

**UNITED STATES DISTRICT COURT
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.

Thomas Wieder (P33228)
Attorney for Plaintiff
2445 Newport Rd.
Ann Arbor, MI 48103
(734) 994-6647
wiedert@aol.com

Office of the City Attorney
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendants
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170
spostema@a2gov.org
aelias@a2gov.org

**PLAINTIFF'S POST-JUDGMENT MOTION FOR
ADDITIONAL INJUNCTIVE RELIEF**

For his Motion, Plaintiff states:

1. In its May 20, 2014 Opinion and Order, and accompanying Judgment, the Court ordered that:
 - a. Defendants are permanently enjoined from taking any action to enforce the provisions of Section 12.2 of the Charter of the City of Ann Arbor;
 - b. Plaintiff's request for Writ of Mandamus is granted; and

c. Defendants must accept and process any nomination petitions submitted by Plaintiff and determine his eligibility without regard to the voided provisions of Section 12.2 of the Charter of the City of Ann Arbor.

2. The combined effect of the Court's rulings was to require Defendants to take all steps necessary to place Plaintiff Dascola's name on the August 5, 2014 primary ballot for the Democratic nomination for City Council from the City's Third Ward and to employ such ballots for the conduct of the election.

3. Notwithstanding the foregoing, on or about June 25, 2014, Defendant Clerk Beaudry caused to be mailed to approximately 400 absentee voters in the Third Ward ballots which did not list the name of Plaintiff Dascola as a candidate for the Democratic nomination for Third Ward City Council Member, in violation of this Court's Judgment. Only the other two candidates for the nomination were listed on these ballots.

4. Plaintiff is further informed and believes, based on the statements of Defendant Beaudry, City Attorney Postema and County Clerk Lawrence Kestenbaum, that all of the ballots printed for this contest had the same defect.

5. Plaintiff has no knowledge of, nor does he suggest, any deliberate act by any person which resulted in the printing of the defective ballots.

6. The error was promptly reported to Clerk Beaudry, and a new set of ballots, properly including the name of Plaintiff Dascola, was printed and delivered to the City Clerk.

7. On June 30, 2014, new, "correct" ballots were mailed to all of the absentee voters who had received the defective ones. Accompanying these ballots was a letter

from Clerk Beaudry urging the absentee voters not to use the defective ballots and to return the “correct” ballots to the Clerk. It further informed these voters that, if they had sent in a defective ballot, they should proceed to sending in a correct ballot, and their original ballot would not be counted. The letter from the Clerk did not state whether votes cast on the defective ballots would be counted if the voter returned only that ballot, and not a correct one.

8. The failure of the Defendants to clearly state that votes cast on defective ballots will not be counted leaves open the possibility that some of them will be counted.

9. In addition to the letter sent to each absentee voter who received a defective ballot, Plaintiff is informed that telephone calls from the Clerk’s Office are being made to persons who returned defective ballots, urging them to send in a correct ballot.

10. Defendants have, as of this writing, failed and refused to state if they will count votes for Third Ward Council Member appearing on defective ballots, if the voters who cast those votes do not return a replacement correct ballot.

11. Several dozen of the defective ballots had already been received by the City Clerk through July 3, 2014.

12. Counting any of the votes in this election contest cast on the defective ballots would be in violation of this Court’s Judgment and constitutes a further denial of Plaintiff’s right to equal protection under the Due Process clause of the 14th Amendment.

13. Counting even a small number ballots that do not contain the name of Plaintiff Dascola would give the other candidates an unfair and illegal advantage in the election.

14. Concurrence in the Motion was sought, but not obtained.

WHEREFORE, Plaintiff asks this Court to do the following:

- A. Enjoin the Defendants from counting any votes cast for Third Ward Council Member on ballots which do not include Plaintiff's name in the list of candidates, while allowing votes cast for other offices to be counted.
- B. Award Plaintiff his actual costs and attorney's fees incurred as a result of Defendants' failure to properly place Plaintiff's name on the ballot and by its sending of ballots not containing his name to hundreds of voters.

/s/ Thomas F. Wieder
Thomas F. Wieder (P33228)
Attorney for Plaintiff

Dated: July 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 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: Stephen K. Postema and Abigail Elias.

/s/ Thomas F. Wieder
Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
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spostema@a2gov.org
aalias@a2gov.org

**MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S POST-JUDGMENT
MOTION FOR ADDITIONAL INJUNCTIVE RELIEF**

STATEMENT OF FACTS

In its May 20, 2014 Opinion and Order, and accompanying Judgment, the Court ordered that:

1. Defendants are permanently enjoined from taking any action to enforce the provisions of Section 12.2 of the Charter of the City of Ann Arbor;
2. Plaintiff's request for Writ of Mandamus is granted; and
3. Defendants must accept and process any nomination petitions submitted by Plaintiff and determine his eligibility without regard to the voided provisions of Section 12.2 of the Charter of the City of Ann Arbor.

