

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Ohio Democratic Party, *et al*, :
Relators, :
-vs- :
J. Kenneth Blackwell :
Secretary, State Of Ohio, :
Respondent. :

CASE NO. 06 CVH 11609
JUDGE WHITE

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FRANKLIN COUNTY, OHIO

DECISION DENYING RELATORS'
COMPLAINT FOR WRIT OF MANDAMUS

Rendered this 31st day of October 2006.

WHITE, J.

INTRODUCTION

This matter is before the Court on Relators', Ohio Democrtatic Party *et al*,
(Relators) Petition For A Writ Of Mandamus against Respondent, J. Kenneth
Blackwell, Secretary of State of Ohio ("Respondent") filed on September 6, 2006.
Respondent filed its Memo Contra on October 20, 2006. Relators filed a
Supplemental Brief in Support of Writ of Mandamus on October 20, 2006.

Relators request this Court to grant an Order directing Respondent to issue Directives which will provide direction to the County Boards of Elections as to how to (1) alleviate congestion at polling places, including the use of back-up paper ballots; (2) manage malfunctioning voting machines to ensure that the votes already cast are not lost; and (3) assure the security of voting machines and related equipment so as to avoid accidental or willful adverse impacts on the voting process. (*See* Relators' Petition at 9)

Relators contend that Respondent is required by law to issue directives to guide boards in the holding of elections. (Relators' Petition at 3). According to Relators, the directives that were issued by Respondent concerning the upcoming general election are inadequate and the Respondent has not carried out his statutorily imposed duties. (Relators' Petition at 3-4). In support, Relators cite to two studies from the Center for Democracy and Election Management released in September of 2005, and the Election Science Institute report released on August 15, 2006. (Relators' Petition at 8) Relators acknowledge that these reports have been disputed; however, Relators contend that Respondent has failed to provide adequate directives to address the long lines that may develop from the use of the Direct Recording Electronic voting systems ("DRE"). In addition to failing to address the congestion issue, Respondent failed to issue a directive that addresses how to handle

malfunctioning machines to avoid the loss of already cast votes. (Relators' Petition at 8).

In response, Respondent argues that Relators are requesting that this Court dictate the election procedures in all 88 counties in Ohio. (Memo Contra at 1). The relief sought by Relators is not available through a writ of mandamus because the Relators are requesting specific directives for their own benefit. Respondent contends that Relators are not entitled to a writ of mandamus simply because Relators do not agree with the Respondent's course of conduct. (Memo Contra at 3).

Furthermore, Respondent argues that under a recent Supreme Court decision, a writ of mandamus cannot be used to compel the performance of general duties. (Memo Contra at 4). In addition, Respondent contends that if any specific legal duties exist, such duties are the responsibility of the local boards of elections and not the Secretary of State. According to Respondent the boards of elections have a duty to ensure adequate voting supplies; the control and management of voting machines are exclusively within the province of the local boards; and the security of the ballots and voting systems is a specific duty imposed on the boards of elections.

LAW AND ARGUMENT

A writ of mandamus is an order, in this case to a public officer, to perform an act which the law specifically enjoins as a duty resulting from his office. R.C. 2731.01. In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy at law. *State ex rel Hodges v. Taft*, 64 Ohio St. 3d 1, 3-4 (Ohio 1992); *see also State, ex rel. Harris, v. Rhodes*, (1978), 54 Ohio St 2d 41.

A court in a mandamus proceeding cannot create the legal duty the relator would enforce through it; creation of the duty is the distinct function of the legislative branch of government. *State, ex rel. Stanley, v. Cook*, (1946), 146 Ohio St. 348; *Davis v State, ex rel. Pecsok*, (1936), 130 Ohio St. 411, paragraph one of the syllabus.

The writ is to be issued with great caution and *only when the way is clear*. *State ex rel Taylor v Glasser*, (1977), 50 Ohio St. 2d 165 (emphasis added). A writ cannot issue to control an officer's exercise of discretion, but it can be issued to compel him to exercise it when he has a clear legal duty to do so. *See State, ex rel. Martin, v. Corrigan*, (1986), 25 Ohio St.3d 29. The writ may not be issued to compel the observance of laws in general, but only to command the performance of a specific act specially enjoined by law to be performed. *State ex rel Stanley v Cook* (1946), 146

Ohio St. 348, paragraph seven of the syllabus. Mandamus also may not be used to compel the performance of a permissive act. *State ex rel. Hodges*, 64 Ohio St. 3d at 4.

In this case, not only Relators, but all Ohio citizens have the right to vote, which is a fundamental right. *Yick Wo v. Hopkins* (1886), 118 U.S. 356; *Wesberry v. Sanders* (1963), 376 U.S. 1. The importance of the right to vote was expressed by the United States Supreme Court in *Wesberry v. Sanders, supra*, at page 560:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Thus, there is a clear legal right.

