

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

DEREK HAMILTON, *et al.*,

Plaintiffs,

v.

ASHLAND COUNTY BOARD  
OF ELECTIONS, *et al.*,

Defendants.

) CASE NO. 1:08 CV 2546

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) JUDGE DONALD C. NUGENT

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) MEMORANDUM OPINION

) AND ORDER

This matter comes before the Court upon Plaintiffs' Motion for a Temporary Restraining Order ("TRO") and First Amended Complaint ("Complaint"). (ECF # 2, 7). Defendants, Ashland County Board of Elections and individually named Board Members, filed a joint response, and the Ohio Secretary of State filed its own separate response to the Motion for TRO. (ECF # 8, 12). Because the Complaint addresses issues related to the election on November 4, 2008 (four days from now), and a final judgment on the merits of the underlying Complaint would be moot after that time, the Court ordered a full evidentiary hearing to be held on October 31, 2008. At this hearing, the parties presented evidence in the form of witnesses, affidavits, and exhibits, fully addressing the merits of the underlying Complaint. The parties were given the opportunity to

present any evidence they believed was relevant to the issues before the Court. Having heard and reviewed all of the relevant evidence and arguments presented by the parties, for the reasons stated below, Plaintiffs' Motion for a TRO is DENIED, and the First Amended Complaint is DISMISSED.

## **I. BACKGROUND<sup>1</sup>**

The Ohio Justice & Policy Center ("OJPC") is a non-profit, non-partisan, public interest organization that, among other things, works to help offenders successfully re-enter the community. As part of its mission, OJPC helped to register young adults (18-21), who are detained at Department of Youth Services ("DYS") institutions housing youth offenders, to vote in the upcoming November 4, 2008 elections. As part of this registration drive, an OJPC volunteer helped Plaintiffs register to vote in Ashland County. Plaintiffs are housed at Mohican Juvenile Correctional Facility ("Mohican"), which is located in Ashland County, Ohio. Plaintiffs are all between 18 and 21; all registered before the October 6, 2008 registration cut-off; all will have been housed in Ashland County for more than 30 days before the election; and none are scheduled to be released prior to the election.

On October 15, 2008, a resident of Ashland County filed a challenge to Plaintiffs' voter registrations, claiming that, under Ohio law, they did not qualify as residents of Ashland County and were, therefore, ineligible to vote in that County. The Board of Elections scheduled a hearing on October 24, 2008, to address the challenge. The director of the Board of Elections contacted

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The factual summary is based upon the statements of fact provided by the parties. Where facts are in dispute, the Court has taken the facts from courtroom testimony, affidavit, or other evidence. Any information presented but not supported by evidence at the hearing is stated in the light most favorable to the party who does not bear the burden of proof.

the staff at Mohican about the hearing on October 16, 2008, on October 17, 2008, and on October 20, 2008. (Def. Response, Ex. C: Affidavit of Shannon Leininger). Written notice of the exact time and place of the hearing was mailed to each Plaintiff on October 19, 2008. (Def. Response, Ex. C: Affidavit of Shannon Leininger). The written notices were received at Mohican on October 23, 2008. (Pl. Motion, Ex. 1-16: Plaintiffs' Affidavits; Pl. Reply, Ex. B: Affidavit of Karen Wood; Def. Response, Ex. D: Affidavit of Michael Donatini). DYS would not allow Plaintiffs to attend the hearing without a Court order. (Def. Response, Ex. D: Affidavit of Michael Donatini).

The Board held the hearing. Plaintiffs did not attend and were not represented by counsel. The Board ruled that under the applicable statutes, Plaintiffs were not residents of Ashland County for purposes of voter registration, and Plaintiffs were removed from the registration list. Plaintiffs now challenge that ruling.

## **II. DISCUSSION**

Plaintiffs raise four claims for relief in their First Amended Complaint: Violations of the Due Process Clause of the Fourteenth Amendment, Violations of the Equal Protection Clause of the Fourteenth Amendment, Violations of the First Amendment, and Violations of State Registration Law. They seek injunction relief requiring the Ashland County Board of Elections to return them to the registration list and to provide them with absentee ballots.

