

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-010995

09/22/2015

HONORABLE DAVID B. GASS

CLERK OF THE COURT
L. Stogsdill
Deputy

HENRY STEVEN JOHNSON

HENRY STEVEN JOHNSON
726 N CAMBRIDGE ST
GILBERT AZ 85233

v.

DON COVEY, et al.

COLLEEN CONNOR

JAMES DRISCOLL-MACEACHRON
DAVID R SCHWARTZ

HEARING

Prior to the commencement of the Hearing, Defendants' Exhibit 1 was marked for identification.

Courtroom 514- ECB

2:58 p.m. This is the time set for an Evidentiary Hearing. Plaintiff appears on his own behalf. Defendants, Don Covey, Helen Purcell, Denny Barney, Steve Chucuri, Andy Kunesek, Clint Hickman and Steve Gallardo are represented by counsel, Colleen Connor and Steven Goodrich. Defendants Helen Purcell and Darryl Colvin are present. Defendants Lily Tram, Daryl Colvin, Charles Santa Cruz, Jill Humphreys and Julie Smith as Board Members of the Gilbert Unified School District, are represented by counsel, Brad Gardner (appearing in place of David R. Schwartz.)

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

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Plaintiff's case:

Staci Griffin-Burke is sworn and testifies.

Plaintiff's Exhibit 2 (encompassing Plaintiff's #1-10 pursuant to the Court's order) is marked for identification and received in evidence.

Defendants' Exhibit 1 is received in evidence.

The witness is excused.

Darryl Colvin is sworn and testifies.

The witness is excused.

Plaintiff rests.

Defendants' case:

Hope Olgin is sworn and testifies.

The witness is excused.

Karen Osborne is sworn and testifies.

The witness is excused.

Defendants' rest.

Closing statements are presented.

For the reasons stated on the record,

IT IS ORDERED denying Plaintiff's request for injunctive relief.

4:05 p.m. Hearing concludes.

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LATER:

Ruling

Procedural and Factual Background

On September 17, 2015, Plaintiff Henry Steven Johnson filed an Application for Permanent Injunction and Order to Show Cause and Special Action to Challenge Factual Assertions Contained in the Voter Information Pamphlet and Request Factual Correction As Required by A.R.S. §15-481(A)(9). On September 21, 2015, the Court held a return hearing on Mr. Johnson's Application. Also on September 21, 2015, Defendant Maricopa County filed Maricopa County's Motion to Dismiss. The Court held a hearing on September 22, 2015 on both Mr. Johnson's Application and the State's Motion to Dismiss and has considered the evidence presented at that hearing.

Mr. Johnson challenges the factual accuracy of a single sentence in one argument in support of a budget override in the Voter Informational Pamphlet for the Gilbert Unified School District No. 41 of Maricopa County for the all mail ballot election on November 3, 2015 (The Pamphlet). The sentence reads: "However, with only one 1.6% raise and no movement on the salary schedule for experience in seven years it's no wonder many teachers are leaving Gilbert and moving to other districts." *See* Pamphlet at page 26. The argument also appears in Spanish at page 60.

Mr. Johnson challenges the accuracy of the statement, saying that the teachers have received more than one raise in the most recent seven years. In his Application for Permanent Injunction, Mr. Johnson alleges that Mr. Plumb's statement is inaccurate or misleading because teachers have received the following during the past seven years:

- 2015: 1.6% permanent raise for all staff, including teachers.
- 2014: 1.4% raise permanent raise for all staff, including teachers.
- 2013: 3% raise permanent raise for teachers.
- 2012: 2% one-time stipend to all staff, not just teachers.
- 2011: .5% one-time stipend.

See Affidavit of Staci K. Burk (attached to Application for Permanent Injunction) and her testimony. During the hearing, Ms. Burk testified that there may have been raises for other staff as well. Mr. Johnson, however, does not explain if and how the above impacted the "salary

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schedule for experience” over the past seven years. Ms. Burk also conceded that the teachers had received only a single 1.6% raise.

As for timing, Ms. Burk was engaged in all the communications regarding the Pamphlet language up to and including September 14, 2015. When Ms. Burk spoke to the elections staff on September 14, 2015, Ms. Burk told the staff that she expected an injunction would be filed. She explained that she had considered filing it, but then she spoke to Mr. Johnson. She did not speak to Mr. Johnson about her concerns until Monday, September 14, 2015. Neither Ms. Burk nor Mr. Johnson explained why Mr. Johnson filed instead of Ms. Burk. Mr. Johnson brings his election challenge under A.R.S. §15-481(A)(9). In relevant part, subsection (A)(9) provides:

The county school superintendent shall review all factual statements contained in the written arguments and correct any inaccurate statements of fact. The superintendent shall not review and correct any portion of the written arguments that are identified as statements of the author's opinion. The county school superintendent shall make the written arguments available to the public as provided in title 39, chapter 1, article 2. A deadline for submitting arguments to be included in the informational report shall be set by the county school superintendent.

