

Nos. 10-4481 and 11-3059/3060

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
**Jan 18, 2011**  
LEONARD GREEN, Clerk

TRACIE HUNTER, Committee to Elect Tracie M. )  
 Hunter for Judge, )  
 )  
 Plaintiff - Appellee, )  
 )  
 )  
 NORTHEAST OHIO COALITION FOR THE )  
 HOMELESS; OHIO DEMOCRATIC PARTY, )  
 )  
 Intervenor - Appellees, )  
 )  
 )  
 v. )  
 )  
 HAMILTON COUNTY BOARD OF )  
 ELECTIONS, et al., )  
 )  
 Defendants - Appellants (11-3060), )  
 )  
 )  
 JOHN WILLIAMS, )  
 )  
 )  
 Intervenor - Appellant (10-4481, 11-3059). )

ORDER

Before: MOORE, COLE, and ROGERS, Circuit Judges.

Intervenor John Williams appeals the district court’s order of January 12, 2011, that granted in part and denied in part the plaintiff’s and plaintiff-intervenors’ motion to enforce a preliminary injunction entered by the district court on November 22, 2010. Williams seeks an emergency stay of the January 12 order. Additionally, the Hamilton County Board of Elections (“Board”) appeals the same order. The Board seeks an emergency stay of the January 12 order and of any further proceedings in the district court pending the resolution of these appeals. Plaintiff Tracie Hunter and Plaintiff-Intervenors Northeast Ohio Coalition for the Homeless (“Coalition”) and the Ohio Democratic Party have responded in opposition to the motions.

This case is difficult, and at this time, we address only the motions to stay. Plaintiff Tracie Hunter is a candidate for judge of the Hamilton County Juvenile Court. In a complaint brought under 42 U.S.C. § 1983, she challenged the unanimous decision of the Hamilton County Board of Elections (“Board”) to reject hundreds of provisional ballots that were cast in the wrong precinct as violative of the rights to equal protection and due process of law under the Fourteenth Amendment to the United States Constitution. Hunter was joined by the Coalition and the Ohio Democratic Party. The district court conducted an emergency hearing and, on November 22, 2010, issued a preliminary injunction directing the Board to undertake an investigation into whether poll-worker error contributed to the rejection of 849 provisional ballots that were cast in an incorrect precinct. (This number later was modified to 850 because one voter cast two ballots in an incorrect precinct.)

Williams appealed (No. 10-4481) and moved for an emergency stay. A motions panel denied that request and a motion to reconsider. The appeal is fully briefed and awaiting oral argument and decision.

Following the November 22 order, then Secretary of State Jennifer Brunner issued Directive 2010-79, which addressed the investigation of poll-worker error with respect to those provisional ballots in which the voter used the last four digits of their Social Security number as identification. This was based on a consent decree issued in *Northeast Ohio Coalition for the Homeless v. Brunner*, No. C2-06-896 (S.D. Ohio, Apr. 19, 2010) (consent decree). The consent decree provided that local boards of elections may not reject a provisional ballot by a voter who used the last four digits of a Social Security number as identification if the ballot was cast in the correct location, but the wrong precinct, as a result of poll-worker error. Directive 2010-79 appears to have continued instructions issued by the Secretary prior to the November 22 order.

Subsequently, in Directive 2010-80, the Secretary issued instructions for the investigation of the 849 provisional ballots mentioned in the November 22 order. The Board undertook an investigation by sending questionnaires to all poll workers and by issuing subpoenas to poll workers for testimony. Meetings were conducted on December 16 and 17, at which the Board heard from 75 poll workers and deadlocked on a number of procedural issues. In Directive 2010-87, Secretary Brunner ordered the Board to accelerate its investigation by taking specific steps.

The Board convened on December 28. At that meeting, the Board unanimously voted to reject more than 500 ballots that had been cast in the wrong precinct. The Board also unanimously voted to count certain ballots that were rejected due to staff error and other ballots that were cast in the wrong precinct due to poll-worker error. There remained 269 ballots that had been cast in the correct location, but in the wrong precinct. The Board voted and tied 2-2 on whether to accept these ballots for counting.

In the meantime, after the issuance of Directive 2010-87, Williams and a Hamilton County elector, John W. Painter, filed a petition for a writ of mandamus in the Ohio Supreme Court to compel the Secretary to rescind Directives 2010-80 and 2010-87 as erroneous interpretations of Ohio law and to direct the Board to review the 849 ballots with the same procedures and scrutiny as applied to other provisional ballots, without assuming poll-worker error.

Hunter and the Coalition then filed in the federal district court action an emergency motion to enjoin the state action. The district court denied that motion, noting that “[i]t is within the province of the Ohio Supreme Court to determine whether the Secretary of State[’s] . . . directives comply with state law governing election procedures . . . .” The court noted that if the Ohio Supreme Court issued a ruling that the plaintiffs believed to interfere with the district court’s November 22

preliminary injunction, or “that Plaintiffs believe is otherwise contra to constitutional or federal law,” they could file a new motion for injunctive relief.