### **A. Due Process Claim**

Plaintiffs claim that they were deprived of their right to vote in the upcoming election without the benefit of due process. There is no doubt that the right to vote is a fundamental right

deserving of due process protections. *See Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526 (1964); *Bell v. Marinko*, 235 F. Supp. 2d 772, 777 (N.D. Ohio 2002). The Due Process Clause requires that a party be given notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Dusenbery v. United States*, 534 U.S. 1261, 168, 122 S. Ct. 694 (2002); *see also*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Part of the circumstances to be considered in this case are the expediency issues associated with obtaining a timely decision from the Board of Elections on voter registration challenges. In order to assure timely decisions on elections matters, Directive No. 2008-79 of the Ohio Secretary of State requires that a hearing on a challenge to voter registration “shall be held, and the challenge decided, no later than ten days after the board receives the challenge.” The expediency requirement is a protection for voters meant to ensure, whenever possible, that they have time to take corrective action if their registration is successfully challenged for some deficiency that could be corrected. In this case, the Board received the challenge on October 15, 2008, and the case was heard and decided nine days later, on Friday, October 24.

To provide timely notice of a hearing, Ohio Revised Code §3503.24 (made applicable to these types of challenges through Directive No. 2008-79 of the Ohio Secretary of State) requires the Board of Elections to send notice of a hearing by first class mail at least three days prior to a hearing, and encourages the Board to send notice sooner than that (8-10 days prior) whenever it is practicable, in order to further ensure that due process requirements are met. In this case, the director of the Board of Elections contacted the staff at Mohican about the hearing on October 16, 2008 (the day after the challenge was filed and eight days before the hearing took place), and on

October 17, 2008, and on October 20, 2008. (Def. Response, Ex. C: Affidavit of Shannon Leininger). Written notice of the exact time and place of the hearing was mailed on October 19, 2008, five days prior to the hearing. (Def. Response, Ex. C: Affidavit of Shannon Leininger). The written notices were received at Mohican on October 23, 2008, and on that date, an attorney with the Ashland County Prosecutor's Office spoke with DYS legal staff to see if Plaintiffs would be released to attend the hearing. (Pl. Motion, Ex. 1-16: Plaintiffs' Affidavits; Pl. Reply, Ex. B: Affidavit of Karen Wood; Def. Response, Ex. D: Affidavit of Michael Donatini). The attorney was told that DYS would not allow Plaintiffs to attend without a Court order. (Def. Response, Ex. D: Affidavit of Michael Donatini). The Defendants in this case cannot be held responsible for any failure of Mohican or DYS to pass information onto the Plaintiffs or for its decision not to allow Plaintiffs to attend the hearing. Clearly, having contacted Plaintiffs' legal custodians four times between the filing of the challenge and the hearing, and having mailed the written notification of the hearing five days prior, the Board of Elections was diligent in its efforts to notify Plaintiffs of the hearing, and was in compliance with O.R.C. §3503.24 and Directive No. 2008-79 of the Ohio Secretary of State.

Further, Plaintiffs themselves affirmed that they received the written notification prior to the hearing (the day before). They had the opportunity, at that point, to attempt to arrange for some representative to appear on their behalf; to seek the aid of staff at Mohican or DYS to help them address the issue; or, to contact the Board of Elections directly to request a continuance. There is no evidence that any such attempt was ever made.

At the hearing, the Board appears to have considered both of the statutes Plaintiffs claim are relevant to the matter. (Board Transcript at p. 9). They admittedly took testimony and

considered evidence even though there was no representative for Plaintiffs present to contest the challenge. (Pl. Motion at 13). Further, Plaintiffs argument that the Board did not consider whether any of them intended to remain in Ashland County after their release is rendered meaningless by their failure to offer any evidence of such an intent in support of their Motion for a TRO, or at the subsequent hearing before this Court.

Under all of the circumstances, it appears to this Court that the Board of Elections took great pains to notify Plaintiffs of the hearing in a timely manner, and did everything within its power to afford them an opportunity to present their objections. The Board of Elections cannot be held responsible for Plaintiffs' inability to capitalize on this opportunity due to the nature of their detention. It appears to have done everything it could reasonably be expected to do to comply with the applicable law, and to inform Plaintiffs and their custodians that the hearing would be taking place. Plaintiffs, therefore, were afforded all necessary due process by the Defendants.

B. Equal Protection

Plaintiffs claim that they are being denied equal protection because other DYS residents, who are similarly situated, have been treated differently with regard to their ability to vote in their county of confinement. The Equal Protection Clause directs that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

Plaintiffs have offered no evidence, however, to show that the other DYS residents they cite are actually similarly situated. First of all, there is no evidence that any other DYS residents have registered in Ashland County or have been subject to decisions made by Defendants in this case. Secondly, there is no actual evidence that any other DYS residents have registered in a county in which they were not residents prior to their detention, or in a county they intend to leave

after they are released from detention. Finally, there is no evidence that any other DYS residents have had their registration challenged. Therefore, there is no evidence to suggest that any other DYS residents are similarly situated with regard to this voter registration issue.

