

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION No. 1:15-CV-559**

THE CITY OF GREENSBORO,)
LEWIS A. BRANDON III, JOYCE)
JOHNSON, NELSON JOHNSON,)
RICHARD ALAN KORITZ, SANDRA)
SELF KORITZ, AND CHARLI MAE)
SYKES,)

Plaintiffs,)

vs.)

GUILFORD COUNTY BOARD OF)
ELECTIONS,)

Defendants.)

**DEFENDANT'S BRIEF IN
RESPONSE TO PLAINTIFFS'
COMPLAINT, MOTION FOR
TEMPORARY RESTRAINING
ORDER, MOTION FOR
PRELIMINARY INJUNCTION AND
REQUESTS FOR TEMPORARY AND
PERMANENT INJUNCTIVE RELIEF**

NOW COMES Defendant Guilford County Board of Elections stating its position regarding the Plaintiff's Complaint filed on July 13, 2015, including requests for temporary and permanent injunctive relief and the Plaintiffs' Motions for Temporary Restraining Order and Motion for Preliminary Injunction, as follows:

I. BACKGROUND

On July 2, 2015, eleven (11) days before the Plaintiffs filed this action, the North Carolina General Assembly passed a local act, referred to in the Plaintiff's Complaint as the "Greensboro Act." 2015 N.C. Sess. Laws 138. The Greensboro Act, *inter alia*, set out a new redistricting plan for the cities of Greensboro and Trinity, located respectively in Guilford and Randolph counties.

Defendant Guilford County Board of Elections is required by N.C. Gen. Stat. § 163-1 *et seq.* to conduct fair, impartial, and lawful elections within the county. In that capacity, Defendant acknowledges that it is a necessary party to this action. In order to carry out its mandate to hold the required elections, it is the opinion of Defendant that it must inform the Court of the necessary processes and appropriate timetables in which it could carry out its statutory duties. N.C. Gen. Stat. § 163-284 (2011).

II. QUESTION PRESENTED

The issue before this Court concerns the definition of the role of Guilford County Board of Elections as the sole defendant in this matter, and the appropriate remedy in light of the Plaintiffs' Complaint and request for temporary and permanent injunctive relief.

III. ARGUMENTS

A. THE GUILFORD COUNTY BOARD OF ELECTIONS SERVES A VITAL, BUT STATUTORILY LIMITED, ROLE TO CONDUCT ELECTIONS IN A FAIR AND IMPARTIAL MANNER AND, THUS, PERFORMS A SOLELY ADMINISTRATIVE OR MINISTERIAL FUNCTION.

Generally speaking, county boards of elections (hereinafter, also sometimes referred to interchangeably as “local boards of elections”) conduct all elections in North Carolina in their respective jurisdictions. N.C. Gen. Stat. § 163-33 (2013). The North Carolina General Statutes authorize two types of elections: (1) regular elections of candidates to office, and (2) special elections. N.C. Gen. Stat. § 163-1 (2015). In conducting those elections, county boards of elections, including the Guilford County

Board of Elections, are mandated by North Carolina statutes to conduct fair, impartial, and lawful elections in Guilford County. N.C. Gen. Stat. § 163-166.5 (2002). Further, county boards of elections, including the Guilford County Board of Elections, must act within the regulations and directions of the State Board of Elections (hereinafter, “State Board”) and is subject to review by the state board. N.C. Gen. Stat. 163-22 (2012).

1. The Guilford County Board of Elections is a local board of elections that has statutory authority and duties that are limited in scope as prescribed under N.C. Gen. Stat. § 163-33 (2013).

The Guilford County Board of Elections, like all local boards of elections, does not have discretionary authority in implementation of election rules, regulations, and procedures. By statute, the State Board of Elections has “general supervision over the primaries and elections in this State” and has the overall responsibility for elections. *Id.* The duties of the county board of elections fall into the limited categories of administrative duties and quasi-judicial duties in which the county boards of elections are restricted to the following activities: (1) Make and issue rules, regulations, and instructions consistent with directives from the State Board pursuant to N.C. Gen. Stat. § 163-132.4; (2) Appoint all chief judges, judges, assistants, and other officers of elections, and designate the respective precincts; (3) Hear protests about election irregularities and complaints about election officials; (4) Establish, define, provide, rearrange, discontinue and combine election precincts, provide places for registration and for holding primaries and elections; (5) determine the sufficiency of petitions; (6) Advertise and contract for printing of ballots and other election supplies; (7) Provide for the purchase, preservation,