The combined effect of the Court's rulings was to require Defendants to take all steps necessary to place Plaintiff Dascola's name on the August 5, 2014 primary ballot for the Democratic nomination for City Council from the City's Third Ward and to employ such ballots for the conduct of the election.

Notwithstanding the foregoing, on or about June 25, 2014, Defendant Clerk Beaudry caused to be mailed to approximately 400 absentee voters in the Third Ward ballots which did not list the name of Plaintiff Dascola as a candidate for the Democratic nomination for Third Ward City Council Member, in violation of this Court's Judgment. Only the other two candidates for the nomination were listed on these ballots. (A copy of the relevant portions of an actual ballot sent to an absentee voter is attached hereto as Exhibit A.)

Based on the statements of Defendant Beaudry, City Attorney Postema and County Clerk Lawrence Kestenbaum, all of the ballots printed for this contest had the same defect.

Plaintiff has no knowledge of, nor does he suggest, any deliberate act by any person which resulted in the printing of the defective ballots.

The cause of the printing of the defective ballots has been explained in public statements and in conversation with Plaintiff's counsel by County Clerk Kestenbaum and City Attorney Stephen Postema as follows:

The ordering of the ballots for the entire county is handled by the Washtenaw County Clerk, which contracts with a private vendor to layout and print the ballots. Proof ballots were sent to all municipal clerks in the county, as well as all candidates. These proofs did display Plaintiff Dascola's name properly. Subsequently, the City of Ypsilanti requested the deletion of its city council primaries from the ballots, because its charter provides for no listing of primary races if there is only one candidate for any such race.

The third party vendor apparently misunderstood the direction to delete the Ypsilanti council races, and deleted both the Ypsilanti and Ann Arbor council races. This error was caught, and the vendor was told to reinstate the Ann Arbor council races. County Clerk Kestenbaum has stated his understanding that, in responding to this direction, the vendor used an earlier draft of the ballot which did not include Plaintiff's name, perhaps because it was prepared before this Court's May 20, 2014 ruling leading him to be placed on the ballot.

When this revised ballot was presented to the Washtenaw County Elections Commission, the omission of Plaintiff's name was not noticed, and the vendor was

instructed to proceed with the printing of the ballots. Proofs of this version of the ballot were not distributed to clerks and candidates.

While it does not appear that Defendants were responsible for the improper printing of the ballot, they are responsible for failing to inspect the ballots received to insure that they were correct, before sending them to hundreds of voters.

The omission of Plaintiff's name was immediately noticed by a recipient of a defective ballot, and the error was promptly reported to Clerk Beaudry. A new set of ballots, properly including the name of Plaintiff Dascola, was printed and delivered to the City Clerk.

On June 30, 2014, new, "correct" ballots were mailed to all of the absentee voters who had received the defective ones. Accompanying these ballots was a letter from Clerk Beaudry urging the absentee voters not to use the defective ballots and to return the "correct" ballots to the Clerk. It further informed these voters that, if they had sent in a defective ballot, they should proceed to sending in a correct ballot, and their original ballot would not be counted. The letter from the Clerk did not state whether votes cast on the defective ballots would be counted if the voter returned only that ballot, and not a correct one. (The text of the Clerk's letter is attached hereto as Exhibit B.)

In addition to the letter sent to each absentee voter who received a defective ballot, Plaintiff is informed that telephone calls from the Clerk's Office are being made to persons who returned defective ballots, urging them to send in a correct ballot.

Defendants have, as of this writing, failed and refused to state if they will count votes for Third Ward Council Member appearing on defective ballots, if the voters who cast those votes do not return a replacement correct ballot. The failure of the Defendants

to clearly state that votes cast on defective ballots will not be counted leaves open the possibility that some of them will be counted.

Several dozen of the defective ballots had already been received by the City Clerk through July 3, 2014.

Counting any of the votes in this election contest cast on the defective ballots would be in violation of this Court's Judgment and constitutes a further denial of Plaintiff's right to equal protection under the Due Process clause of the 14th Amendment.

Counting even a small number ballots that do not contain the name of Plaintiff Dascola would give the other candidates an unfair and illegal advantage in the election.

DISCUSSION

It is abundantly clear that Plaintiff Dascola has the legal right to have his name appear on all ballots used for this August's Democratic Primary for Third Ward City Council Member.

