UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff, Case No. 5:14-cv-11296-LPZ_RSW

vs. Hon. Lawrence P. Zatkoff

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

Defendants.
/

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BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Statement of Facts

This action concerns Plaintiff Robert Dascola's attempt to seek election to the position of Council Member from the Third Ward of the City of Ann Arbor in the 2014 primary and general election cycle. Defendants claim that Plaintiff is ineligible to run for this office, based on Ann Arbor City Charter provisions which were previously declared "unconstitutional and void" by two separate decisions of this Court.

Plaintiff is a resident of the Third Ward of Defendant City of Ann Arbor, having resided there since on or about September 15, 2012.

Plaintiff has been a registered elector of the Third Ward of Defendant City of Ann Arbor since on or about January 15, 2014.

On or about March 11, 2014, Plaintiff obtained nominating petition forms from Defendant City's Office of the City Clerk to run as a Democratic candidate for the position of City Council Member representing the City's Third Ward.

On March 12, 2014, Plaintiff received an email from Dena C. Waddell, identified as Administrative Assistant/City of Ann Arbor/City Clerk Office stating:

> Mr. Dascola,
>
> > You recently pulled petitions to run for a city council position with the City of Ann Arbor. Unfortunately, you do not meet the residency requirement to run at this time. A person is eligible to hold a city office if the person has been a resident of the ward from which elected, for at least one year immediately preceding election or appointment. It appears that you became a registered (Ann Arbor) voter earlier this calendar year. My apologies for not noticing this while you were at the office. If you have any questions feel free to contact our office at 734-794-6140. (Exhibit A, attached.)

The language which appears in current printed copies of Ann Arbor's City Charter, published by the City without annotation, sets forth the eligibility requirements for city offices, both elective and appointive, as follows:

> Eligibility for City Office—General Qualifications
>
> > SECTION 12.2 Except as otherwise provided in this charter, a person is eligible to hold a City office if the person has been a registered elector of the City, or of territory annexed to the City or both, and, in the case of a Council Member, a resident of the ward from which elected, for at least one year immediately preceding election or appointment. This requirement may be waived as to appointive officers by resolution concurred in by not less than seven members of the Council.

As to elective officers (Mayor and City Council Member), this language sets forth two separate and distinct requirements: 1) That a candidate for either office have been a

registered voter of the City for a year prior to election (or appointment); and 2) A candidate for Council Member has been a resident of the Ward from which elected for a year prior to election (or appointment).

In subsequent communications with Plaintiff's counsel, Ann Arbor City Attorney Stephen Postema has stated that the City believes that Plaintiff does not meet either the voter registration requirement or the ward durational residency requirement.

Plaintiff asserts that whether he satisfies either of the requirements printed in the Charter is completely irrelevant, because those requirements, in fact, no longer exist. Each of the requirements has been found to violative of the Equal Protection Clause of the 14th Amendment to the United States Constitution and declared void by decisions of this Court.

In 1971, the validity of the cited language of the Charter regarding the one-year ward residency requirement for the position of Council Member was challenged in the case of Daniel J. Feld, et al v. City of Ann Arbor and Harold Saunders, File No. 37342 (E.D. Mich. 1972), in which the Plaintiffs alleged that the provision violated the Equal Protection Clause of the 14th Amendment to the United States Constitution.

In finding for the Plaintiffs, U.S. District Court Judge Lawrence Gubow, in an Order dated January 12, 1972, stated:

> IT IS ORDERED that the Plaintiff's Motion for Summary Judgment be, and it hereby is, granted and
>
> IT IS FURTHER ORDERED and declared that the portion of Section 12.2 of the Ann Arbor City Charter which requires all candidates for the office of councilman to have been residents of the ward from which they are elected for at least one year immediately preceding their election violates the equal protection clause of the 14th Amendment to the U.S. Constitution and is, therefore, unconstitutional and void. (Copy of Order attached as Exhibit B.)

At about the same time as the Feld case, a second case was filed, Human Rights Party, David F. Black and Mark Dickman v. City of Ann Arbor and Harold Saunders, City Clerk of Ann Arbor, File No. 37852 (E.D. Mich. 1972). This second case challenged the constitutionality of the one-year city voter registration requirement contained in Charter Section 12.2.