and maintenance of voting booths, and other election equipment and documents; (8) Provide for issuance of all notices, advertisements, and publications concerning elections required by law; (9) Receive returns of primaries and elections, canvass returns, and issuing certificates of election enabling candidates to take office; (10) Appoint and remove the board's clerk, assistant clerks, and other employees as well as precinct transfer assistants; (11) Prepare and submit budget estimates for cost of elections for ensuing fiscal year; (12) Perform its duties under Chapter 163 and as directed by the State Board; hearing challenges to voter registration; (13) Maintain access to ballot boxes, and any other election related materials and equipment; and (14) Make available forms concerning deceased voters. N.C. Gen. Stat. § 163-33 (2013).

In general, county boards of elections are prohibited from acting “inconsistent with law or the rules established by the State Board of Elections.” *Republican Party of North Carolina v. Martin*, 682 F. Supp. 834, (M.D.N.C. 1988), *rev'd on other grounds*, 865 F.2d 1259 (4th Cir. 1988)(reversing, on appeal, denial of the motion to intervene); *see also*, N.C. Gen. Stat. 163-33 (2013).

2. The Guilford County Board of Elections is mandated by statute to act in an efficient, impartial, and honest manner concerning election administration.

County boards of elections are directed, by the North Carolina statutes and under the rules promulgated by the State Board, to maintain “The appearance as well as the *reality* of care, efficiency, impartiality, and honest election administration.” N.C. Gen. Stat. § 163-166.5 (2002) (emphasis added). It is important to note the dual mandate to

not only fulfill its role to administer elections in an impartial manner, but to maintain the appearance and the reality of impartiality. The importance of public confidence that local elections are conducted in such a manner and by individuals who have no partisan agenda – in fact, whom have no agenda at all, but are fair, impartial and lawful – cannot be over-emphasized or overstated. Perhaps, the best illustration of this is to consider how impartial an election would be considered if Defendant took a stand, any stand, on the underlying constitutionality issue and this Court ruled otherwise. In administration of elections, the Guilford County Board of Elections, in acting impartial and in a nonpartisan manner, also holds its Team Members to the same standard of care, efficiency, impartiality and honest election administration. In training of the Team Members, the local boards of election are mandated by the State Board to ensure that Team Members “provide voter assistance in a nonpartisan manner, will not attempt to influence any decision of a voter being provided any type of assistance, and will not wear any clothing or pins with political messages while assisting voters.” 08 N.C. Admin. Code 16 .0103 (2015). Therefore, local boards of elections must conduct themselves as administrators or stewards of the statutes and rules for conducting elections; it is not, and cannot, function in a policy-making role in lieu of or in addition to its ministerial function in conducting elections.

3. The Guilford County Board of Elections performs only a ministerial role regarding elections conducted in its precincts.

The essential role of the local board of elections, including the Guilford County Board of Elections, is specific and narrow. The county boards of elections have no

authority to act in a manner inconsistent with the statutes governing elections and are “merely acting in a ministerial capacity and can only carry out duties as detailed by statute and the State Board.” *Martin*, 682 F. Supp. 834 at 835. To the extent that the Plaintiffs seek redress from the Guilford County Board of Elections outside election administration, it is superfluous since the Guilford County Board of Elections exercises virtually no discretion in the implementation of stated law and act only in a ministerial capacity. *Id.*

B. THE GUILFORD COUNTY BOARD OF ELECTIONS MAY BE A NECESSARY DEFENDANT IN THIS ACTION, BUT ONLY TO THE EXTENT THAT ANY TEMPORARY AND/OR INJUNCTIVE RELIEF ISSUED BY THE COURT WILL ISSUE DIRECTLY TO THIS LOCAL BOARD OF ELECTIONS IN CARRYING OUT ITS MINISTERIAL DUTIES, BUT NOT TO THE EXTENT THAT GUILFORD COUNTY BOARD OF ELECTIONS CAN PROVIDE ANY REMEDY REGARDING HOUSE BILL 263 (NOW, 2015 N.C. SESS. LAWS 138).

Defendant does not contest that it may be a necessary party, at least to the extent necessary to implement any election to be conducted pursuant to the orders of this Court.¹ However, any mandates directed to more appropriate entities, which should be parties to this case, will derive the same effect and in a more practical manner.