The error or errors that led to the printing of the defective ballots may not have been committed by the Defendants, but it is clear that they have ultimate responsibility to insure that proper ballots reach the voters of the City of Ann Arbor, including the Third Ward. They are the only parties subject to this Court's Permanent Injunction and Writ of Mandamus.

Defendants seem preoccupied with establishing that they did make the error(s) leading to the printing of defective ballots, but establishing fault for the error(s) is beside the point. It is the City Clerk and her staff who are responsible for sending out ballots to absentee voters and supplying the City's precincts with ballots for election day.

Defendant Clerk tries to dodge responsibility for this problem by saying that the proof ballot she saw was correct, and she was not informed of the subsequent changes and problems that occurred.

While this may be true, it would have been an easy matter for the Clerk to completely prevent the problem of defective ballots reaching voters. On the Partisan Section of the ballot, there are just three contested races, all in the Democratic column – Representative in Congress, Mayor of Ann Arbor and Third Ward Council Member. There are just nine candidates for these three offices. It could not have taken more than a minute for the Clerk to confirm that all nine of these candidates' names were on the ballot. Instead, the Clerk assumed that nothing happened between the presentation of the proof ballot and the delivery of the actual ballots. Instead of making this simple, final inspection before sending out 400 absentee ballots, they were put in the mail without examination.

Of course, assigning blame for the error is not important here; determining a proper remedy is the task for the Court.

Plaintiff's counsel has done an extensive multistate and federal search for statutory or case law authority governing a situation such as this. Unfortunately, none has been found. The search may have been faulty, or this may be a case of first impression.

In the absence of clear authority, Plaintiff suggests that this may be the proper analysis for the Court to adopt. A ballot is the method by which a “contest” for a political office is presented to a voter to make a choice. The contest consists of all persons who have earned a place on the ballot, as well as the opportunity to cast a write-

in vote.

Plaintiff suggests that a “ballot” which does not actually present the “contest” to the voter is not a ballot at all, and a listing of fewer than all of the choices a voter can make is not a presentation to the voter of the contest.

All parties agree that the 400 ballots sent to the absentee voters are “defective.” Plaintiff argues that the defect is fatal; it makes those ballots unusable for the recording of preferences in the Third Ward contest, because the actual contest has not been presented. As to the Third Ward contest, the ballot is a nullity. A “ballot” leaving out one candidate’s name is not very different from failing to place anything about the Third Ward contest on the ballot, at all, because the ballot does not present the actual Third Ward contest.

Since all parties agree that the Third Ward ballots are defective as to the City Council race, what is the argument to legitimize and make use of those ballots in any way regarding the Third Ward contest?

In correspondence to Defendant Beaudry from State Director of Elections Christopher Thomas (Exhibit C, attached), Thomas says that not counting the defective ballots may result in “disenfranchisement of these voters.” No voter has the right to vote in the Julie Grand v. Samuel McMullen Council race shown on the “ballot,” because it doesn’t exist. Third Ward voters have the right to vote in the Robert Dascola v. Julie Grand v. Samuel McMullen Council race. To date, Thomas has cited no legal authority for his conclusions, nor any authority giving his office the power to direct a local clerk in a matter such as this.

The City’s position on the authority of the Bureau of Elections is unclear.

Previously, City Attorney suggested to Plaintiff's counsel that the City Clerk must follow "directives" from the Bureau of Elections on this matter. He now says that the City is not so obligated, but may take into account what the Bureau advises. Plaintiff argues that the Bureau has no authority in this matter. Thomas informed Plaintiff's counsel that the source of his authority is MCL 168.21, MCL 168.31(1)(a) and (b), and MCL 168.931 (1)(h), the texts of which are as follows:

168.21. Secretary of state; chief election officer, powers and duties

Sec. 21. The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.

168.31. Secretary of state; duties as to elections; rules

Sec. 31. (1) The secretary of state shall do all of the following:

(a) Subject to subsection (2), issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, [MCL 24.201](#) to [24.328](#), for the conduct of elections and registrations in accordance with the laws of this state.

(b) Advise and direct local election officials as to the proper methods of conducting elections.

168.931. Prohibited conduct; misdemeanors

Sec. 931. (1) A person who violates 1 or more of the following subdivisions is guilty of a misdemeanor:...

(h) A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.

With regard to Section 21, "supervisory control" is never defined. There is only one case in the annotations to the section, and it relies on an earlier version of 168.31,

which provides that the Secretary of State has the power and duty “to prepare rules, regulations and instructions for the conduct of elections and registrations in accordance with the laws of the state...” This case occurred before the adoption of the Michigan Administrative Procedures Act (MAPA).