In finding for the Plaintiffs, U.S. District Court Judge Ralph Freeman, in an Order dated March 29, 1972, stated:

> IT IS ORDERED that the plaintiffs' Motion for Summary Judgment be, and it hereby is, granted and that defendants Motion for Summary Judgment be denied.
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> IT IS FURTHER ORDERED and declared that the portion of Section 12.2 of the Ann Arbor City Charter which requires all candidates for the office of councilman to have been registered electors of the City of Ann Arbor for at least one year immediately preceding their election violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and is, therefore, unconstitutional and void. (Copies of Order and Judge Freeman's March 17, 1972 Opinion are attached as Exhibits C and D.)

Neither the Feld, nor the Human Rights Party, decision was appealed, nor has either been overruled, vacated or modified in any way.

Defendant City asserts that it may enforce the voided language of the Charter, stating that "we believe that they are no longer void in light of subsequent changes in federal and Michigan jurisprudence." (Email from Ann Arbor City Attorney Stephen Postema to Plaintiff's attorney, March 24, 2014, Exhibit D.)

The City agreed to receive nominating petitions from Plaintiff Dascola, review them to determine if they contain sufficient valid signatures, and hold them pending

resolution of this litigation. Mr. Dascola has submitted his petitions, and City Clerk Beaudry has determined that they contain a sufficient number of valid signatures.

Discussion

There is a single legal issue which should be dispositive of this case. Once a law has been found by a court of competent jurisdiction to be "unconstitutional and void," can that law subsequently be of any force and effect, absent any effective reversal, vacating or revision of the finding of the original court?

Plaintiff asserts that the clear and unequivocal answer is "No," a conclusion supported by consistent and voluminous decisions of Federal and Michigan courts. Those courts have consistently found that the status of such a voided law is that it is "as if the law had never been written." It has been figuratively, if not literally, wiped off the books. Nothing can revive it from the dead and make it effective once again.

Defendants assert a rather novel, alternative theory of what happens to such dead laws. It maintains that when some undefined quantity of subsequent jurisprudence emerges which differs from the original "voiding" decision, the voided law is magically "unvoided," and a governmental body such as the City of Ann Arbor is free to resume applying and enforcing the voided law.

Plaintiff is unaware of any authority for this novel theory, and Defendants have offered none. Moreover, the theory is vague in the extreme. How much subsequent jurisprudence must come into being for the voided law to be "unvoided?" Is a single case enough, or two or twenty? Can state court decisions unvoid a law voided by a federal court? Do decisions from other trial courts count, or only from appellate courts? Who

gets to decide when the appropriate threshold has been reached? Can any governmental body decide on its own and resume application and enforcement of the voided law?

Another way of stating the Defendants' position is that if the earlier case which voided the law were being decided today, recent case law suggests that it would now be decided differently. The City would be free to reach this conclusion, ignore the original decision and act as if the voided law were in full force and effect.

Fortunately, there is amply case law which addresses what happens to "voided" laws, and it consistently holds that once a law is found to be void, it ceases to have any existence. It cannot be un-voided, resuscitated and applied, because it is no longer there.

The durable binding force of a court order, regardless of subsequent developments casting doubt on its validity, was firmly established in the landmark case of United States v. United Mine Workers of America, 330 U.S. 258, 293 (1947), in which the United States Supreme Court held: "[W]e find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

The Michigan Supreme Court has had occasion to thoroughly consider the effect of a declaration that a law is unconstitutional and void. In Stanton v. Lloyd Hamond Produce Farms, 400 Mich. 135 (1977), the Court stated:

> It is a general rule of statutory interpretation that an unconstitutional statute is void ab initio. This principle is stated in 16 Am.Jur.2d, Constitutional Law, s 177, pp. 402-403, as follows:
>
> > "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from

