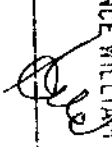


VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

REPUBLICAN PARTY OF VIRGINIA, et al.,)
)
Plaintiffs,)
)
v.)
)
PRINCE WILLIAM COUNTY ELECTORAL)
BOARD, et al.)
)
Defendants.)

Case No. CL 22008769-0

CIRCUIT COURT CLERKS OFFICE
 PRINCE WILLIAM COUNTY, VA

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DEFENDANTS PRINCE WILLIAM COUNTY ELECTORAL BOARD AND
ERIC OLSEN, GENERAL REGISTRAR'S
OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION AND
DEMURRER AND MOTION TO DISMISS COMPLAINT

Defendants Prince William County Electoral Board (the "Board") and Eric Olsen, General Registrar for Prince William County ("Registrar Olsen"), collectively the "defendants," hereby file their Opposition to the Motion for Temporary Injunction filed by the Republican Party of Virginia and Prince William County Republican Committee ("plaintiffs"), and defendants' Demurrer and Motion to Dismiss plaintiffs' Complaint, and state as follows:

I. INTRODUCTION AND BACKGROUND

Plaintiffs' Motion for Temporary Injunction focuses upon Virginia's statute relating to appointment of election officers, particularly the Board's designation of chief officers and assistant chief officers. Plaintiffs claim that the Board's designation of chief officers and assistant chief officers in certain voting precincts violates Va. Code § 24.2-115. Pursuant to that statute, the political parties were to "file its nominations with the secretary of the electoral board at least 10 days before February 1 each year." Va. Code § 24.2-115. However, plaintiffs did not file any

timely nominations. In fact, plaintiffs have not filed any nominations for approximately the last 20 years. On February 3, 2022, the Board appointed approximately 1800 election officers, but only about 1200 accepted the position. Accordingly, the Board needed to recruit more election officers. On September 9, 2022, the Board appointed more election officers. Thereafter, the Board sent out its list of Chiefs and Assistant Chiefs on September 29, 2022, about 5 weeks before the November 8, 2022 election. Nearly three weeks later, on October 18, 2022, the chair of the Prince William County Republican Committee sent a demand to the Board that certain people be assigned to particular precincts as chief or assistant chief. The very next day, October 19, 2022, plaintiffs filed this suit and their Motion for Temporary Injunction.

Plaintiffs' Motion for Temporary Injunction fails, as does their Complaint for declaratory and injunctive relief, for multiple reasons. To begin, plaintiffs lack standing to file this civil action.¹ Under Va. Code § 24.2-104.1, which was enacted by the General Assembly in 2021, only the Virginia Attorney General has authority to file *civil actions* (including actions for injunctive relief) for violation of any election law under Title 24.2, which includes the statute at issue. No private right of action is mentioned in Va. Code § 24.2-115. Furthermore, even if plaintiffs did have standing, they are not entitled to injunctive relief as they cannot meet all of the elements for such an extraordinary remedy, particularly since plaintiffs have no likelihood of prevailing on the merits.

¹ Additionally, plaintiff "Republican Party of Virginia" is actually reflected in the Virginia State Corporation Commission records as Republican Party of Virginia, Inc., a nonstock company incorporated in Virginia. Plaintiff "Prince William County Republican Committee" is not incorporated and claims that it is a "unit" of the "Republican Party of Virginia." See Complaint, ¶ 5. Accordingly, Prince William County Republican Committee is not a separate entity and not a proper party.

II. ARGUMENT

A. Plaintiffs lack standing.

Title 24.2 of the Virginia Code contains the Commonwealth's election laws. Virginia Code § 24.2-104.1, which is entitled "Civil actions by Attorney General," states:

A. Whenever the *Attorney General* has reasonable cause to believe that a violation of an election law has occurred and that the rights of any voter or group of voters have been affected by such violation, the Attorney General may commence a civil action in the appropriate circuit court for appropriate relief.

B. In such civil action, the court may:

1. Award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title, as is necessary to assure the full enjoyment of the rights granted by this title.

(Emphasis added).

Section 24.2-104.1 provides a civil cause of action for violation of Title 24.2, and vests the power to pursue such a civil action in the Virginia Attorney General.² There are multiple other Code sections within Title 24.2 that provide for a private cause of action by certain delineated people for violation of particular statute sections,³ but Va. Code § 24.2-115 is silent on that point.

