

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

Derek Hamilton et al.,	:	Case No. 1:08-cv-02546
Plaintiffs,	:	
vs.	:	Judge Donald Nugent
Ashland County Board of Elections, et al.,	:	
Defendants.	:	

**Plaintiffs’ Reply to
Defendant Board of Elections’ Response To
Plaintiffs’ Motion For Temporary Restraining Order**

This case implicates Plaintiffs’ fundamental First Amendment right to vote. Plaintiffs’ participation in the electoral process is especially important and in society’s best interest because they will eventually return to the community after release from confinement. Studies have shown that former offenders who vote are less likely to commit crime and more likely to become productive members of the community. Thus, it is important not only for Plaintiffs, but also for our community, that their First Amendment voting rights not be infringed. In this Reply, Plaintiffs’ will clarify five issues raised in the Board of Elections Response (Doc. 8): (1) the circumstances surrounding Plaintiffs’ registration and their relationship with the Ohio Justice & Policy Center, (2) the clear due process violation by the Board, (3) Ohio’s voter residency requirements, (4) evidence supporting Plaintiffs’ equal protection claim, and (5) the risk of substantial harm to others and the public interest implicated in granting or denying the TRO.

I. Clarification of Facts Surrounding Registration Process

The Ohio Justice & Policy Center (“OJPC”) is a non-profit, non-partisan, public interest law firm that, among other things, works to help offenders successfully re-enter the community. OJPC provides a range of services—legal and non-legal—to accomplish its mission. Protecting the right of ex-offenders to vote is an important component of OJPC’s non-legal advocacy.

Before the October 6, 2008 registration deadline expired, OJPC worked with DYS institutions to register eligible youth to vote. OJPC arranged for staff or volunteers to meet with residents at six DYS facilities who met the qualifications to vote and were interested in registering to vote. OJPC’s efforts were strictly non-partisan and not on behalf of any particular candidate or cause. As part of this voter registration drive, an OJPC volunteer registered Plaintiffs to vote.

Before conducting the voter registration drive, OJPC called the Secretary of State’s Office to ascertain whether the youth should register in the county of their confinement. The Secretary of State’s Office advised OJPC that the youngsters should register in the county of confinement. *See* Affidavit of Angelina Jackson, attached as Exhibit A (a recording of the voicemail where these instructions were given will also be provided at the TRO hearing on Friday, October 31, 2008). Based on the Secretary of State’s instructions, OJPC did not anticipate that any problems would arise.

On October 24, 2008, the Ashland County Defendants held a challenge hearing that Plaintiffs were unable to attend because of their confinement. Though Defendants allege that OJPC could have sought a continuance on Plaintiffs’ behalf, OJPC was not in a position to do that because no attorney-client relationship existed at that point. It was not

until Sunday October 26, 2008, that undersigned counsel was able to travel from Cincinnati to Perrysville, Ohio, where the Mohican DYS facility is located, to meet with Plaintiffs to ascertain whether they desired representation. Most importantly, the Plaintiffs in this case are the 16 residents of the Mohican *not* OJPC; thus, all of the Board's attempts to find fault with OJPC's efforts to register these voters, before OJPC became their counsel of record, are misplaced and irrelevant.

Through no fault of their own, Plaintiffs, all of whom lawfully and timely registered to vote, will be denied to vote in this election unless this Court intervenes to protect Plaintiffs' Due Process, Equal Protection, and First Amendment rights.

II. Due Process Claim

Before interpreting Ohio voter residency requirements, this Court must first address the flagrant violation of Plaintiffs' rights under the Due Process Clause. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Board argues that Plaintiffs are unlikely to succeed on the merits of their due process claim by asserting that people confined to state custody have no absolute right to attend civil proceedings in person. While a prisoner may not have a due process right to attend civil court proceedings that the prisoner initiates, *see In re Warden of the Wisconsin State Prison v. Zajackowski*, 541 F.2d 177, 180 (1976), Plaintiffs certainly had a due process right to be heard in a proceeding that could (and ultimately did) deprive them of their right to vote. Here, however, Plaintiffs were provided with no opportunity whatsoever to be heard, despite the fact that the interest at stake is one of the most fundamental constitutional rights.

The actions of Ashland County Board of Elections in this case unlawfully deprived Plaintiffs of their fundamental voting rights. Directive 2008-79, which Defendants reference, recognizes that sending notice three days prior to a scheduled hearing may not be “constitutionally sufficient notice.” In this case, the Board of Elections placed all of the letters to each individual Plaintiff in one envelope addressed to the “Mohican Youth Center” bearing a first class postage stamp dated Sunday, October 19, 2008. See Affidavit of Karen Wood, attached as Exhibit B. Since United States mail service is not available on Sunday, this letter could not have been picked up by the postal service before Monday, October 20, 2008. The Mohican facility received the envelope on October 23, 2008 and distributed the letters to Plaintiffs that same day. *See Wood Aff.* The fact that the notice did not arrive until the day before the hearing clearly abridged the Plaintiff’s constitutional rights by failing to provide Plaintiffs with a “meaningful opportunity” to be heard. Further, the notice was untimely in light of the fact that Plaintiffs are confined to a secure facility, they depend on the facility to distribute their mail, and they require the facility’s assistance in attending the hearing or obtaining a representative to attend on their behalf. The Board was surely aware of these factors when they received the challenge. Additionally, Plaintiffs’ inability to attend the hearing resulted in the Board reaching a decision without hearing argument regarding R.C. 3503.04, which provides that Plaintiffs are residents of Ashland County for voting purposes. The fact that the Board reached its decision without full consideration of this relevant statute further demonstrates that this hearing did not provide Plaintiffs with a meaningful opportunity to be heard.

