UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ALFRED E. EHM,
Plaintiff

v.

BOARD OF TRUSTEES of the SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Defendant

SA-06-CA-103-RF

ORDER GRANTING MOTION TO DISMISS

Before the Court are *Motion to Dismiss* (Docket No. 4), *Brief in Opposition to Defendant's "Motion to Dismiss With Prejudice"* (Docket No. 7), and associated briefs. Motion GRANTED.

INTRODUCTION

Plaintiff Alfred E.Ehm, a *pro se* litigant, is a resident of San Antonio. Defendant Board of Trustees is the organization in charge of the public transportation system in San Antonio. Plaintiff brings this case under 42 U.S.C. § 1983 and various other laws. His complaint is as follows:

> Defendant Board is *intentionally* depriving Plaintiff and the affected qualified voters who reside within the RTTD [Rapid Transit Tax District] of their fundamental and constitutional protected right to elect all 11 members of the

> Board, in that it *knowingly*, *deliberately*, and *willingly* evades compliance with the *Right to Vote Law* of 1964, the aim of the Trustees and the three appointing authorities being the perpetuation of an appointed Board and of taxation without representation.[1]

That is, Plaintiff contends, the Constitution and various other laws require the Transit Authority to install its Board members through a public election; anything short of it – such as the appointment system it currently has in place – violates his (and the public's) constitutional and statutory rights.

Defendant now brings a Motion to Dismiss, arguing that it is under no obligation to hold elections rather than install its members by appointment. The merits of this Motion are addressed below.

REASONING

The Court agrees with Defendant's arguments. In the U.S. Supreme Court case of *Sailors v. Board of Education of Kent County*, that Court faced a similar challenge to a Board "chosen, not by the electors of the county, but by delegates from the local boards."[2] That is, the Board in that case employed a hybrid election/appointment system to choose its members, and the plaintiff challenged the system as violating the citizens' right to vote – and

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[1] Docket No. 1 at 5-6 (italics in original).

[2] 387 U.S. 105, 106 (1967).

in particular, the constitutional one-person/one-vote principle.[3] And there, the Court held the system valid. It wrote, "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. . . . At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointment systems . . . ."[4]

And some years later, the U.S. Court of Appeals for the Fifth Circuit followed the Supreme Court's lead in *Sailors* in a similar case, *Byrd v. City of San Antonio*.[5] In that case, the plaintiff, a citizen of San Antonio, sued the Board of the City Public Service energy entity on grounds quite similar to the ones urged here, specifically that "the vacancy selection procedure denies them the Republican Form of Government guaranteed by the Constitution, because the Board has been effectively removed from direct or indirect accountability to the electorate."[6]

To be sure, that Board's appointment process in that case was slightly different in its particulars from the one here. The Board's charter fixed a number of Board members (in that case, five), set up the mayor as one member and provided that the City Council elect the

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[3] *Id.* at 111.

[4] *Id.* at 109-11.

[5] 587 F.2d 184 (5th Cir. 1979).

[6] *Byrd*, 587 F.2d at 187.

other four, and then provided that "[a]ny vacancy on the Board [be] filled by a majority vote of the remaining board members."[7] But the appointment process in that case was the same as the one here in its appointive, rather than publicly elective, character, and that is the relevant point for purposes of this analysis.

One must also note the striking similarity between the plaintiff's allegation there and the plaintiff's allegation here:

> Plaintiffs instituted this suit to redress the alleged deprivation of federal constitutional and statutory rights. It is in essence a frontal attack upon what plaintiffs refer to as "self perpetuation of the control and management of a municipal bureaucracy, the City Public Service Board of San Antonio." They contend that the procedure utilized in selecting Board members deprives them of their right to vote, and constitutes a denial both of Equal Protection and the right to a Republican Form of Government.[8]

Thus, it becomes of central importance what the Fifth Circuit held in that case. And what it held in that case was that the case could be dismissed quite readily. It relied, factually, on two core points: First, "The only 'governmental body' of San Antonio to which the constitutional and statutory provisions urged by appellants would apply is the City Council."[9] And second, "[T]he Board is not a form of government but is a board of managers of the municipally-owned San Antonio Electric and Gas system held and operated

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[7] *Byrd*, 587 F.2d at 185.

[8] *Byrd*, 587 F.2d at 185.

[9] *Id.* at 186.

as a corporate and proprietary activity of the City of San Antonio."[10] Neither party contests that these critical facts obtain here; the Board here does no more than carry out non-legislative, proprietary, governmental functions.

And legally speaking, *Byrd* relied on one principle that, the parties do not dispute, applies here as well: "There is no statute or constitutional provision which requires election or appointment by elected officials of the persons who carry out this proprietary and non-governmental function."[11]

Just as in *Sailors* and *Byrd*, therefore, the Court here ought to dismiss this action. The Texas Transportation Code clearly specifies the method for selecting Board members: The Board consists of a baseline of five members, with more to be added depending on the population of the relevant community.[12] (Here, the number added is six, bringing the total size of the Board to eleven.) The initial five members are established as follows:

> The five board members under Section 451.501(a)(1) are appointed by the governing body of the principal municipality, except in an authority having a principal municipality with a population of more than 1.2 million, the five board members are appointed by the mayor of the principal municipality and are subject to confirmation by the governing body of the principal municipality.[13]

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[10] *Id.* at 186 (internal quotation marks omitted).

[11] *Id.* at 186.

[12] Tex. Transp. Code § 451.501(a).

[13] Tex. Transp. Code § 451.502(a).

And then, the additional six members are established as follows:

> In an authority having six additional members, the additional members are appointed as follows: (1) two members appointed by a panel composed of: (A) the mayors of the municipalities in the authority, excluding the mayor of the principal municipality; and (B) the county judges of the counties having unincorporated area in the authority, excluding the county judge of the principal county; (2) three members appointed by the commissioners court of the principal county; and (3) one member, who serves as presiding officer of the board, appointed by a majority of the board.[14]

In other words, the Board employs a purely appointive system for its members. At the same time, as noted, the Board here is of a non-legislative character, carrying out only proprietary and non-governmental functions.

CONCLUSION

Accordingly, the Court finds no infirmity in the Board's selection process. Plaintiff's case fails to state a claim upon which relief can be granted, and pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court dismisses it. At the same time, the Court declines to award attorney's fees to Defendant, despite Defendant's urgings that Plaintiff has a habit of filing meritless and vexatious lawsuits. Similarly, the Court declines Defendant's invitation to dismiss the case with prejudice, for the Court does not like doing so in the 12(b)(6) context generally, and all the more so where a *pro se* plaintiff is involved. Plaintiff may re-

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[14] Tex. Transp. Code § 451.502(e).

file the case to the extent that his failing to state a valid legal claim was the product of incomplete drafting rather than a simple legal failure of his case. To the extent that Plaintiff has fairly stated his case and the Court has found it without merit, however, the Court is confident that Plaintiff will recognize the unhappy reality respecting his grievances and simply let them go.

DISMISSED WITHOUT PREJUDICE.

Signed this 31st day of May, 2006.

ROYAL FURGESON
UNITED STATES DISTRICT JUDGE