Court of Appeals, State of Michigan

ORDER

Amy Ronayne Krause
Presiding Judge

Stephen L. Borrello

Michael F. Gadola
Judges

Philip M. O'Halloran MD v Secretary of State
Richard DeVisser v Secretary of State

Docket Nos. 363503; 363505

LC Nos. 22-000162-MZ; 22-000164-MZ

The motions for immediate consideration filed by defendants and amici are GRANTED.

The motion to waive the requirements of MCR 7.209 is GRANTED.

The motions to file amici curiae briefs are GRANTED and the briefs provided with the motions are accepted.

The motion for stay pending appeal is DENIED.

Presiding Judge

Gadola, J., concurs and states: Our dissenting colleague offers a somewhat lengthy analysis of the contested provisions of the Secretary of State's Election Challenger Manual. That analysis fails, in my judgment, to grapple with the fundamental legal issue involved in this case. That is, whether the contested provisions are "rules" within the meaning of the Administrative Procedures Act and must, therefore, be promulgated. For all the reasons stated in the well researched, cogent, and thorough opinion of the Court of Claims judge, I think it inescapable that those provisions are rules. And because they have not been promulgated, they are incapable of enforcement or application in the upcoming election and must, as ordered by the trial court, be modified in accordance with the court's order.

The relief the trial court ordered was narrow in scope in comparison to the relief plaintiff-appellees sought. It further bears noting that the issue before us does not involve the wisdom of the Secretary's instructions. The Secretary has had two years since the last General Election either to seek changes to the Election Law consistent with what appeared in the Manual in May of this year, or to promulgate those instructions as rules. She did not. She should not therefore be heard to complain that the trial court's order has somehow imperiled the orderly conduct of the impending election.

Ronayne Krause, P.J., dissents and states: I respectfully dissent from the Court's decision not to grant a stay pending appeal, because I conclude that defendants have a high likelihood of success on the merits, and defendants and the public will suffer grave and irreparable harm whereas plaintiffs will not.

The Court of Claims granted relief to plaintiffs regarding five specific challenges to the May 2022 "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" Manual promulgated by the Secretary of State. Four of those challenges are at issue in this appeal. I will address each in turn.

1. Credential form requirement

First, the May 2022 Manual requires a unified form for credentialing election challengers. The Court of Claims recognized that the Secretary of State may do so in principle, and it noted that the Secretary of State may "prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations" under MCL 168.31(1)(e). Notably, this power is distinct from the Secretary of State's rulemaking authority under the Administrative Procedures Act (APA), MCL 24.201 *et seq*., which is set forth in MCL 168.31(1)(a). Pursuant to MCL 168.732,

> Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

Therefore, pursuant to statute: "authority" to be a poll challenger (1) must be in writing, (2) must bear the printed name of the challenger, (3) must bear the challenger's assigned precinct number, and (4) must be signed by the chairman or presiding officer of some kind of credentialing organization.

As it happens, the "Michigan Challenger Credential Cards" created by the Secretary of State require (1) the name of the challenger, (2) the name of the credentialing organization, (3) the date of the election for which the challenger is credentialed, (4) the signature of the chairman or presiding officer of the credentialing organization, and (5) the precinct number. Although the date of the election is not specified in MCL 168.732, that statute does require compliance with preceding sections, and a fair reading of MCL 168.730(1), referring to designation of challengers "at *an* election" (emphasis added), strongly suggests that the date of the election is actually a requirement. Therefore, the credential cards *exactly match* the requirements of the statute.

Because the credential cards are entirely consistent with and conformant to MCL 168.732, they should be deemed within the Secretary of State's powers to act outside the APA under MCL 168.31(1)(e). The Secretary of State has a high likelihood of succeeding on the merits in this issue.

2. Communication only through a challenger liaison

The May 2020 Manual specifies that polling places or absentee ballot processing places should have a "challenger liaison," by default the precinct chairperson unless otherwise specified, and challengers must not communicate with election inspectors other than the challenger liaison unless otherwise instructed. The Court of Claims is correct that this does not appear to be explicitly set forth by statute.

However, the Secretary of State correctly observes that, pursuant to MCL 168.31(1)(c), it is empowered, again distinct from its rulemaking authority set forth under MCL 168.31(1)(a), to promulgate a manual that, *inter alia*, includes specific instructions on... procedures and forms for processing challenges." The Court of Claims correctly observes that, pursuant to MCL 168.733(1)(e), challengers may "bring to an election inspector's attention" a variety of concerns. However, it is worth noting that MCL 168.729 refers to swearing a challenged voter "by 1 of the inspectors" and questioning a challenged voter by "any inspector or qualified elector at the poll." It is therefore not clear that "an election inspector" necessarily means "*any* election inspector." The Legislature could have said "any" and, elsewhere within the same statutory scheme, it explicitly did so.

Providing a challenger liaison therefore does not appear contrary to any statute, so long as such a liaison is actually available, and it appears to be within the Secretary of State's authority under a statutory provision distinct from its rulemaking authority. The Secretary of State therefore has a high likelihood of success on the merits in this issue.