Defendants also argue that institutional security risks weighed against conveying Plaintiffs for the hearing. This argument ignores the fact that Plaintiffs were not provided

with adequate, timely notice and were thereby deprived of an opportunity to be heard, whether in person, through a representative, or in any other manner. Moreover, the case law cited by Defendants provides that deference to an institution's interest in security and the economical administration of custody is relevant when the *institution's* decision whether to transport an inmate is at issue. *See Zajackowski*, supra. That is, the law grants this deference to the Department of Youth Services or the Mohican Juvenile Correctional Facility, not the Ashland County Board of Elections. There is nothing in the record to suggest that DYS or Mohican would have refused to convey Plaintiffs for a hearing for security or administrative reasons. (*See* Doc. 8 at 10.) As the Board's own affidavits attest, the reason for not bringing the youth to the hearing was because DYS was not able to secure a court order for that purpose in time, not because of any concerns about security. (*See* Doc. 8-2 at 14 [Exh. D, Donatini Aff.]

III. Ohio Voter Residency Requirements

In interpreting Ohio voting law, the Ohio Supreme Court has made clear that the voter wishing to exercise his rights should receive the benefit of the doubt: "The exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning." *Kyser v. Board of Elections of Cuyahoga County*, 36 Ohio St.2d 17, 23, 303 N.E.2d 77, 81 (1973). In public statements, counsel for the Board has expressed doubt as to what the various voter residency statutes mean: "Rogers said the law is not clear when it comes to the residency of youths in correctional facilities and where they should vote.... 'We need somebody to tell us where they should vote,' Rogers said." Rachel Dissell, *Ashland County elections board sued over incarcerated youths' voter registrations*,

Cleveland Plain Dealer, Oct. 29, 2008, available at <http://www.cleveland.com/news/plaindealer/index.ssf?/base/news/1225269198317840.xml&coll=2> (and attached as Exhibit C). Because the Board is in doubt as to the precise meaning of these statutes, that doubt should be construed in favor of Plaintiffs and their fundamental right to vote.

Ohio's voter registration laws are "reasonably susceptible" to a meaning that allows Plaintiffs to exercise their right to vote in Ashland County. The Board makes three critical errors in interpreting O.R.C. § 3503.04, the exception for inmate of public and private institutions: (1) They misinterpret the phrase "qualified as to age and residence within the county;" (2) they misconstrue the definition of "inmate;" and (3) they incorrectly define "temporary treatment."

A. The age and residency qualifications of an elector are set forth in the Constitution, O.R.C. § 3503.07, and O.R.C. § 3503.01.

To become a qualified elector in Ohio, a person must have the necessary qualifications to be entitled to vote. R. C. § 3501.01(N). Section 1, Article V of the Ohio Constitution contains the four qualifications required of persons who wish to vote. An elector must: 1) be a citizen of the United States; 2) have attained the age of 18 years; 3) have resided in the state, county, township, or ward, such time as may be provided by law; and 4) have been registered to vote for 30 days immediately preceding the election at which the citizen offers to vote. *Id.* Thus a person is a qualified elector if he has resided in the state, county, township, or ward for 30 days prior to the election. *See also* R. C. 3503.07 (each person who will be eighteen or more on the November election date, is a citizen and "continues to reside in the precinct until the next election, will at that time have fulfilled all

the requirements as to length of residency to qualify him as an elector”); R.C. 3503.01(A)(an 18 year old who has registered 30 days before the election and “has been a resident of the state thirty days immediately preceding the election... has the qualifications of an elector....”).

To be “qualified as to ...residence within the county” one must have resided in the county for 30 days. Thus all of the plaintiffs were qualified electors when they registered to vote because they will have resided at Mohican for at least thirty days before the November 4th election.

Defendants claim that “otherwise qualified as to age and residence within the county” refers to O.R.C. § 3503.02, which would require proof that Plaintiffs intend to reside in or return to Ashland County. (Doc. 8 at 6-7). As previously noted, the only qualifications regarding residence are specified in the Constitution, R.C. 3503.07, and R.C. 3503.01. In fact, the title of R.C. 3503.07 is: “*Qualifications to register*” and R.C. 3503.01 is titled in part: “*Age and residence*”; and specifies the “*qualifications of an elector*” with respect to *age and residence*. (Emphasis added). The clause in question itself specifically refers to “qualified as to age and residence.” There can be no doubt the clause is referring to R.C. 3503.07, and R.C. 3503.01, the only statutes that set forth the qualifications with respect to age and residency.