As discussed in the declaration attached to the Defendants’ Motion to Dismiss, the elections department had been working on the Pamphlet. On September 1, 2015, the elections department received signoff of the Pamphlet from the school district. On September 4, 2015, the elections department approved the Pamphlet. **The Pamphlet was posted on the website on September 10, 2015.** 56,515 Pamphlets were printed. The printing was completed by the time Ms. Burk called the elections department on September 14, 2015.

The Pamphlet must be mailed on September 29, 2015. Reprinting the Pamphlet cannot be completed until October 7, 2017. If the Court were to order reprinting, the election could not proceed as required by statute. Early voting also begins on October 7, 2015.

The election has begun. The ballots under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) were distributed as required by statute on September 17, 2015, the same day that Mr. Johnson filed. A total of forty-six UOCAVA voters have been sent their ballots, forty by email and six by regular United States Postal Service. With the UOCAVA ballot, the voter was directed to an online version of the Pamphlet.

Defendants move to dismiss the Complaint on several grounds:

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- Mr. Johnson’s claim is barred under the doctrine of laches.
- Mr. Johnson is not able to establish entitlement to a preliminary injunction.
- The author of the argument, Mr. Justin Plumb, is a necessary and indispensable party who has not been joined in this matter.

Analysis

Mr. Johnson’s claim is barred under the doctrine of laches and also is moot.

Laches

“In election matters, time is of the essence because disputes concerning election and petition issues must be initiated and resolved, allowing time for the preparation and printing of [publicity pamphlets and] absentee voting ballots.” See *McLaughlin v. Bennett*, 225 Ariz. 351, 353, 238 P.3d 619, 621 (2010) (quoting *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15, 973 P.2d 1166, 1169 (1998)). For that reason, election cases often involve laches defenses. See *id.* at 412–13, ¶¶ 15–17, 973 P.2d at 1169–70 (citing *Mathieu v. Mahoney*, 174 Ariz. 456, 459, 851 P.2d 81, 84 (1993)) At the heart of the timeliness concern in election cases is the need to initiate and resolve the matters “in time to prepare the ballots for absentee voting to avoid rendering an action moot.” See *Mathieu*, 174 Ariz. at 459, 851 P.2d at 84.

If a delay in bringing an action is unreasonable and also produces an unjust result or prejudices the parties under the totality of the circumstances, laches generally will bar a claim. See *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 6, 13 P.3d 1198, 1200 (2000); *Harris*, 193 Ariz. at 410 n. 2, ¶ 2, 973 P.2d at 1167 n. 2 (1998) (citing *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10, 144 P.3d 510, 511 (2006)). “The prejudice . . . may be demonstrated by showing injury or a change in position as a result of the delay. See *League of Arizona Cities & Towns v. Martin*, 219 Ariz. 556, 557-62, 201 P.3d 517, 518-23 (2009) (internal citations omitted).

Here, the Defendants have established prejudice. They have changed their position significantly as a result of the delay. The Defendants have printed more than 55,000 Pamphlets, which are ready to be distributed. They are not in a position to reprint the Pamphlets with any court-ordered changes and still distribute the Pamphlets to the voters on the schedule mandated by statute. In addition, the election has begun. The ballots under UOCAVA have been distributed.

The issue then is whether Mr. Johnson’s delay was unreasonable. To determine whether Mr. Johnson’s delay was unreasonable, the Court must examine Mr. Johnson’s reasons for the

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delay. *See Harris*, 193 Ariz. at 412, ¶ 16, 973 P.2d at 1169. His reasons may include the extent to which he knew the basis for his challenge beforehand. *See id.* Here, at the returning hearing on his petition, Mr. Johnson said he waited because he believed that the county school superintendent would make the changes that someone else (Ms. Staci Burk) had requested. However, Mr. Johnson himself did not seek the changes to the Pamphlet until he filed this action. To the extent that the Defendants were aware of Ms. Burk's concerns before printing the Pamphlets, Mr. Johnson did not give them timely notice of his concerns even if he shares the same concerns as Ms. Burk.

