

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

EILEEN JANIS and KIM COLHOFF,)

Plaintiffs,)

vs.)

Civil Action No. 09-5019

CHRIS NELSON, in his official capacity as)

Secretary of State of South Dakota and as a)

member of the State Board of Elections;)

MATT McCAULLEY, CINDY SCHULTZ,)

CHRISTOPHER W. MADSEN,)

RICHARD CASEY, KAREN M. LAYHER,)

and LINDA LEA M. VIKEN, in their)

official capacities as members of the State)

Board of Elections; and SUE GANJE, in her)

official capacity as Auditor for Shannon)

County,)

Defendants.)

**PLAINTIFFS' MOTION TO WITHDRAW THEIR REQUEST FOR A
TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION**

Plaintiffs, by and through counsel, hereby move to voluntarily withdraw, without prejudice, their motion for a temporary restraining order or preliminary injunction. In support of this motion, Plaintiffs show as follows:

Plaintiffs filed the instant lawsuit on February 18, 2009 challenging the denial of their right to vote in the November 4, 2008 general elections. Specifically, Plaintiffs allege they were wrongfully denied the right to vote based on their felony convictions even though they were sentenced only to probation and South Dakota law allows probationers to vote. Compl. at ¶ 1; S.D.C.L. § 23A-27-35. Plaintiffs also maintain they never received notice from Defendants that they were being removed from the state and county voter registration lists as ineligible voters. Compl. at ¶¶ 14, 22. Plaintiff Eileen

Janis further contends that, once county election officials refused to allow her to cast a regular ballot, she requested and was denied the right to vote by provisional ballot. *Id.* at ¶ 17. Plaintiffs assert Defendants' actions violated both state and federal law, including Section 5 of the Voting Rights Act which requires Shannon County to seek preclearance from the U.S. Department of Justice or the U.S. District Court for the District of Columbia prior to implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *Id.* at ¶¶ 33 – 61; 42 U.S.C. § 1973c.

Defendant Sue Ganje, the County Auditor for Shannon County where Plaintiffs are residents, filed her answer to the complaint on March 17, 2009, and the remaining defendants (the "state defendants") filed their answer on March 25, 2009. In their answers, Defendants admit that Shannon County, South Dakota is a covered jurisdiction subject to the preclearance requirements of Section 5 of the Voting Rights Act. Def. Ganje's Answer at ¶ 28; State Defs.' Answer at ¶ 33. Defendant Ganje admits Plaintiff Janis registered to vote in September 1984 and was removed from the county voter registration list on or about February 8, 2008. Def. Ganje's Answer at ¶¶ 5, 13. The state defendants further acknowledge that, as Secretary of State, Defendant Nelson is required under the Help America Vote Act to maintain a statewide voter registration list, but contend that it is the county auditor's responsibility to maintain an accurate and current voter registration roll for federal elections. State Defs.' Answer at ¶¶ 47, 55. All of the defendants admit that a member of the precinct election board should have informed Plaintiff Janis that she could cast a provisional ballot. Def. Ganje's Answer at ¶ 47; State Defs.' Answer at ¶¶ 51-52.

On March 25, 2009, Plaintiffs filed a “Motion for a Temporary Restraining Order or Preliminary Injunction,” requesting that their names be immediately restored to the voter rolls in time for the next election in Shannon County (currently scheduled for June 9, 2009) and Defendants be enjoined from removing their names from voter rolls until this litigation is resolved. The state defendants and Defendant Ganje filed their responses in opposition to Plaintiffs’ motion for a temporary restraining order or preliminary injunction on April 13, 2009. In her response, Defendant Ganje stated that Plaintiff Janis was registered to vote as of November 4, 2008, and Plaintiff Colhoff was registered to vote as of April 8, 2009.* Defendant Ganje also attached an affidavit to her response attesting that Plaintiffs’ names are now back on the county voter registration list and will not be removed absent a court order. See Ex. A. Because Defendant Ganje has sworn she will not prevent Plaintiffs from voting in upcoming elections, Plaintiffs have obtained the remedy they sought in filing their motion.