Furthermore, there is no plain or adequate remedy. Thus, the question becomes whether Respondent has a clear legal duty to issue directives regarding: 1) the malfunctioning of the voting machines; 2) to assure the security of voting machines and related equipment; and 3) to alleviate the congestion at polling places.

Respondent is the chief elections officer of the State of Ohio and as such, has duties and powers relating, *inter alia*, to the conduct of elections. R.C. 3501.04 (Page's 2006). Pursuant to R.C. 3501.05, the Secretary of State has the duty to advise boards of elections as to the proper methods of conducting elections, to prepare rules and instructions for the conduct of elections, and to compel the observance by

election officials of the requirements of the election laws. R.C. 3501.05(B), (C), and (M) (Page's 2006).

As stated previously, a writ should only be issued with great caution and *only* when the way is clear. While there is no specific authority that requires Respondent to issue directives on the specific matters set forth by Relators, directives were issued which seemingly address Relators' concerns.

With respect to congestion of the voting places, Respondent has issued a directive to the boards of elections advising them to be flexible about the "5-minute rule." Under 3505 23, there is a provision that limits voters to five minutes in the voting compartment when there is a line of people waiting to vote. If a voter seems to be taking an unusually long amount of time to vacate the voting compartment, two poll workers of different parties may want to inquire if the voter requires assistance. Moreover, Respondent has issued Directive 2005-07, which requires boards of elections using DRE voting systems to deploy the machines at a ration of one machine for every 175 registered voters.

As noted in a footnote by Respondent, there is a feature on the website for the Secretary of State that allows every voter to find out exactly what type of voting machine is in their county as well as an option to receive a free instructional video on how to use that particular machine.

On the issue of the voting machine malfunctioning, R.C. 3506.14(B) provides that prior to the start of election, the boards of elections shall have the voting machine or automatic tabulating equipment tested to ascertain that it will accurately count the votes cast for all offices and on all questions and issues. In Directive 2006-45, the Respondent issued a directive reminding the boards of elections to test and audit the accuracy of the voting machines. Respondent also cites to numerous directives in which Respondent has emphasized the importance of keeping the ballots secure.

Regarding the security issue, Relators admit that Respondent issued directives stressing the importance of the security of the equipment and set forth storage requirements. (Relators' Petition at 10). But Relators assert that these measures are not adequate. In its Supplemental Brief, Relators assert that Respondent can further ensure the security of the ballot by allowing a representative from each party to be in the voting machine storage areas when the room is unlocked. (Relator Supplemental Brief at 4).

Contrary to Relators' assertion that Respondent has done nothing, Respondent has issued directives with measures to alleviate congestion, to assure the proper operation of the machines and to ensure that the machines are secure. Relators contend, however, that the measures taken are not adequate. That contention remains to be seen. Respondent issued directives that, if performed

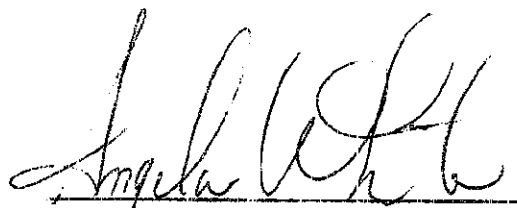
properly by the boards of elections, could resolve Relators' concerns. But it appears that Relators want to compel Respondent to issue directives setting forth measures they (Relators) suggest. While the Court understands Relators' concerns, a writ of mandamus will not lie for that purpose. A writ will be issued only where there is a clear legal duty to perform and not to compel a public official to perform a desired or preferred act not mandated by statute.

The duties and powers granted the Secretary of State are general and they are general to give the chief elections officer of the state the requisite discretion to issue directives and advisories necessary and conducive to ensure that the elections are properly conducted. A mandamus cannot be issued to compel the exercise of that discretion. *Martin*, supra.

There must be a clear legal duty to perform on behalf of the Respondent for the issuance of a writ of mandamus to be proper. Pursuant to R.C. 3501.04 and R.C. 3501.05, Respondent has only a general duty to implement the policies and procedures for Ohio elections. As the Supreme Court of Ohio noted, while there may be authority found in R.C. 3501.04 and R.C. 3501.05 regarding the issuance of directives, there is no *specific* authority that requires Respondent to do specifically as Relators are requesting. *Hodges* at 6-7.

Upon careful review of the evidence and the applicable law, there is no clear legal duty for Respondent to perform as prescribed by Relators. Therefore, it is the decision of this Court in this instance that Relators' Petition For A Writ of Mandamus is hereby **DENIED**.

SO ORDERED.



ANGELA P. WHITE, JUDGE

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