The Court, therefore finds that Plaintiffs have not presented evidence sufficient to establish that any similarly situated people have been treated differently on this issue, let alone that they have been treated differently by *these* Defendants. For this reason, Plaintiffs' Equal Protection claim must fail.

### C. Free Speech

The claim for an alleged violation of free speech was presented for the first time in Plaintiffs First Amended Complaint, and was not argued by any party in the TRO briefing, or at the evidentiary hearing. However, this claim can be dismissed as a matter of law. The right of free speech has never been absolute. The United States Supreme Court has long held that, although the constitutional right of a citizen to vote is unquestioned, this right is subject to the imposition of appropriate state standards and regulations. *See, Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972); *Lassiter v. Northampton County Bd. Of Elections*, 360 U.S. 45, 50-51 (1959).

There are many reasons why residency requirements are necessary and important restrictions on the voting process. First and foremost, such restrictions do not prevent a person from exercising their right to vote, rather they merely direct them as to where they should submit that vote. It is obviously also important to ensure that people with no ties to a local community are not able to dilute the vote of residents on local ballot issues. Residency requirements are also clearly necessary to ensure the proper administration, collection, and recording of ballots and as a means of tracking voters and preventing voter fraud. As a matter of law, residency requirements

are a reasonable, necessary, and extremely minor restriction on the right to vote, and they do not impermissibly interfere with voters' First Amendment rights.

D. State Registration Laws

Chapter 3503 of the Ohio Revised Code sets forth the qualifications and registration requirements for voting in Ohio. Sections 3503.01 through 3503.05 are listed as “[Qualifications],” and Sections 3503.06 through 3503.33 are listed as “[Registration].” Plaintiffs claim that § 3503.04 is the relevant statute relating to their ability to vote in the county in which they are currently detained.

O.R.C. § 3503.04 states as follows:

Persons who are inmates of a public or private institution who are citizens of the United States and have resided in this state thirty days immediately preceding the election, and who are otherwise qualified as to age and residence within the county shall have their lawful residence in the county, city, village and township in which said institution is located provided, that the lawful residence of a qualified elector who is an inmate in such an institution for temporary treatment only, shall be the residence from which he entered such institution.

Plaintiffs argue that this section creates an exception to the residency requirements set forth in O.R.C. §3503.02, allowing them to claim residency in the county in which they are detained. Plaintiffs claim that they are inmates of Mohican, a public institution, that they are citizens of the United States, that they have resided in the state for thirty days immediately prior to the election, that they are otherwise qualified as to age and residency in Ashland County, and that they are not inmates “for temporary treatment only.”

Defendants argue that this section does not apply to Plaintiffs because they are not technically “inmates.” Alternatively, they argue that the section does not benefit Plaintiffs because they are in the institution for “temporary treatment only,” and are not “otherwise qualified



as to residence within the county.”

Defendants submitted the testimony of Judge Damien Vercillo to support their contention that youth offenders in DYS facilities are not referred to as “inmates.” Plaintiffs gained a concession from this witness that he is not an expert in elections law and has no idea how the general assembly would have defined “inmate” relative to this particular statute. The term “inmate” is not defined in Chapter 3503.

Defendants also submitted evidence through Judge Vercillo’s testimony that offenders are only temporarily detained at DYS facilities, and that Mohican specializes in offenders with substance abuse problems, and that it offers treatment programs which are a normal part of the protocol at that facility. They argue that Plaintiffs are at Mohican for temporary treatment, and that they, therefore, are residents of their hometown for voter registration purposes.

Plaintiffs, on the other hand, obtained testimony from Judge Vercillo that offenders housed at Mohican are not there for “treatment only.” They then argued that, temporary or not, Plaintiffs are not in the institution “for temporary treatment only.” Therefore, under the statute, they say Plaintiffs should be able to vote in the county of their detention. Chapter 3503 does not define or otherwise explain “temporary,” “treatment,” or “temporary treatment only.”

The statute is unclear as to its meaning in determining who is an “inmate” and who is confined for “temporary treatment only.” There are arguments to be had on both sides with regard to these terms, and the legislative history offers no help in deciphering the General Assembly’s intent. However, this Court need not make a determination on these terms to resolve the question at hand.<sup>2</sup> Section 3503.04 requires that in order for an “inmate” to “have their lawful residence in

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It is fortuitous that these terms need not be deciphered to answer the question at issue in

the county, city, village and township in which said institution is located,” they must be “otherwise qualified as to age<sup>3</sup> and residence within the county.”<sup>4</sup>

To determine whether Plaintiffs are “otherwise qualified” as to residence within the county, the Court must look to the other “qualification” sections within Chapter 3503. Section 3503.01 defines age and residence qualifications as follows:

Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector...