3. Prohibition of electronic devices at absent voter counting boards (AVCBs)

The October 2020 Manual expressly forbade the use of "all electronic devices" at AVCBs. At a minimum, challenging a ban on the use of electronics would clearly be barred by laches at this point, irrespective of whether such a ban could be considered a "rule" that otherwise should have been promulgated under the APA pursuant to MCL 168.31(1)(a). Furthermore, it appears that nobody is challenging whether the Secretary of State may prohibit the use of electronics at AVCBs. This is significant because there does not appear to be any statutory authority explicitly prohibiting the use of electronics at AVCBs, either. Prohibiting possession of electronics would appear to be at most a minor logical extrapolation of prohibiting the use of electronics.

In other words, if the Secretary of State may not prohibit possession of electronics at AVCBs, then it stands to reason that it also may not prohibit the use of electronics at AVCBs, a position that nobody seems to be inclined to take. Furthermore, as the Secretary of State notes, there does not appear to be any statutory grant of permission for challenges to possess electronics at AVCBs. The Secretary of State therefore has a high likelihood of success on the merits in this issue.

4. Impermissible challenges

The May 2022 Manual defines "impermissible challenges" as "challenges that are made on improper grounds," specifically being:

- Challenges made to something other than a voter's eligibility or an election process;
- Challenges made without a sufficient basis, as explained below; and
- Challenges made for a prohibited reason.

The Court of Claims noted that no statute defines or references "permissible" or "impermissible" challenges. However, given that the May 2022 Manual goes on to thoroughly explain what does and does not constitute a permissible or impermissible challenge, that is essentially irrelevant.

Pursuant to MCL 168.727(1),

> An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book. A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct. An election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot.

Pursuant to MCL 168.727(2)(b), an election inspector is required to, *inter alia*, make a written report "upon a challenge being made under subsection (1)." Pursuant to MCL 168.727(3), "a challenger shall not make a challenge indiscriminately and without good cause," and doing so "for the purpose of annoying or delaying voters" is a misdemeanor. The statute therefore clearly explains that only a limited range of challenges must be recorded, all amounting to eligibility to vote, a problem with the applicant's name, or improprieties involving absentee voting. Therefore, the first bullet-point summarizing an impermissible challenge is entirely consistent with MCL 168.727.

The May 2022 Manual explains there are a limited number of grounds for challenging a voter's eligibility. The list on pages 11-12 appears to mirror MCL 168.492 for qualifications to be an elector, so it necessarily stands to reason that no other basis for challenging a person's eligibility to vote *could* be permissible. The fact that a challenger must explain why the challenger believes the voter is ineligible is perfectly consistent with MCL 168.727(3). The enumerated list of reasons that are not permitted on page 12 is largely consistent with the prohibition against challenges based on, say, dress or ethnicity on page 8 of the October 2020 Manual, and it is simply a logical extrapolation obviously for purposes of guidance. In other words, this is nothing more than a procedure and form for processing challenges under MCL 168.31(1)(c). Strictly speaking, MCL 168.727(2)(b) would seem to require *all* challenges made under MCL 168.727(1) to be recorded, but MCL 168.727(3) is clearly intended to be a limitation on such challenges. The Court of Claims erred by focusing on the use of talismanic words instead of substance.

The slightly closer question is whether a challenger may be ejected for "repeated impermissible challenges." Pursuant to MCL 168.733(3), "any evidence of ... disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board." It is noteworthy that the list of impermissible challenges mostly involves blatantly discriminatory challenges, such as to race, manner of dress, need for assistance, support or opposition for a candidate, etc; it also includes being unable to provide any basis for a challenge. Clearly, therefore, an "impermissible" challenge is something a great deal more than merely a challenge that turns out to be unwarranted. "Any evidence" is quite a low standard, and "disorderly conduct" would seem to include blatantly discriminatory or disruptive challenges, or challenges prohibited by MCL 168.727(3). Ejecting challengers for repeatedly attempting to make challenges that are blatantly improper would seem consistent with MCL 168.733(3).

Because the discussion of "permissible" and "impermissible" challenges in the May 2022 Manual is clearly explanatory rather than setting forth any novel requirements not already established by statute, it is within the Secretary of State's authority under MCL 168.31(1)(b) to "advise and direct local election officials as to the proper methods of conducting elections." Again, that authority is distinct from its

rulemaking authority under MCL 168.31(1)(a). Therefore, the Secretary of State has a high likelihood of success on the merits in this issue.

5. Harm to the parties and to the public

It does not seem outlandish to conclude that the Secretary of State is *capable of* issuing an updated Manual in advance of the election, even though the election is now only a week away. Although the presumption is arguably questionable, it is at least conceivable that all voting locations are internet-accessible and have staff that are computer-savvy, so the Secretary of State could simply upload a new version of the Manual to its website. However, promulgating guidance and actually communicating it, much less ensuring that all election workers are trained and cognizant of the new guidance, are entirely different. Furthermore, that analysis misses the point that the May 2022 Manual exists for the protection of the election process itself. It is extremely short-sighted and narrow-minded to ignore the ramifications, which include inhibiting the Secretary of State from ensuring that elections are carried out in an orderly and fair manner. The Court of Claims even conceded that propriety of the Secretary of State's goals and that the challenged directives were highly likely to be helpful. It is *extremely* doubtful that plaintiffs will suffer any harm from being prohibited from being disruptive or bringing their phones into AVCBs, and the credential form requirement imposes nothing new. In contrast, the Secretary of State *and the public* will, by definition, be irreparably harmed by an election process that is disruptive.

For the above reasons, I would grant a stay pursuant to MCR 7.209(D) pending appeal.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 3, 2022
Date

Chief Clerk