

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

NORTHEAST OHIO COALITION	:	
FOR THE HOMELESS, <i>et al.</i> ,	:	CASE NO. C2:06-0896
	:	
Plaintiffs,	:	JUDGE ALGENON MARBLEY
v.	:	
	:	MAGISTRATE TERENCE KEMP
JENNIFER BRUNNER, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**REPLY MEMORANDUM OF DEFENDANT JENNIFER BRUNNER, OHIO
SECRETARY OF STATE, IN SUPPORT OF MOTION FOR RECONSIDERATION OF
DECISION TO GRANT PLAINTIFFS' FIRST MOTION FOR ATTORNEY FEES**

On September 30, 2008, the court issued an "Opinion and Order" granting Plaintiffs' Motion for Attorney Fees incurred during litigation surrounding the November, 2006 election. [R-108]. Defendant, Jennifer Brunner, Ohio Secretary of State, has asked this court to reconsider that decision based upon clear errors of law identified in her motion. [R-191].

In response, plaintiffs offer no defense whatsoever of the court's legal ruling; they simply point out that Motions for Reconsideration are disfavored except, *inter alia*, in cases of clear legal error. [R-199; R-200]. But the attorney fee award *does* reflect clear legal error, not because the court made any erroneous factual findings, but because the facts found by the court cannot support a fee award as a matter of law.

To recap briefly, a plaintiff seeking to recover attorney fees as a prevailing party must meet three requirements. The plaintiff must:

- (1) obtain actual relief, such as an enforceable judgment or a consent decree, that
- (2) materially alters the legal relationship between the parties and
- (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement.

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001); *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 615 (6th Cir. 2006). In this case, the plaintiffs prevailed on *none* of their substantive constitutional claims. However, the Secretary voluntarily entered into two Orders, the November 1, 2006 Consent Order and the November 15, 2006 Enforcement Order. Based on a few provisions in those Orders, the court found the plaintiffs to be prevailing parties and awarded attorney fees. That decision represents clear legal error.

Error of Law No. 1: This Court found that the November 1, 2006 Consent Order “changed the legal relationship between the parties” because thereafter the Secretary was no longer at liberty to alter or rescind Directive 2006-78. [R-108, p. 18].

NEOCH does not dispute that Directive 2006-78 merely restated the Ohio Revised Code. Any rescission of the Directive would therefore have been a hollow gesture, with or without the existence of the Consent Order, since the Secretary cannot rescind the Ohio Revised Code. Nothing in the Consent Order changed the relationship between the parties.

Error of Law No. 2: The Court found that the November 1, 2006 Consent Order “changed the legal relationship between the parties” because Plaintiffs were empowered to monitor compliance with Directive 2006-78. [R-108, p. 18].

Nothing in the November 1, 2008 Consent Order speaks to observers or enforcement. Since the Consent Order merely parroted the requirements of state law, the Plaintiffs were

already able to seek judicial review of any questionable ballot handling. The Consent Order gave Plaintiffs no rights they did not already possess. .

Error of Law No. 3: The November 15, 2006 Enforcement Order did not change the legal relationship between the parties in any way that directly benefitted the plaintiffs.

The Enforcement Order authorized “duly appointed and authorized observers” to be present when the boards of elections determined the eligibility of provisional ballots. [R-57]. However, such observers were already authorized under R.C. §3505.21 and R.C. §3505.183(D).

The Enforcement Order required the boards, upon request, to provide observers a list of rejected ballots, along with the reasons for the rejections, and permitted the observers to object to the rejection of a provisional ballot before the board made its final decision. [R-57, ¶¶ 4-6]. But these two provisions – the right of observers to demand information and to register objections to ballot disqualification – failed the third prong of the *Buckhannon* test: they did not directly benefit the Plaintiffs themselves. *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992) (unless the relief directly benefits the plaintiff at the time the relief is granted, he or she is not a “prevailing party”). The observers in question are appointed by the political parties. R.C. 3505.21. The Agreed Enforcement Order did not give NEOCH or the other Plaintiffs any right to appoint their own observers.

Plaintiffs concede that District Courts have authority to revisit interlocutory orders in the face of clear legal error. Since the judgment awarding fees based on the 2006 Orders was based on legal error (which Plaintiffs do not address or refute in their brief), the Secretary respectfully asks the court to reconsider its earlier decision and deny the first application for attorney fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on this 3rd day of April, 2009.
Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Richard N. Coglianesse