by the sworn affidavits of the Ann Arbor City Clerk (Exh. 1), the Ann Arbor Deputy City Clerk (Exh. 9), Ms. Miriam Quinzy, a clerical staff person at the Ann Arbor City Clerk (Exh. 10), and Mr. Edward Golembiewski, Chief Deputy Clerk/Director of Elections of the Washtenaw County Clerk's Office (Exh. 11). These affidavits chronicle the actual events that took place, and cites to the record are at the end of each paragraph.

Immediately after receipt of this Court's Order on May 20, 2014, the Ann Arbor City Clerk determined Mr. Dascola's eligibility without regard to the City's Charter eligibility requirements and deemed him eligible. She accepted and processed Mr. Dascola's nominating petitions. She then immediately submitted the Affidavit of Identity for Mr. Dascola to the Washtenaw County Clerk's office, which is the process required to have him placed on the ballot. Exh. 2 attached. The ballot was to be approved and printed by the Washtenaw County Clerk's office. These actions took place on May 20, 2014. (Exh. 1, ¶ 3)

On May 23, 2014, the City Clerk received an email from the Washtenaw County Clerk's office, which is attached as Exh. 3. Attached to this email was a 350 page ballot proof for all of the ballots in Washtenaw County and a checklist form. Included in this ballot proof were the 10 pages as Exh. 4, which covered the nine precincts in the Third Ward of the City of Ann Arbor, one of which is split. This ballot proof contained Mr. Dascola's name on all 10 pages. (Exh. 1, ¶ 4-6.)

The City Clerk then approved and authorized this ballot proof on May 29, 2014 as indicated on the checklist form, which is attached as Exh. 5. This review process was performed by the City Clerk and Deputy City Clerk Jennifer Alexa and involved a review of every word of the ballot that lasted four to five hours. (Exh. 1, ¶ 7) After the proof ballots were approved by the City Clerk, the preparation of the ballot was done by the County Clerk's office. (Exh. 1, ¶ 7)

As set forth in the chronology of the Washtenaw County Deputy Clerk, but for a third party vendor employed by the County Clerk's office, GBSI, deleted all of the City of Ann Arbor races on the ballot. New proof ballots were produced with this error. This error was caught by the County Clerk's office and the County Clerk's office then added the Ann Arbor City races back onto the ballot, but now without the Plaintiff's name on the ballot for the 3<sup>rd</sup> Ward race. This error was not caught by the Washtenaw County Clerk's Office. The final proof ballots without the Plaintiff's name on them were then sent to the Washtenaw County Election Commission for final approval. The Election Commission voted to approve the ballots on June 9, 2014. (Exhs. 6 and 12 ¶ 10 – 28.)

After the Washtenaw County Election Commission approved the ballots, they were sent to the printer; once the ballots were printed they were delivered to the City Clerk's office. On June 18, 2014 the City's election warehouse received over 66,000 ballots for the August 5, 2014 primary from the printer for the Washtenaw County Clerk's office. These ballots covered all five wards in the City of Ann Arbor. On June 19, 2014, between 100 and 300 ballots for each precinct in each of the five wards were transported to the Ann Arbor City Clerk's office so that the City Clerk's office could send out ballots to the over 1,800 absentee voters who had already requested an absentee ballot. (Exh. 1, ¶ 8–9)

Between June 19 and June 25, 2014, the following clerical staff of the Ann Arbor City Clerk's office took part in placing the ballots in the envelopes for mailing to the Third Ward: Jennifer Alexa and Miriam Quinzy. The mailing requires a very focused procedure. To prepare absentee ballots for mailing the following steps are taken: (1) the ballot is folded three times along pre-creased lines; (2) each ballot is then placed into a privacy sleeve, with the ballot number showing (Exh. 7 is a sample of an absentee ballot and mailing sleeve); (3) each ballot has a ballot number in the upper right hand corner and the ward and precinct number at the top (Exh. 8 is the folded ballot); (4) the ballot is matched with a return envelope that has the same precinct, and ballot number on it (Exh. 9 is an example of the return envelope; (5) the ballot in the privacy sleeve and the return envelope are then placed in a mailing envelope addressed to the voter. These were the precise tasks that the City Clerk asked staff to perform in order to prepare and mail the absentee ballots. (Exh. 1, ¶ 11; Exh. 9, ¶ 4 ;Exh. 10, ¶ 4)

At no time while performing the precise tasks required to prepare the ballots for mailing did any City Clerk's office staff review the ballots for errors because this proofing process had already taken place on May 29, 2014. (Exhs. 9, 10, and 11) The City Clerk did not personally review the ballots for any of the wards because she and the Deputy Clerk had already carefully reviewed the ballot proof sent by the Washtenaw County Clerk's office. The City Clerk's practice was also



based on the fact that she had never received a ballot that had been approved by the County Election Commission that later turned out to have omitted a candidate. (Exh. 1, ¶ 12 – 13.)

Based on her experience with the approval process, it has never been the City Clerk's practice to re-proof a ballot that has been approved by the Washtenaw County Election Commission after it comes from the printer and before it is mailed out. (Exh. 1, ¶ 13 – 14.)

The Ann Arbor City Clerk's office sent first ballots to 392 absent voters in the Third Ward on June 25, 2014. When these were sent, the City Clerk had no knowledge of the error on the ballot; nor did the other staff that mailed the ballots. The City Clerk believed that the ballots being sent conformed to the ballot proof she had authorized on May 29, 2014. (Exh. 1, ¶ 13 – 17.)