Section 38, rewritten after the adoption of MAPA, directs the Secretary of State to issue rules and promulgate instructions pursuant to MAPA. The Secretary has never done this with regard to election matters. It also says that the Secretary shall “Advise and direct local election officials as to the proper methods of conducting elections.” What is the meaning of “direct” in this sentence? Is it an unfettered grant of power to the Secretary to control any aspect of elections? Principles of statutory construction would dictate that Subsections (a) and (b) should be read together and conflict between them is to be avoided if possible. The most reasonable interpretation of this section is that the authority of the Secretary over elections is limited to instructions and rules adopted under the MAPA procedures. The Secretary has never done this.

A recent case addresses the issue of the authority of the Secretary in the absence of rules and regulations adopted pursuant to MAPA. In Bryanton v. Johnson, 902 F.Supp.2d 983 (E.D. Mich 2012), voters and representative organizations sued the Secretary, seeking declaratory and injunctive relief prohibiting the Secretary from including a “citizenship checkbox” on applications to vote utilized at polling places, and in applications for absent voter ballots. The plaintiffs asked for a preliminary injunction to prevent the practice.

In finding for the plaintiffs and granting their request for a preliminary injunction, the court held:

Mich. Comp. Laws § 168.31(1)(a) states: “The secretary of state shall ... issue instructions and promulgate rules pursuant to the administrative procedures act ..., for the conduct of elections and registrations in accordance with the laws of this state.” This does not create an “open season” for Defendant to write new laws, and then say they are not new laws, and even though significant in content, avoid the MAPA. “[W]ithout a clear legislative intent to waive the requirements of the MAPA, we will not sanction state agency ‘law-making’ in the absence of the legislatively designed protections of the APA.” Danse Corp. v. City of Madison Heights, 466 Mich. 175, 184, 644 N.W.2d 721 (2002).

In short, even looking to Thomas’s own claimed sources of authority to dictate how votes made on the defective ballots should be dealt with, none supports the notion that he can bind the City and the Clerk to any particular action.

In addition to providing no authority supporting his claim that he can direct local clerks what to do, it should also be noted that Thomas cites not a single source of legal authority for his position that such “votes” should be counted under these circumstances.

Perhaps, more importantly, any decision about counting these “votes” under state law must be reconciled with U.S. Constitutional provisions. The essence of Plaintiff’s case is grounded in the Equal Protection clause. To count “votes” on “ballots” that contain some, but not all, of the candidates’ names would be a clear violation of Plaintiff’s right to equal protection. Given this fact, any interpretation under state law that permits the ballots to be counted is irrelevant.

In Williams v. Rhodes, 393 U.S. 23 (1968), the Supreme Court addressed state laws regulating access to the ballot of new political parties. Although acknowledging that states are delegated many powers in the regulation of elections, the court struck down the Ohio election laws, because they violated the Equal Protection Clause.

[The] Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. ... We therefore

hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall * * * deny to any person * * * the equal protection of the laws.' Ibid., p. (28-29)

How much of a practical problem are the defective ballots? It is impossible to know until election night. The City does seem to be working diligently to limit the number of defective ballots which are returned and not replaced with a correct ballot. If its efforts are successful, there may be a very small number of these ballots, but as long as a single defective ballot has not been returned or replaced, the scope of the problem will be unknown.

Unfortunately, even a very small number of defective ballots could be decisive. Ann Arbor has a history of very close elections, with one or two-vote margins, including a Mayoral contest decided by a single vote out of nearly 30,000 cast. Just five years ago, in 2009, the Third Ward Democratic Council Primary was decided by just six votes.

It is important that this matter be decided now, rather than waiting until the votes are counted. Voters who sent in defective ballots are entitled to know if their Third Ward votes will be counted, or if they will have to complete and send in a new, correct ballot to attain that result.

Should this matter remain undecided before election day, it could cause considerable confusion in counting the votes and may prompt additional litigation that would delay the seating of the newly-elected Council Member.

CONCLUSION

For the reasons stated above, Plaintiff asks this Court to grant his Post-Judgment Motion for Additional Injunctive Relief and permanently enjoin Defendants from

counting any votes cast on defective ballots in the Third Ward Council Member race that have not been replaced by correct ballots. Votes cast for other offices on those ballots shall be counted.

/s/ Thomas F. Wieder
Thomas F. Wieder (P33228)
Attorney for Plaintiff

Dated: July 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 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: Stephen K. Postema and Abigail Elias.

/s/ Thomas F. Wieder
Attorney for Plaintiff