Further, Mr. Johnson did not act timely upon learning that the county school superintendent was not going to make the changes. The Pamphlet was posted online on September 10, 2015. Ms. Burk's requested changes were not in the online posting. Mr. Johnson did not file this action until a week later, and more than three days after Ms. Burk had been told that her requested changes would not be made. Though Mr. Johnson filed within three days, at that point, any delay was unreasonable.

In few types of litigation will a one or two week delay be considered unreasonable, however, election cases are different. The very tight time constraints, the federal and state laws governing elections, and the time needed to print and distribute election materials mean every second counts. As a result, Mr. Johnson's failure to bring this action earlier is unreasonable.

Mootness

Mr. Johnson's case became moot upon the beginning of the election and the printing and publication of the Pamphlet. Timeliness is a critical concern in election cases because of the need to initiate and resolve the matters "in time to prepare the ballots for absentee voting to avoid rendering an action moot." *See Mathieu*, 174 Ariz. at 459, 851 P.2d at 84. "A case becomes moot when an event occurs which would cause the outcome . . . to have no practical effect on the parties." *Sedona Private Prop. Owners Ass'n v. City of Sedona*, 192 Ariz. 126, 127, ¶ 5, 961 P.2d 1074, 1075 (App. 1998).

Here, the prejudice to the Defendants that supports laches also establishes that that the issue is moot. The ballots and the Pamphlet have been printed. UOCAVA ballots have been distributed. New pamphlets cannot be printed in time to meet the statutory election deadlines. If this Court were to deny Mr. Johnson the relief he seeks, he has no time to seek appellate review, and the same is true for the Defendants if this Court were to grant Mr. Johnson the relief he seeks.

Further, this Court will consider a moot issue only if the issue is of "great public importance or [is] capable of repetition yet evading review." *See Slade v. Schneider*, 212 Ariz.

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176, 179, ¶ 15, 129 P.3d 465, 468 (App.2006). Those exceptions do not apply here. Mr. Johnson seeks to have one sentence in one argument changed. It is not an issue of great public importance and it is not capable of repetition without review.

Mr. Johnson cannot establish entitlement to a preliminary injunction.

The language that Mr. Johnson seeks to change is subject to several interpretations, as are the facts that he wishes to add to the language. For example:

- The teachers did receive only one 1.6% raise in the past 7 years. They may have received other raises in other amounts, but they received no other 1.6% raise.
- Mr. Johnson did not establish that a stipends or permanent raise for all staff, including teachers, constituted “**movement on the salary schedule for experience**” **during the last seven years.**
- Mr. Johnson did not establish that a one-time stipend constitutes a raise.

As a result, Mr. Johnson cannot establish a strong likelihood of success on the merits. For the same reasons, Mr. Johnson cannot establish irreparable injury if this Court denies relief because he cannot establish that a harm will occur. The balance of the hardships, if this Court were to grant Mr. Johnson relief, falls on the Defendants and the public because of the adverse impact of delaying the distribution of important election materials. Additionally, public policy favors having the elections proceed timely.

As a final matter, Mr. Johnson suggested an alternative to reprinting the Pamphlet, which would be to prepare an insert. Such a remedy is not practical, particularly since it would highlight a single statement over all others.

Mr. Plumb is not a necessary and indispensable party.

Whether a party is indispensable or not is a question of law. *See Gerow v. Covill*, 192 Ariz. 9, 14-15, 960 P.2d 55, 60-61 (Ct. App. 1998), *as amended* (Aug. 26, 1998). Before addressing indispensability, the court must consider whether the party is necessary to the action. *See id.* “A necessary party is: (1) one in whose absence complete relief is not possible among those already parties, or (2) one whose interests would be impaired or impeded by a judgment, or (3) one whose absence would leave those already parties subject to multiple or inconsistent obligations. *See id.* (citing Ariz. R. Civ. P. 19(a)). The court also must consider “possible resulting prejudice and adequacy of remedy before determining indispensability.” *See id.*

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Here, the Court can grant complete relief in Mr. Plumb's absence. The Court could enter the necessary orders to make the requested changes to the Pamphlet whether Mr. Plumb appears or not. Mr. Plumb's interests would not be impaired or impeded if only a factual correction were made. Additionally, Mr. Plumb's absence does not subject the defendants to a risk of inconsistent obligations

The Court shares Defendants' concerns about Mr. Plumb's First Amendment rights, but those rights do not necessarily result in him being a necessary and indispensable party under Rule 19.

IT IS THEREFORE ORDERED for the foregoing reasons granting Maricopa County's Motion to Dismiss, filed September 21, 2015.

Dated: September 22, 2015

/s/ Honorable David B. Gass
HONORABLE DAVID B. GASS
JUDICIAL OFFICER OF THE SUPERIOR COURT