On June 27, 2014, when the City Clerk first learned of the error on the first ballot, the City Clerk stopped sending the first ballot. On June 30, 2014, she sent second, replacement ballots to the 392 absentee voters. (Exh. 1, ¶ 18 – 19.) From June 25 through July 22, 2014, the City Clerk has undertaken extensive efforts to remedy this situation and this will continue.

## **DISCUSSION**

To establish a prima facie case to impose sanctions on a party for contempt requires proof by "clear and convincing evidence that shows that [the party]

violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Elec. Workers Pension Trust Fund of Local Union \u008758, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003) (quotes and citations omitted). "Clear and convincing evidence is a not a light burden and should not be confused with the less stringent, proof by a preponderance of the evidence. *Id*

When a court evaluates a defendant's alleged failure to comply with a court order, it must "consider whether the defendant took all reasonable steps within [his] power to comply with the court's order." *Id.* (brackets in original). "The magnitude of the sanctions imposed should be assessed by weighing the harm caused by noncompliance, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Glover v. Johnson*, 199 F.3d 310, 312 (6th Cir. 1999) (quotes and citations omitted) (Court finds some actions of prison officials did not comply with Court order in making necessary improvements in education programming which was under their direct control over a five to ten year period, but other claims of contempt were reversed as the types of programming were not contained within Court's order.)

With this standard in mind, Defendants respectfully suggest that the documented facts do not amount to clear and convincing evidence that the City Clerk's office violated a definite and specific order within the Court's May 20,

2014 Order requiring the City and the City Clerk to perform or refrain from performing particular acts. The evidence demonstrates immediate compliance with the specific terms of the Court Order. First, the Defendants complied with the Order that they could not enforce the eligibility requirements of the Charter; they didn't enforce them and the City Clerk deemed Plaintiff eligible. Second, the City Clerk accepted and processed Mr. Dascola's nominating petitions. After processing Plaintiff's nominating petitions and finding him eligible, the City Clerk provided the necessary Affidavit of Identity and then approving the ballot proof with Mr. Dascola on it. (Exh. 1, ¶ 3.)

The Court has also requested that the Defendants state why they should not be held in contempt of Court "for failing to inspect the Third Ward absentee primary ballots prior to delivery," in addition to failing to adhere to the Court's Order. The Court's Show Cause Order specifically recognizes that such a failure would be separate and distinct from a failure to adhere to the Court's May 20, 2014 Order. The Defendants understand the Court's desire to have the reasons why the City Clerk did not review the ballots before mailing. In hindsight the City Clerk wishes she had re-proofed and inspected the ballots and has offered the explanation for why she didn't re-proof the ballots prior to mailing.

She relied on the fact that she had carefully reviewed the ballot proof before she approved it. She relied on the fact that the Washtenaw County Clerk's Office

had the proof ballots and that she would receive printed ballots that had been conformed to the proofed ballots after being reviewed and approved by the Washtenaw County Election Commission. She relied upon the fact that in 9 years as City Clerk she had never received a printed ballot that had been approved by the County Election Commission that later turned out to have omitted a candidate. She had received 66,000 printed ballots for the election and was trying to get them mailed out as efficiently as possible. Over 1,800 absentee ballots had already been requested. This failure to inspect the ballots prior to mailing was not an action against the Court, the Plaintiff, the other candidates, or the public. It was done because of the sincere belief by the City Clerk and the staff that the ballot they mailed had been previously reviewed and approved. (Exh. 1, ¶ 26) The City Clerk did not review the ballot before mailing because she never contemplated the series of events that caused the County Clerk and Election Commission to approve an erroneous ballot. (Exh. 1, ¶ 16, 17).

### **CONCLUSION**

The City and the City Clerk takes responsibility for that mailing and genuinely regrets that she did not re-proof the ballot or notice the omission on the ballot after the printed ballots were received and before they were mailed. In hindsight, this would have prevented the problem. She has apologized to the absentee voters who were mailed the first ballots. She has apologized to the

Plaintiff and other candidates by voicemail or phone. However, the ballots were sent out with the sincere belief on the part of the City Clerk and her staff that they contained the name of Plaintiff as printed on the ballot proof reviewed, approved, and authorized by the City Clerk on May 29, 2014.

The City Clerk cannot take back the mailing, the best she can do, and has done, is to minimize any damage from the mailing to Mr. Dascola, the other Third Ward candidates, and the voters. Her actions to that end were taken immediately upon learning of the error in the first ballot and have continued since then. Finally, although the City Clerk had relied upon the proofing process with the County, in future elections the City Clerk will not rely on the ballot proof process alone of the County Clerk's Office or the fact that the County Election Commission reviewed and approved a ballot, but will also incorporate a process to re-proof the actual ballots received from the printer against the final proof approved by the City.

The Defendants request that the Court not find them in contempt and recognize that this error was not in resistance to the Court's May 20, 2014 Order.

Dated July 23, 2014

Respectfully submitted,

By: /s/ Stephen K. Postema  
Stephen K. Postema (P38871)  
Attorneys for Defendants  
OFFICE OF THE CITY ATTORNEY

## CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Thomas Wieder; and I hereby certify that I have mailed by US Mail the document to the following non-ECF participant: None.

/s/Jane Allen  
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