The role of the State Board is to have general supervision over the primaries and elections in this State and to make such reasonable rules and regulations with respect to the conduct of primaries and elections, not in contradiction with other provisions of

¹ It is incumbent upon Defendant to note the case law, including *Martin, supra*, which suggests a contrary conclusion. *Martin* did, in fact, dismiss the local board of election as a party.

Chapter 163, and to make recommendations to the Governor and legislature relative to the conduct and administration of the primaries and elections in the State as it may deem advisable. N.C. Gen. Stat. 163-22 (2009). Pursuant to those duties of the State Board as outlined, the local boards of election do not possess and are not authorized by statute to influence policies or procedures regarding primaries and elections administration. Further, the State Board is authorized by statute to assist any county board of elections in any matter in which litigation is “contemplated or has been initiated” to provide assistance to in that litigation in which uniform administration of Chapter 163 of the North Carolina General Statutes has been, or would be, threatened. N.C. Gen. Stat. 163-25 (2011). Further, the State Board has the authority to promulgate reasonable interim temporary rules and regulations regarding elections administration in the event that any State election law is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965, and such ruling adversely affects the conduct and holding of any pending primary or election. N.C. Gen. Stat. 163-22.2 (1986). The State Board is also “authorized, upon recommendation of the North Carolina Attorney General (hereinafter, “Attorney General”), to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes.” *Id.* Additionally, the North Carolina Attorney General (hereinafter, “Attorney General”) is mandated under North Carolina law to provide the State Board with legal assistance in the “execution of its authority” or to recommend private counsel. *Id.*

The case law does, however, present interesting questions for this Court to consider. In *Republican Party v. Martin*, the court upheld the dismissal of the local Boards of Election (including, interestingly, the Guilford County board of Election) as “*superfluous*” to the matter seeking the inclusion of certain candidates on the local ballots since the local boards must merely follow the guidance and mandates established by the General Assembly and the State Board of Elections. *Id.* However, in *Wright v. North Carolina*, Plaintiffs, in an action seeking, as the Plaintiff seek here, to challenge a local bill redistricting matter in Wake County sought to add the Governor, the Senate President Pro Tem and the Speaker for the House. *Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2014). The court in *Wright* found that the General Assembly officials were not necessary parties and further opined *in dicta* that the Governor was also not a necessary party. Taken together and read broadly, these cases present an apparent anomaly: local Boards of Elections are not necessary parties since they have no authority to act other than required by rule or statute (*Martin*) while the parties with authority, i.e., the General Assembly and the State, are not necessary parties since they lack a “special duty to enforce the challenged Session law.” (*Wright*, 787 F.3d at 262).

Perhaps in partial response to this anomaly, in 2013 the General Assembly amended legislation which states that the Speaker of the House of Representatives and the President Pro Tem of the Senate have joint standing as agents of the state in any court case that challenges a state statute or a provision of the North Carolina Constitution. 2014 N.C. Sess. Laws 115. While this statute has clear implications in North Carolina

Courts, it is less impactful for Federal Court and can serve as no more than a clear statement of intent in this Court's analysis of necessary and permissive parties.

Upon more careful analysis, this apparent anomaly is less acute than it may appear. The relief sought in *Martin* did not require local Boards of Elections to be subject to injunctive relief or other mandate from the court to be successfully resolved; such is clearly not the case here. Even taking the ministerial role of Defendant Guilford County Board of Elections, it will be subject to some form of injunctive relief regarding implementation of its duties – whether in the form of an actual injunction from this Court or in the form of temporary rules issued by the State Board of Elections.

The Guilford County Board of Elections does not opine in this Brief as to whether there are other necessary parties but does wish to state its position that it has no objection to the inclusion of any appropriate additional parties.

C. DEFENDANT'S ROLE OF CONDUCTING ELECTIONS WITHIN THE CONTEXT OF THE INSTANT MATTER.

The Defendant intends to provide such information as this Court deems necessary to ensure fair, impartial and lawful election as the Court conducts the proceedings in this case and provides guidance to the parties. In order to carry out a proper election, the Guilford County Board of Elections must ensure compliance with the following tasks that adhere to statutory deadlines (or other administrative deadlines):

1. Absentee ballots, for civilian and military/overseas voters, must be available at least 30 days prior to any election, per N.C. Gen. Stat. § 163-302(b).