On January 7, 2011, the Ohio Supreme Court issued an opinion that granted Williams’s and Painter’s petition for a writ of mandamus. *State ex rel. Painter v. Brunner*, Slip Opinion No. 2011-Ohio-35 (Jan. 7, 2011). The Ohio Supreme Court concluded that Directives 2010-80 and 2010-87 were erroneous under Ohio law, because Ohio does not provide a poll-worker-error exception to the statutory requirement that provisional ballots must be cast in the voter’s correct precinct. The court also addressed the district court’s November 22 injunction and opined that the injunction did not provide support for the Secretary’s directives. Rather, the court concluded, the Board was simply required to conduct “the same inquiry that [it] had engaged in for its initial determination of the validity of the provisional ballots.” *Id.* at ¶ 40. The court thus granted “a writ of mandamus to compel the secretary of state to rescind Directives 2010-80 and 2010-87 and to compel the board of elections to rescind its decisions made pursuant to those directives and to instead review” the provisional ballots that are the subject of the district court’s order “with exactly the same procedures and scrutiny applied to any provisional ballots during the board’s review of them leading up to its decision on November 16, without assuming that poll-worker error occurred in the absence of specific evidence to the contrary.” *Id.* at ¶ 52.

Following the Ohio Supreme Court’s decision, Secretary Brunner issued Directive 2011-02, which rescinded Directives 2010-80 and 2010-87. She also issued Directive 2011-03, which purported to break the Board’s tie vote at its December 28 meeting. Several days later, incoming Secretary of State Jon Husted issued Directive 2011-04, which superseded Directive 2011-03 and ordered the Board to examine the ballots cast in the wrong precinct in the manner directed by the Ohio Supreme Court.

Plaintiff Hunter then filed an emergency motion in the district court to enforce the November 22 preliminary injunction. The following day, on January 12, the district court issued an order that (1) enjoined the Board from complying with Directive 2011-04; (2) ordered the Board “to count the 149 ballots that were investigated and found to have been cast in the wrong precinct due to poll worker’s error in determining whether the street address was located inside the precinct;” (3) ordered the Board to count seven ballots that were unanimously voted on December 28 to have been cast in the wrong precinct due to poll-worker error; (4) ordered the Board to count nine ballots that were unanimously voted on December 28 to have been rejected due to staff error; and (5) ordered the Board to investigate all ballots subject to the *Northeast Ohio Coalition* consent decree for poll-worker error and count those ballots as required by that consent decree. The Board was ordered to take these actions by January 22, 2011, the Ohio statutory deadline for amending the certification of election results.

On the same day, Secretary Husted issued Directive 2011-05, which also directed the Board to amend its certification by January 22 “in a manner that is consistent with both the Ohio Supreme Court’s Order in *Painter* and the board’s obligations” under the district court’s preliminary injunction of November 22. The Secretary also directed the Board to investigate the *Northeast Ohio Coalition* consent-decree ballots.

Williams appealed the district court’s January 12 order. The Board also appealed. In the meantime, on January 14, the district court granted, without a hearing, the plaintiff’s motion for an order to show cause why the Board and its members should not be held in contempt for failure to follow the district court’s orders. The district court ordered the Board to appear for a contempt hearing on Tuesday, January 18, 2011, at 2:00 p.m. In a second order issued on January 14, the district court enjoined “the application of Ohio Revised Code §§ 3505.32(A) and 3513.22 as they

Nos. 10-4481 and 11-3059/3060

- 6 -

apply to the results of the race for Hamilton County Juvenile Court Judge and prohibit[ed] any certification of the election results from this race from going into effect until further order of this Court.”

In this posture, Williams and the Board seek an emergency stay. The factors relevant to a stay pending appeal are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224, 227 (6th Cir. 2004). Given the conflicting decisions in this case and the difficult position in which the Board finds itself, we conclude that a stay should issue pending the resolution of these appeals.

First, these appeals present serious questions on their merits, particularly with respect to the January 12 order. As the above recitation should make clear, the facts of this case are complex, and the appeals present questions of law regarding the interplay of federal and state law. Further, there appear to be factual issues. The district court has ordered 149 votes to be counted on the basis of poll-worker error, but the evidence in support of that error is contested.

It further appears that irreparable injury may occur in the absence of a stay. The Board and its members face contempt proceedings if they do not carry out the district court’s order. If they do carry out the order, the results of the election may be reached before resolution of these appeals. It is uncertain whether the consequences of either scenario may be undone.


For these reasons, the motions to stay are **GRANTED**. The district court’s order of January 12 is stayed pending this appeal, and further district court proceedings also are stayed. This stay leaves in place the district court’s order of January 14 that prohibits any certification of the results of the race for the Juvenile Court judge from going into effect on January 22. In this regard, we note

Nos. 10-4481 and 11-3059/3060

- 7 -

that the Juvenile Court appears to be fully staffed, with the temporary assignment of a retired juvenile judge to the seat at issue in this litigation. The clerk is directed to consolidate appeal Nos. 10-4481, 11-3059, and 11-3060 and to advance oral argument in all three appeals to Thursday, January 20, 2011, at 5:00 p.m. Simultaneous merits briefs shall be filed in appeal Nos. 11-3059 and 11-3060 by 3:00 p.m. on Wednesday, January 19, 2011.

ENTERED BY ORDER OF THE COURT



---

Clerk