According to this section, which sets forth the basic qualifications for voting in Ohio, a citizen must be a resident of the county and precinct in which he/she offers to vote, in order to be qualified.

Section 3503.02 sets forth the rules for determining residency. The applicable portion of §3503.02 (subsection C) reads as follows:

A person shall not be considered to have gained a residence in any county of this state into which the person comes for temporary purposes only, without the intention of making such county the permanent place of abode.

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this case as the interpretation of such an important state law, in the absence of any real indication from the state legislature as to its meaning, is a matter better suited to the state courts.

<sup>3</sup> There is no dispute that these Plaintiffs are qualified as to age.

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It would appear that this section may not have been intended as an exception to the county residency requirement, but rather, to allow an “inmate” to claim an address for purposes of receiving an absentee ballot and to provide a city, village, and township of residence within their county of general residency, if they had no other address. This would be similar to the protections now being offered to homeless voters in some areas - allowing them to register a shelter or a general location as an address for voter registration purposes.

Plaintiffs have essentially conceded that they do not satisfy the requirements of § 3503.02 because they have submitted no evidence or argument to indicate that they are in Ashland County for anything other than temporary purposes, or that they have the intention of making Ashland their permanent place of abode. Therefore, Plaintiffs cannot establish residency in Ashland County under O.R.C. §3503.02(C), which, in turn, means they cannot satisfy the qualification requirements of O.R.C. §3503.01, which, in turn, means they are not “otherwise qualified” as to residence in the county with regard to O.R.C. §3503.04.

Residency requirements have been incorporated into Ohio’s voting statutes for many important reasons. Possibly the most important of which is the reality that, although federal elections garner the most press and attention during presidential election years, there are also a great number of local elections issues that will have a very direct and important influence on the lives of the local residents in each individual county.

Registration of individuals who do not meet the statutory residency requirements to vote in a particular county may very well have a detrimental effect on local residents by diluting the vote of these individuals who will be directly affected by the local election issues. Further, denying registration to individuals who do not meet the statutory requirements for residency in a particular county is not tantamount to denying them a voice or a vote in the election. These individuals are allowed and encouraged to exercise their right to vote in the county in which they actually do maintain residence under the Ohio’s statutory scheme.

There is no doubt that there are a few circumstances in which determining residency is not as clear cut a question as it may seem on its face. It is, however, the voters’ personal responsibility to ensure that they are registered to vote in the right county and that all other

qualifications and requirements have been met. The right to vote is an individual right, and although there are many laudable organizations that have made it their goal to advise and assist people in the execution of this right, the ultimate responsibility for ensuring compliance with the applicable laws rests with each individual. This Court's role is to determine whether, in fact, the law has been satisfied and voters are properly registered in the correct county. Counsel for Plaintiffs submitted evidence that an employee of the Secretary of State's office told OJPC that Plaintiffs could register in the county in which they are detained.<sup>5</sup> Unfortunately, even though they may have been misguided or otherwise justifiably mistaken in their evaluation of whether O.R.C. §§ 3503.02 and 3502.04 gave Plaintiffs the legal right to vote in Ashland County, this Court may not waive statutory requirements. Despite any good faith efforts of the voters or any organization aiding or assisting them to comply with those requirements, if the qualifications and requirements are not, in fact, met, the registration is not valid.

The unfortunate practical result of this case will be that these Plaintiffs will not be able to cast a vote in the upcoming election. This end result, however, stems not from the Court's decision on the merits of the Complaint, but rather from the fact that there is now insufficient time for Plaintiffs to register in the proper county. Time is of the essence in elections issues. Because Plaintiffs did not register until October 6, 2008 and subsequently a challenge was not issued until October 15, 2008, the Board of Elections hearing could not have been scheduled sooner than eleven days before the election. Therefore, Plaintiffs did not receive the benefit of the Board's decision in time to register in the county of their true residency. Had they mistakenly registered in

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The information was informally provided over the phone in response to an email sent by OJPC; it was not a formal memorandum or directive, and was not issued by Jennifer Brunner, the Secretary of State.

Ashland County much earlier in the process, there would have been time subsequent to any challenge and adverse decision to allow them to register in the proper county and still preserve their ability to cast a vote in this election. Because they registered so late in the process, this Court, therefore, is put in the undesirable position of rendering a decision which, though correct and necessary under the law, makes it impossible for sixteen otherwise qualified and capable citizens to vote in this important election.

### **III. CONCLUSION**

Based upon the foregoing, Plaintiff's Motion for a Temporary Restraining Order (Doc. # 2) is DENIED, and the First Amended Complaint (ECF #7) is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

/s/ Donald C. Nugent  
DONALD C. NUGENT  
United States District Judge

DATE: October 31, 2008