

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

JENNIFER BRUNNER,

Defendants.

: Case No. 2:08-CV-145

:
: JUDGE O'MALLEY

:

:

**MATTHEW DAMSCHRODER'S MOTION TO QUASH SUBPOENA ISSUED BY
PLAINTIFFS**

Matthew Damschroder, the Director of the Franklin County Board of Elections, a non-party to this matter, respectfully requests that this Court quash the subpoena served upon him in connection with the above captioned matter. The reasons for this motion are set forth in the accompanying memorandum in support.

Respectfully Submitted,

**RON O'BRIEN
FRANKLIN COUNTY
PROSECUTING ATTORNEY**

/s/ Patrick J. Piccininni
Patrick J. Piccininni (0055324)
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
614/462-3555
614/462-6012 FAX
ppiccin@franklincountyohio.gov
Attorney for Matthew Damschroder,
Director, Franklin County Board of Elections

MEMORANDUM IN SUPPORT

I Introduction

This matter is before the Court on the subpoena issued to Matthew Damschroder, Director of the Franklin County Board of Elections on Friday, February 1, 2008. (Exhibit 1). The subpoena requires that Mr. Damschroder appear on February 5, 2008 to give testimony in the above captioned matter.

Mr. Damschroder requests that this Court quash the subpoena because Plaintiffs have failed to comply with the strictures of Fed. R. Civ. P. 45; Plaintiffs failed to take the necessary steps to avoid undue burden on the witness; they failed to tender the filing fee to the witness; and, they have served the subpoena outside the mileage and territorial jurisdiction of the Court.

II. Law and Argument

A. Plaintiffs' counsel failed to take reasonable steps to avoid undue burden to the subject of the subpoena.

Fed. R. Civ. P. 45(c)(1) states:

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

This action is premised on the directive of the Ohio Secretary of State requiring the Cuyahoga County Board of Elections to conduct the March 4, 2008 primary using a Central Count Optical Scan (CCOS) voting system. The decision of the Secretary of State was made on December 21, 2007 (Doc. 6, p.15). Plaintiffs waited 27 days, until

January 17, 2008 before filing this action. (Doc. 1). On January 24, 2008, this Court set a deadline of January 28, 2008 for Plaintiffs to file their motion for preliminary injunction and set the hearing for February 5, 2008. (Doc. 6). Knowing time was of the essence, Plaintiffs then waited an additional 4 days (8 days from the Court setting dates in this matter) to serve the Director of the Franklin County Board of Elections a subpoena commanding him to appear at 9:30 AM on February 5, 2008.

Currently, the Franklin County Board of Elections is preparing for the upcoming March 2008 primary. Voting starts on February 8, 2008. All preparations must be in place at that time. To require the Franklin County Board of Elections Director to be out of the county during this critical time required for preparation would simply render Plaintiffs counsel's obligations under Fed. R. Civ. P. 45 (c)(1) meaningless. Plaintiffs should not be rewarded for waiting until the 59th minute of the eleventh hour to serve the subpoena.

Additionally, the subpoena requires that the witness travel 142.26 miles from his office to attend the trial. (See Mapquest Directions Exhibit 2).¹² Fed. R. Civ. P. 45(c)(3)(A)(ii) states:

Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:...

(ii) **requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a**

¹ The Mapquest was converted to pdf format for filing with the Court, thus its appearance may appear altered in the conversion process.

² The straight line distance between zip code 43215 (Downtown Columbus) and 44113 (Downtown Cleveland) is 126 miles. www.findlocalweather.com computation, Exhibit 3).

trial by traveling from any such place within the state where the trial is held.... (Emphasis added).

Mr. Damschroder is given approximate 72 hours to rearrange matters to require him to attend this hearing. This is precisely the undue burden that Fed. R. Civ. P. 45(c) seeks to avoid.

B. The subpoena is invalid because Plaintiffs counsel failed to tender the witness fee and mileage at the time of service as required by Fed. R. Civ. P. 45(c).

Fed. R. Civ. P. 45(b)(1) states”

Any person who is at least 18 years old and not a party may serve a subpoena. **Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.** (Emphasis added).

Plaintiffs counsel failed to do tender the fees required by the rule. Cases interpreting this requirement have held that the subpoena is invalid if the fees are not tendered simultaneously with the subpoena. *CF&I Steel Corp. v. Mitsui and Co.*, 713 F. 2d 494, 496 (9th Cir. 1983). In fact, other courts in this district have stated that “[f]ailure to tender fees and mileage renders the subpoena invalid and frees the witness of any obligation to attend.” *Hazelwood v. Webb*, United States District Court for the District of Kentucky Case No. 4:06CV-P107-M, 2007 U.S. Dist. LEXIS 71778 (D. Ky. 2007) (Exhibit 4). Thus, it is submitted that this subpoena is invalid.

C. The deponent is outside the territorial jurisdiction of this Court and not within 100 miles of the place of trial.

As stated above, the witness must travel 142.8 miles from the location of the trial. Fed. R. Civ. P. 45(b)(2)(B) states that a subpoena may be served “outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection.” The service of this subpoena is not within the parameters set forth above. Accordingly, it is submitted that the plaintiffs cannot enforce this subpoena. See, *Johnson v. Land-O-Lakes*, 181 F.R.D. 388 (100 mile limitation did not extend the Court’s jurisdiction over an officer of the party corporation, thus court denied the motion of the plaintiffs to have an individual subject to the subpoena power of the court).

Thus, it would appear that this subpoena was not properly issued and must be quashed.

III. Conclusion

For the foregoing reasons, it is requested that the Court protect Matt Damschroder from significant expense as a result of the subpoena issued on February 1, 2008 and quash same.

Respectfully Submitted,

**RON O'BRIEN
FRANKLIN COUNTY
PROSECUTING ATTORNEY**

/s/ Patrick J. Piccininni
Patrick J. Piccininni (0055324)
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
614/462-3555
614/462-6012 FAX
pjpccin@franklincountyohio.gov
Attorney for Matt Damschroder,
Director, Franklin County Board of Elections

CERTIFICATE OF SERVICE

I certify that on this 2nd day of February, 2008, the foregoing was electronically filed with the Court's ECF system and served on the attorneys for the parties and movants through the Court's electronic filing system.

/s/ Patrick J. Piccininni
Patrick J. Piccininni (0055324)
Assistant Prosecuting Attorney