Plaintiffs emphasize, however, that the withdrawal of their motion for a temporary restraining order or preliminary injunction bears no impact on the ultimate merits of their legal claims. As already stated, Defendant Ganje admits that Plaintiff Janis was removed from the county voter registration list which, according to the state defendants, means that she also was removed from the state voter registration list. The state defendants characterize their role in maintaining accurate voter registration lists as passive, thus leaving it up to the sixty-six (66) individual counties to enforce the state’s felon disenfranchisement law without any state oversight as to the accuracy of the counties’ actions. However, those county lists, according to the state defendants, have a direct impact on the accuracy of the statewide voter registration list. Therefore, Plaintiffs

* See Def. Ganje’s Resp. to Pls.’ Mot. for T.R.O. or Prelim. Inj. at 2.

maintain that the deletion of their names from the state and county voter registration lists and the denial of their right to vote based on their felony convictions are indicative of a pattern and practice in the state of South Dakota whereby election officials automatically remove from voter registration rolls the names of individuals convicted of felonies regardless of the criminal sentence imposed. Defendants' admissions further buttress Plaintiffs' assertions that what happened to them more than likely occurs in counties other than Shannon and impacts a far greater number of eligible voters throughout the state.

Moreover, in their responses to Plaintiffs' motion, Defendants do not offer any explanation as to why Plaintiffs – who were both convicted of felonies – were removed from the voter registration lists. Plaintiffs find it worthy of note that Plaintiff Colhoff's name was not placed back on the voter registration rolls until April 8, 2009, after Plaintiffs filed their complaint and motion for injunctive relief. Also suspect is Defendant Ganje's contention that Plaintiff Janis was registered to vote as of November 4, 2008 - the same date as the election at issue in the complaint - yet she was not allowed to vote at the November 2008 election, nor was she even allowed to vote by provisional ballot while officials clarified her voter registration status. Clearly, discovery into these matters and the manner in which Defendants have been enforcing South Dakota's felon disenfranchisement law is necessary for this Court to properly consider Plaintiffs' Section 5 claim.

CONCLUSION

For the reasons stated above, Plaintiffs voluntarily withdraw their motion for a temporary restraining order or preliminary injunction and respectfully request this Court grant this withdrawal without prejudice.

Respectfully submitted,

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ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served on the following counsel of record via electronic case filing on this _____ day of April, 2009.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS AND KIM COLHOFF,

Case No.: 09-5019

Plaintiff(s),

v.

AFFIDAVIT OF SUE GANJE

CHRIS NELSON, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE OF
SOUTH DAKOTA AND AS A MEMBER OF
THE STATE BOARD OF ELECTIONS; MATT
MCCAULLEY, CINDY SCHULTZ,
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CASEY, KAREN M. LAYHER, AND LINDA
LEA M. VIKEN, IN THEIR OFFICIAL
CAPACITIES AS MEMBERS OF THE STATE
BOARD OF ELECTIONS; AND SUE GANJE,
IN HER OFFICIAL CAPACITY AS AUDITOR
FOR SHANNON COUNTY,

Defendant(s).

State of South Dakota)

) ss.

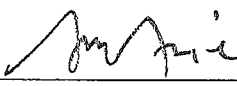
County of Shannon)

Sue Ganje, being duly sworn upon her oath, states as follows:

1. I am the Auditor for Shannon County, South Dakota, and a defendant in the above-entitled action.

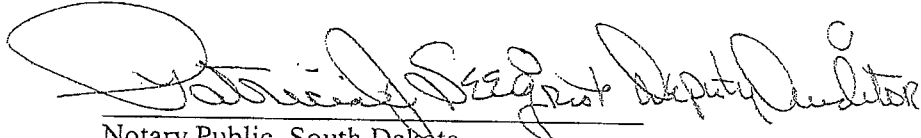
2. Unless ordered by the Court, neither I nor my office will remove either plaintiff from the voter registration list.

Dated this 13th day of April, 2009.



Sue Ganje

Subscribed and sworn to, before me, the undersigned officer, this 13th day of April,
2009.


Notary Public, South Dakota

(SEAL)
My Commission Expires: March 2011