² Another code section, Va. Code § 24.2-104 also provides the Attorney General with authority to enforce and prosecute violations of the election laws and to have the Commonwealth's Attorney assist in criminal matters.

³ For example, Va. Code § 24.2-706, regarding absentee voting, provides that injunctive relief may be sought in the circuit court by: "(i) any aggrieved voter, (ii) any candidate in an election district in whole or in part in the court's jurisdiction where a violation of this section has occurred, or is likely to occur, or (iii) the campaign committee or the appropriate district political party chairman of such candidate." This section further provides that violation is also a misdemeanor.

Virginia Code § 24.2-128, regarding provision of materials in another language, states that either the Attorney General or a qualified voter can file an action in the circuit court to compel provision of materials in a minority language.

Virginia Code § 24.2-130, regarding the process for at-large elections, states that, "Any voter who is a member of a protected class" shall be entitled to "initiate a cause of action in the circuit court of the county or city in which the locality is located" for violation of this section.

Virginia Code § 24.2-1005, regarding intimidation of voters, provides for a misdemeanor, but in 2021 the General Assembly also added a civil action for injunctive relief by the voter who has been intimidated or threatened.

The Supreme Court of Virginia has held that a Virginia court, “do[es] not infer a private right of action when the General Assembly expressly provides for a different method of judicial enforcement.” *Michael Fernandez, DDS, Ltd. v. Commissioner*, 298 Va. 616, 618, 842 S.E.2d 200, 202-203 (2020). “It simply is not enough that the plaintiff has ‘a personal stake in the outcome of the controversy,’ or that ‘the plaintiff’s rights will be affected by the disposition of the case.’ ” *Id.* (quoting *Cherrie v. Virginia Health Services, Inc.*, 292 Va. 309, 325, 787 S.E.2d 855, 858 (2016)).

Accordingly, there is no private civil cause of action for violation of Va. Code § 24.2-115, as any civil action for alleged violation rests in the hands of the Attorney General. As such, these plaintiffs, who are a nonstock corporation and one of its “units”, lack standing to file this lawsuit.

Moreover, plaintiffs lack standing under Supreme Court of Virginia precedent. In *Goldman v. Landside*, 262 Va. 364, 373, 552 S.E.2d 67, 72 (2001), the Court held that the plaintiffs did not have standing because they had not demonstrated, “a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large.” Plaintiffs claim an interest in “confidence in elections” and allowing *both* parties “to have a hand in the administration of the election.” *See* Plaintiffs’ Memorandum in Support of Motion, p. 4; Complaint, ¶ 45. That, however, is not an interest different from the public at large. Moreover, plaintiffs do not have any right to enforce the Board’s designation of chiefs and assistant chiefs – they only have the “opportunity” to nominate people as election officers. Va. Code § 24.2-115. They have no right to assign particular election officers to particular locations. *Id.*

B. Plaintiffs cannot meet all of the elements for a temporary injunction.

It is well-established that “the granting of an injunction is an extraordinary remedy.” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44, 53 (2008). There are

no Virginia Supreme Court cases that specify the exact elements that must be shown for an temporary injunction to issue, but the circuit courts have repeatedly used the Federal standard laid out in *Winter v. NRDC, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed. 2d 249 (2008). Under that standard, the plaintiff must clearly show all of the following: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Id.* at 19-20. “A court of equity will not issue an injunction, an extraordinary remedy, if the petitioner has an adequate remedy at law for the redress of his injury.” *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983).

Furthermore, it has long been held in the Commonwealth that a plaintiff seeking equity must do equity and cannot sleep on its rights.

One of the maxims of equity is that he who seeks equity must do equity. Another maxim is that equity aids only the vigilant. It will not assist one who has slept too long on his rights. A court of equity is never active in relief which is against conscience or public convenience. It has always refused to give its aid to stale demands where the party has slept upon his rights and acquiesced in adverse use thereof to the prejudice of another for a great length of time. ‘Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced.’ *Puckett v. Jesse*, 195 Va. 919, 930, 81 S.E.2d 425, 430 (1954) (quoting *Doggett v. Helm*, 17 Gratt. (58 Va.) 96).

Plaintiffs did not follow the procedures in the very code section they are attempting to use here, and they did not timely nominate election officers this year, or for the last approximately 20 years. For many years, the Republican Party has abdicated any responsibility for the nomination of election officers. The balance of equities does not tip in favor of plaintiffs, but rather in favor of defendants.