2. Guilford County Board of Elections staff will need, at minimum, twelve (12) business days to prepare, proof, seek approval from the State Board, pursuant to 163-165.3(a), thoroughly test ballots, and print ballots (either in house or through a vendor).
3. Notice of election, including date, nature of election, and issues submitted to voters, must be published three times (3x) once per week in the twenty (20) day period preceding the close of books for an election which occurs twenty-five (25) days prior to the election. N.C. Gen. Stat. § 163-33(8) basically gives a forty-five (45) to thirty-eight (38) day window for the first legal advertisement to be placed regarding the October 6th election.

D. OTHER ISSUES REQUIRING ATTENTION

The intent of Guilford County Board of Elections is to provide to this Court with such demographic information and statistics that may be necessarily relevant to the issues presented to the Court in this matter. The Guilford County Board of Elections prepares, as part of its regular elections administration, the following information that may be relevant to this instant matter.

There are additional crucial factors that the Court may find useful in reaching any determinations in this matter. There will be no, or very minimal, cost increases in administering this election under either new or old statutory constructions – even if changes are made at a late date – but before filing is over. However, holding an election, invalidating the results, and conducting another election will have substantial additional

costs (double the cost). The City of Greensboro reimburses the Guilford County Board of Elections for one hundred percent (100%) of direct costs to administer the election pursuant to N.C. Gen. Stat. § 163-284. The Guilford County Board of Elections can revert to the old districts with a few hours' notice prior to any filing date. Once actions in the first section of this document have begun, change will be very difficult and challenging. Though not statutorily required, postcards with the new districts would be mailed to all city voters at a cost to the Guilford County Board of Elections of approximately ninety-thousand dollars and 00/100 cents (\$90,000.00) for which the City of Greensboro would be invoiced.

Under different circumstances than this lawsuit, North Carolina law does allow the movement of municipal elections into the next year's election schedule pursuant to N.C. Gen. Stat. § 160A-23.1(d). If necessary, filing could be accomplished in less than one (1) week, as long as the August 7, 2015 deadline is retained. House Bill 263 changes the city council terms from 2-year to 4-year terms (Sec 2.(c) of the HB263); however, the terms are not staggered. House Bill 263 formulates those changes through the city charter (Section 3.01 of the charter), but it does not change all of the references to the old two-year terms (Section 2.41 (2-3)).

Thus, it is necessary for the Guilford County Board of Elections to proceed with its next required election, however the Court determines that election to be structured, which must be conducted without further modification by August 7, 2015. Simply stated, the next election can be conducted in a manner as described under the current statute or in

some modified version for the next election, so long as all the necessary components for conducting the election are established by that date.

IV. CONCLUSION

The Plaintiffs, in their Complaint, challenges the Constitutionality a bill adopted by the General Assembly; however, the defendant Guilford County Board of Elections has no authority over drawing of districts, the manner of election of Greensboro council members or their terms or any other governance issues involving Greensboro council members. Defendant Guilford County Board of Elections merely conducts the elections within the mandates established by statute and, where challenged, to the extent upheld by judicial review. The Guilford County Board of Elections is charged by statute with acting in a fair, impartial, and lawful manner – both in appearance and in fact. Guilford County Board of Elections has acted and will continue to act within the scope and authority granted to it under North Carolina law, including any mandates issued by this Court. Additionally, the Guilford County Board of Elections is available to provide additional information for the Court's review and consideration as the Court provides guidance through this process.

This the 20th day of July, 2015.

/s/J. Mark Payne
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20 day of July, 2015, a copy of the foregoing *Defendant's Brief In Opposition To Plaintiffs' Complaint, Motion For Temporary Restraining Order, Motion For Preliminary Injunction And Requests For Temporary And Permanent Injunctive Relief* was served upon all parties in accordance with the provisions of Rule 5 of the Federal Rules of Civil Procedure by:

- Hand delivering a copy hereof to the attorney for each said party addressed as follows:
- Depositing a copy hereof, postage prepaid, in the United States Mail, addressed as follows:
- Telecopying a copy thereof to the attorney for each said party and to each party as follows:
- Sending a copy thereof to the attorney for each said party and to each party by electronic mail ("e-mail") as follows:

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- Use of the Court's CM/ECF electronic filing system which will send notification of such filing to the Plaintiffs' counsel of record.

This the 20 day of July, 2015.

/s/ J. Mark Payne
J. Mark Payne