> the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed."
>
> That this rule has been consistently followed in Michigan there can be no doubt. See Adsit v. Secretary of State, 84 Mich. 420, 48 N.W. 31 (1891); Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 83 N.W. 625 (1900); Briggs v. Campbell, Wyant & Cannon Foundry Co., 379 Mich. 160, 150 N.W.2d 752 (1967); People v. Carey, 382 Mich. 285, 170 N.W.2d 145 (1969) (opinion of T. M. Kavanagh, J.); and Horrigan v. Klock, 27 Mich.App. 107, 183 N.W.2d 386 (1970).
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> Briggs v. Campbell, Wyant & Cannon Foundry Co., supra, involved the question of whether an amendatory state statute could apply retroactively in order to cure defects of a statute previously declared unconstitutional. In discussing this issue, the Briggs Court held that the prior unconstitutional statute was void from the date of its passage and, therefore, could not be cured retroactively by a subsequent statutory amendment, unless the contrary clearly appeared from the context of the statute itself.
>
> In Horrigan v. Klock, supra, the Court of Appeals followed the rule that an unconstitutional statute is void ab initio, which was reaffirmed in Briggs, in holding that Maki v. East Tawas, 18 Mich.App. 109, 170 N.W.2d 530 (1969), aff'd 385 Mich. 151, 188 N.W.2d 593 (1971), which declared a state statute to be unconstitutional, was "fully retroactive". See Pittman v. City of Taylor, 398 Mich. 41, 46, 247 N.W.2d 512 (1976).
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> Stanton at pp.144-145, emphasis added.

In Hanger v. State, 64 Mich.App. 572 (1975), the Court of Appeals addressed the status of a statute that had been declared unconstitutional under the Equal Protection Clause and void. "But since section 4 is void, we must treat it as if never written." (At p. 579.) The court also noted, that because of the breadth of the ruling finding the statute void, a subsequent statutory change designed to make it more likely to be constitutional "did not breathe new life into the constitutionally void section." Ibid.

In Sturak v. Ozomaro, 238 Mich. App. 549, 560 (1999), the Michigan Court of Appeals stated: "The unconstitutional statute 'leaves the question that it purports to settle just as it would be had the statute not been enacted.' 16A Am. Jur. 2d, Constitutional Law, Section 203, p. 90."

In a related context, Michigan courts have held that a contract which has been found void as violative of a statute is not resurrected and made effective because, under a subsequently changed statute, it would be found to be valid. "When an agreement or contract is entered into in violation of the statute, repeal of the statute does not make the agreement valid because the Legislature cannot validate a contract which never had a legal existence." Compton v. Joseph Lepak, D.S.S., 154 Mich.App. 360, 371 (1986). In Compton, the court rejected the notion that a subsequent enactment could "raise from the dead a void contract." Ibid. What the City wishes to do here is "raise from the dead" a void provision from its Charter.

All of these decisions are consistent with a common sense understanding and definition of the word "void," which Black's Law Dictionary defines as "Null; ineffectual; nugatory; having no legal force or binding effect; unable in law to support the purpose for which it was intended."

What the City wishes to do here is substitute its own view of current law for the 1972 binding orders of this Court. It is simply not free to do this, to unilaterally decide that its null and void Charter provision may once again be considered alive and enforceable, without the benefit of any legislative, electoral or judicial process having taken place to restore it.

Based on communications between Plaintiff's counsel and the City Attorney, some view of the City's theory, and the authority it relies upon, can be examined. The City asserts that the voided language is no longer void because of "changes in the law." Asked what constitutes changes which would reverse the status of the voided sections, the City has cited West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) and Eastway v. Eisenga, 420 Mich. 410 (1984). In each of these cases, a statute found to be unconstitutional was "revived" by subsequent judicial access.

These cases are clearly distinguishable. In West Coast Hotel, the U.S. Supreme Court explicitly overruled its own prior decision in Adkins v. Children's Hospital, 261 U.S. 525 (1923), which had held invalid a minimum wage statute. In Eastway, the Michigan Supreme Court explicitly overruled its own prior decision in Gallegos v. Glaser Crandall Company, 388 Mich. 654 (1972), which had invalidated part of a workers compensation statute.

In this case, neither of the cases which voided the challenged Charter language was appealed, no court has addressed the validity of either, and, certainly, neither decision has been overruled. Absent any such action by a court empowered to do so, The Feld and Human Rights Party cases still bind the City of Ann Arbor.

Principles of issue preclusion and collateral estoppel preclude the City from relitigating these matters again.

CONCLUSION AND RELIEF REQUESTED

Defendants' efforts to deny Plaintiff a spot on the City of Ann Arbor election ballot are based entirely on applying Ann Arbor City Charter language which, for all relevant legal purposes, has been nonexistent for over forty years, since being declared void by decisions of this Court. There is no legal support for the Defendants' position that the Charter language has become "unvoided" and can now be applied to Plaintiff to deny him a position on the ballot.

This Court should grant Plaintiff's Motion and order the relief sought in the Complaint.

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

Dated: March 29, 2014