Plaintiffs are not likely to prevail on the merits. Plaintiffs are seeking to “designate” certain people as chiefs or assistant chiefs in certain precincts. However, the code section they are citing

actually gives the Board wide discretion in staffing the election. Throughout the code section at issue, the word “practicable” is repeatedly used. Va. Code § 24.2-115. With respect to the paragraph of Va. Code § 24.2-115 that concerns the Board’s designation of chiefs and assistant chiefs, the Code states that each of the political parties shall, “have the opportunity to provide additional nominations” for chief or assistant chief election officers. *Id.* (emphasis added). Nowhere does the Code state that the political parties can staff certain polling places with certain people to serve as chief or assistant chief. The parties are only given the “opportunity” to nominate people for positions. Again, this Code section is full of discretion for the Board to do what is “practicable” in staffing an election; it does not provide the political parties with a final decision on election officers or on chiefs or assistant chiefs. Furthermore, § 24.2-115 ultimately states that the Registrar is to ensure the election is staffed with enough people. There are certain guidelines that the Code section may provide, but there is always the statement that the Board should do whatever is “practicable” under the circumstances with each guideline. If the General Assembly had intended to prohibit the Board from exercising discretion, and instead to impose some rigid formula, it could have written the statute in such a way. The General Assembly granted discretion to the Board and has provided the Board with the right to do whatever is “practicable” to achieve staffing of the election.

Moreover, the Attorney General opinion that plaintiffs cite,⁴ which concerns appointment of election officers in general and not the designation of chiefs and assistant chiefs, again points to the discretion that the Board has when staffing an election. The opinion provides that the Board will be guided by what is “practicable” or “feasible” even where there is a “shall” in Va. Code

⁴ 2006 Va. Att’y Gen. Op. No. 06-058 (Sept 15, 2006).

§24.2-115. The Board has wide discretion, and considering that wide discretion, plaintiffs are unlikely to succeed on the merits.

Additionally, there is no irreparable injury. Plaintiffs do not take issue with any candidate seeking votes in this November 8, 2022 election; rather, they take issue with the assignment of people as chief or assistant chief to particular polling places who have already been appointed to staff the polling places to facilitate the voting process in the upcoming election. The political parties have no right to assign particular people to particular precincts.⁵ The Board has the power to assign people to certain locations exercising its discretion under Va. Code § 24.2-115. Plaintiffs seem to argue that the political party of the staff will make some difference in the election. However, politics are not a part of the actual polling places and election officers may not participate in influencing anyone's vote at the polling places.

Politics are not to be discussed at the polling place, and plaintiffs' attempt to argue that who serves as chief or assistant chief would have some impact on the election is implying that those people would not act in accordance with the law and would draw politics into the polling places.

Lastly, an injunction is not in the public interest. Plaintiffs' attempt at the 11th hour to change the staffing for the polling places will clearly lead to confusion and will likely lead to certain polling places not being staffed with enough people. In fact, the Chair of the Prince William County Republican Committee is already creating confusion – the Chair has called election officers who have been assigned and has told them to move to a different location. These people have then contacted the Registrar's office in confusion because they have never gotten directions from the political parties before, nor should they. Additionally, if a few people are

⁵ In fact, the Chair of the Prince William Republican Committee has specifically acknowledged that he has no right to assign people to particular locations. (See September 19, 2022 email from chairman to Registrar Olsen).

changed in assignments, that creates a domino effect on the entire process. It is a logistical feat to have over a hundred polling places staffed with a sufficient number of qualified individuals. That process cannot be changed at the last minute without causing much confusion and creating serious problems for the administration of the election.

III. CONCLUSION

WHEREFORE, plaintiffs' Motion for Temporary Injunction should be denied, and their Complaint for an Injunction and Declaratory Judgment should be dismissed with prejudice.

PRINCE WILLIAM COUNTY ELECTORAL BOARD and ERIC OLSEN

By:

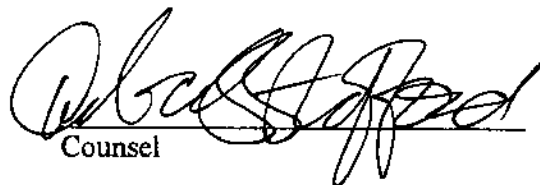

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by first-class mail, postage prepaid, and email on October 31, 2022 to:

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