

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORTHEAST OHIO COALITION FOR THE : Civil Action No. 1:06-CV-00896
HOMELESS, et al. :
 :
Plaintiffs, :
 :
v. : Judge Marbley
 : (Judge Sargus, by assignment)
 :
 :
JENNIFER BRUNNER, et al. : MOTION TO QUASH SUBPOENA
 : OF CLERMONT COUNTY BOARD OF
Defendants. : ELECTIONS
 :
_____ :

Now comes Mary Lynne Birck, assistant prosecuting attorney and counsel for the Clermont County Board of Elections, a non-party, and moves this Court to quash the subpoena served upon it in the above-referenced litigation.

Movant represents that pursuant to Federal Rule of Civil Procedure 45(c)(3)(A), the Court is required to quash said subpoena as the subpoena: fails to allow a reasonable time for the Clermont County Board of Elections to comply; requires a non-party to travel more than 100 miles from the place of business; and subjects the Clermont County Board of Elections to undue burden. In the alternative, the Clermont County Board of Elections requests this Court to modify the subpoena to require an appearance after the certification of the November 4, 2008 presidential election. A supporting memorandum is attached hereto.

Respectfully submitted,

/s/ Mary Lynne Birck

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Memorandum in Support

Procedural Posture

Plaintiff Northeast Coalition for the Homeless filed its Complaint in the underlying litigation on October 24, 2006. It appears from the docket sheet that the litigation was effectively completed, as the Court ordered attorneys' fees and costs on September 30, 2008, until Plaintiff filed its Preliminary Injunction on October 14, 2008. Thereafter, this Court permitted limited discovery.

As evidenced by his Order of October 17th, Judge Marbley was mindful of the concerns of local boards of elections:

The Court recognizes, however, that the election will be held in fewer than eighteen days and that both Defendant Brunner and the Board of Elections Officials, whom Plaintiffs request to depose, are largely consumed with preparing for the election. Therefore, overly broad discovery would be unduly burdensome as well as unnecessary to allow Plaintiffs to prepare for the preliminary injunction hearing.

Further, the Court limited requests for documents and interrogatories to those relating to the upcoming 2008 election and permitted local election officials to be deposed for no longer than one hour in length.

Movant Clermont County Board of Elections ["Clermont County BOE"] complied with the subpoena for telephone deposition; Judy Miller, Director, was deposed for one hour on Tuesday, October 21, 2008.

Prior to the completion of Director Miller's deposition, the Clermont County Board of Elections was served with a subpoena to appear at a hearing on October 23, 2008 at 9 am before this Court. It is this subpoena which is the subject of this Motion to Quash.

Facts

The Clermont County BOE has a staff of ten full-time employees, which includes Director Judy Miller and Deputy Director Mike Keeley. On Thursday, October 23, 2008 at 9 am – the same

date and time as the hearing – the Clermont County BOE has a public meeting (the last meeting prior to the November 4th election) where the public test of the accuracy of the counting of the ballots, also known as the Test Deck, will occur. The Clermont County BOE is located at 76 South Riverside Drive, Batavia, Ohio. The Clermont County BOE is over 110 miles from the Courthouse and takes approximately 2 hours in travel time.

Argument

Federal Rule of Civil Procedure 45(c)(3)(A) requires that a court quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a non-party to travel more than 100 miles from where that person resides, is employed, or regularly transacts business to attend; and (iv) subjects a person to an unfair burden.

I. Failure to Allow a Reasonable Time to Comply/ Imposes an Unfair Burden

This action has been pending for almost two years. The Court has already recognized the burden upon local boards and has limited depositions to one hour per local board. The subpoena issued to “Clermont County Board of Elections” is not issued to any particular individual and is unclear as to whether it requires the appearance of all four members of the Clermont County BOE or one representative employee. As stated, the statutorily mandated Test Deck is scheduled for tomorrow, requiring a public meeting of the Clermont County BOE.

It is incumbent upon Plaintiffs to demonstrate the reasonableness of compelling the attendance at a hearing of Board members less than two weeks prior to the presidential election in a case that is almost two years old. Further, Plaintiffs bear the burden of explaining why the Clermont County BOE should vacate its public meeting and reschedule its publicized public testing of the vote counting system in order to attend the hearing.

To be sure, the Test Deck will be conducted amid the other work of the Clermont County

BOE – sending out absentee ballots, processing returned ballots, on-site voting, answering the questions of a public increasingly confused about ever-changing election requirements.

The unreasonableness of compelling attendance at the hearing is particularly acute for a relatively small county board such as the Clermont County BOE. Sending the director to the hearing means that 10% of the BOE staff and 50% of the management team is absent from the office.

Both Plaintiff and Defendant were present at the deposition of Judy Miller. In light of the availability of the deposition testimony of Director Judy Miller, the subpoena to compel the appearance of “Clermont County Board of Elections” is unreasonable and poses an undue burden upon the Clermont County BOE, its employees, and board members.

II. Requires travel of over 100 miles

The federal courthouse and the Clermont County BOE is over 100 miles apart. Accordingly, Rule 45(c)(3)(A)(ii) requires that the subpoena compelling the attendance of “Clermont County Board of Election” be quashed or modified.

III. The subpoena is invalid on its face because it fails to identify a person as subject of the command.

Federal Rule of Civil Procedure 45(a)(1)(A)(iii) states that a subpoena must “command **each person** to whom it is directed to do the following at a specified time and place: attend and give testimony . . . (emphasis supplied). The issuing officer failed to identify a person who is required to appear at the October 23rd hearing. Indeed, “Clermont County Board of Elections” is an entity not a person. Accordingly, the subpoena is properly deemed invalid as it fails to specify a person.

For the reasons stated herein, the Clermont County Board of Elections requests this Court to quash the subpoena and permit it to continue its statutory duties, or in the alternative, to modify the

subpoena to compel appearance after the certification of the November 4th election.

Respectfully submitted,

/s/ Mary Lynne Birck

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October 2008, the foregoing was electronically filed with the Court's ECF system and served upon the attorneys for the parties and movants through the Court's electronic filing system.

/s/ Mary Lynne Birck

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