Because they are “qualified as to age and residence” R.C. 3503.04 mandates that their residence is in the county where Mohican is located.

B. Plaintiffs are inmates of a public institution.

The Board urges this Court to read the term ‘inmate’ narrowly, such that it only means adult prisoners in the custody of the Department of Rehabilitation and Correction.

(Doc. 8 at 4-5.) And yet the Board itself cites to O.R.C. § 9.15, which uses ‘inmate’ broadly to mean anyone in a “correctional, benevolent, or charitable institution.” (Doc. 8 at 5.) Indeed, the Board and this Court need look no further than the section immediately preceding O.R.C. § 3503.04, where ‘inmate’ is used to refer to residents of a soldiers’ home. O.R.C. § 3503.03. Revised Code Section 3503.04 itself refers to “public and private institutions,” which also plainly encompasses more than state prisons. This Court should not adopt the restrictive definition of ‘inmate’ urged by the Board. Rather, the language of the statute and surrounding statutes make clear that the definition includes the young men at the Mohican facility. And that statute mandates that they register, as they did, in the county of their confinement.

C. Plaintiffs are not seeking temporary treatment; they are indefinitely confined in a juvenile facility.

Defendants contend that Plaintiffs’ lawful residences are the residences they had prior to entering Mohican because they are “largely” in the institution for “temporary treatment.” (Doc. 8 at 6). But the statute requires the inmates to be at the institution for “temporary treatment *only*.” R.C. 2152.41. (Emphasis added). Yet, Defendants state that the juveniles are there for education in addition to treatment, and that juvenile dispositions include “provid[ing] for the care, protection, and mental and physical development of children...and rehabilitat[ing] the offender.” (Doc. 8 at 6) (R.C. 2152.01). That may be the goal of the juvenile of a juvenile disposition, but there are no facts in evidence that suggest that any one of these plaintiffs have actually received any treatment at Mohican. And, Defendants failed to mention that juvenile dispositions also serve to “protect the public interest and safety, hold the offender accountable for the offender's actions, [and] restore the

victim....” Further, juveniles are committed “to the legal custody of the department of youth services for secure confinement....”

Plaintiffs are securely confined in the juvenile facility for many different reasons. They are certainly not there for “temporary treatment *only*.” Therefore, they are not exempted from the rule of O.R.C. § 3503.04, which dictates that these young men register, as they did, in the county of their confinement.

IV. Evidence of Equal Protection Violation

The Board highlights that Plaintiffs had not yet provided evidence of unequal treatment of other similarly situated youth at other DYS facilities when they filed their TRO motion. Attached are affidavits from Eli Braun (Exhibit D) and Angelina Jackson (Exhibit E) that document how youth at the Ohio River Valley and Circleville Juvenile Correctional Facilities, who registered in the same manner as Plaintiffs, were allowed to register and vote in the county of their confinement without incident.

V. Granting the TRO Will Not Cause Substantial Harm to Others and Is in the Public Interest.

The Board of Elections’ argument that granting the TRO in this case will cause substantial harm to others because the votes of these 16 young men will somehow dilute the voting pool (Doc. 8 at 15) is without merit. As is explained above, Plaintiffs lawfully registered in the correct county and have a fundamental right to vote there. Their legitimate votes pose no risk of substantial harm to anyone in Ashland County or anywhere else. Moreover, the risk of a theoretical and de minimis dilution of other Ashland County residents’ votes by these 16 young men cannot reasonably be called ‘substantial.’ This

Court should, instead, be gravely concerned about the far more serious, immediate, and tangible harm of denying these young men's fundamental right to vote in their first election.

This Court should also not countenance suggestions that these young men must meet some standards of understanding local ballot issues, while the requisite level of understanding is simply assumed for other Ashland County residents. Part of the motivation for challenging these young men's voter registrations was that the challenger, Michael Barrett, believed "they don't even know they're in Ashland County * * *. They are going to be voting on levies and tax issues when *they don't know anything about the county.*" See Irv Oslin, *Ashland professor challenges voting rights*, Ashland Times-Gazette, Oct. 23, 2008, available at <http://www.times-gazette.com/news/article/4450751> (attached as Exhibit F); see also Transcript of 10/24/08 hearing at 5, ln. 21-25 & 6, ln. 12-14; and Doc. 8 at 15. Requiring some level of comprehension of local issues and then selectively applying that requirement to only these young men hearkens back to a shameful time in our nation's history when literacy and other tests were selectively used to prevent minority groups from voting, see, e.g., *U.S. v. Raines*, 189 F.Supp. 121, 127 (D.Ga., 1960), and *U.S. v. Parker*, 236 F.Supp. 511, 515 -516 (D.Ala., 1964). Such practices are now specifically prohibited by federal law. 42 U.S.C.A. § 1971(a)(2)(C). This Court should ensure that these practices and the animus behind them are not resurrected in a new form in this case. Accordingly, it is very much in the public interest that the TRO be granted, allowing these young men to exercise their fundamental right to vote.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was filed electronically on October 30, 2008. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Stephen JohnsonGrove
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