

IN THE SUPREME COURT OF OHIO

STATE *ex rel.*)
 LETOHIOVOTE.ORG., *et al.*,)
)
 Relators,)
)
 vs.)
)
 HONORABLE JENNIFER BRUNNER,)
 Ohio Secretary of State,)
)
 Respondent.)

Case No. 09-1310

Original Action in Mandamus

MOTION OF THE OHIO FEDERATION OF TEACHERS, OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, JANE SIMON, AN OHIO TEACHER, AND EVE BOLTON, AN ELECTED SCHOOL BOARD MEMBER, TO INTERVENE AS RESPONDENTS AS OF RIGHT UNDER CIVIL RULE 24(A)

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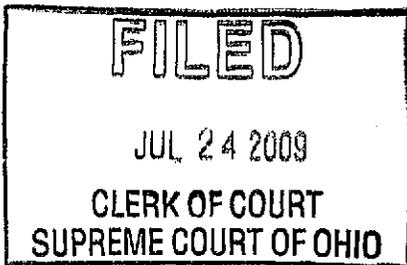
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 Ohio Secretary of State Jennifer Brunner*



The Ohio Federation of Teachers (“OFT”) represents, for purposes of collective bargaining through affiliated local unions, more than 20,000 teachers and employees of Ohio’s public schools. The Ohio School Business Officials Association (“OASBO”) is an association of approximately 1,000 Ohio public school employees, including school district treasurers, business managers, food service and transportation directors, and other school business officers and confidential employees. Jane Simon is a school teacher employed by the Cincinnati City School District. Eve Bolton is a retired Ohio public school teacher who serves as an elected Board Member for the City of Cincinnati Public School District (OFT, OASBO, Ms. Simon and Ms. Bolton are referred to, together, as the “Educators”).

The State of Ohio pays the salaries and benefits for Ohio’s public school teachers and other public school employees, and the costs of operating Ohio’s public school facilities (together, the “School Expenses”), in part, from a segregated fund (the “School Fund”) that is funded by the State’s operation of a lottery (the “Ohio Lottery”) pursuant to Article XV, Section 6 of the Ohio Constitution and R.C. Chapter 3770.

By certain language (the “VLT Provisions”) in newly-enacted Am. Sub. H.B. No. 1, the 128th Ohio General Assembly acknowledged the already-existing authority of the State to operate the Ohio Lottery using an electronic lottery device known as a “video lottery terminal” (“VLT”). VLTs will provide substantial revenues that will be paid into the School Fund and used by the State to pay School Expenses. Ohio Governor Strickland signed Am. Sub. H.B. No. 1 on July 17, 2009. Pursuant to Section 812.20 (the “Immediate Effect Provision”) of that bill, the Ohio General Assembly recognized that the VLT Provisions are appropriations for the current expenses of the State under Article II, Section 1d of the Ohio Constitution, and therefore, became effective immediately when Am. Sub. S.B. No. 1 became law.

By this action, Relators seek to delay the VLT Provisions from becoming law. Ultimately, Relators seek to prevent the VLT provisions from ever becoming the law of the State. The Educators are directly damaged by any delay in the VLT Provisions going into effect. Any delay in the VLT Provisions going into effect imposes an immediate and substantial risk that the Educators' School Expenses will not be adequately funded and paid by the State. Thus, the School Employees have direct and substantial pecuniary interests in the VLT Provisions immediately becoming law, as the 128th Ohio General Assembly intended by the Immediate Effect Provision.

For this reason, the Educators move the Court to intervene as respondents in this case as a matter of right, pursuant to Ohio Civil Rule 24(A). The Educators have direct pecuniary interests in this case and are so situated that the disposition of this case may impair or impede their ability to protect those interests. Moreover, Respondent Ohio Secretary of State has no such direct and substantial pecuniary interest in the VLT Provisions. Indeed, the Ohio Secretary of State has duties to constituents other than the Educators that may divide her "loyalty" on this issue. Accordingly, Respondent Ohio Secretary of State cannot adequately represent the Educators' interests. Thus, the Educators are entitled to intervene in this case as a matter of right to protect their direct and substantial pecuniary interests in the VLT Provisions, and to protect the funding created by the VLTs that the State of Ohio needs to pay the School Expenses.

A memorandum in support is set forth below. Pursuant to Civ.R. 24(C), the School Employees submit their proposed Answer to Relators' Complaint For Writ Of Mandamus as Exhibit A attached hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Underlying Facts

- A. The Educators, And The Ohio School Children To Whom They Have A Duty To Provide A Quality Education, Have Direct And Substantial Interests In The VLT Provisions Becoming Immediately Effective, As The Ohio General Assembly Intended.

Collectively and individually, the Educators have direct and substantial interests in the property and transactions that are the subject of this action because, *inter alia*, they are or represent employees of Ohio public school districts who (a) will receive compensation and benefits paid in part from education funds that will be generated for the State of Ohio from the VLTs that are the subject of Relators' complaint, or, (b) in the case of Intervener Bolton, have a duty to provide a quality public education to Ohio school children that is dependent upon the receipt of such education funds by an Ohio school district. Further, the Educators are so situated that the disposition of this action without their participation may as a practical matter impair or impede their ability to protect their interests.

The Educators' School Expenses are funded by the State of Ohio, in large part, by the State's School Fund. The State, in turn, obtains much of the revenue for the School Fund from the Ohio Lottery it operates pursuant to Article XV, Section 6 of the Ohio Constitution. That section of the Constitution requires the State to pay all net proceeds from the Ohio Lottery into the School Fund, *i.e.*, creates a permanent appropriation of the those funds into the School Fund:

Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.

The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that ***the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs*** as determined in appropriations made by the General Assembly. * * * (Emphasis added).

A substantial portion of the State of Ohio's biennial budgets must be dedicated to the payment of School Expenses. The fiscal crisis recently faced by the Ohio General Assembly, as it attempted to fashion a constitutionally-mandated balanced budget for the 2010-2011 biennium, was virtually unprecedented. The substantial decreases in revenues received by the State have required drastic cuts in State-funded programs. It was in the context of this financial crisis that the Ohio General Assembly was required to devise appropriate mechanisms for the State to obtain revenues necessary to fund its enormous obligations to pay the School Expenses. The mechanism the General Assembly recognized is the constitutionally-authorized VLT Provisions.

The VLT Provisions enact a new Section 3770.21 of the Revised Code, which defines a "video lottery terminal" under Ohio law:

Sec. 3770.21(A) "Video lottery terminal" means any electronic device approved by the state lottery commission that provides immediate prize determinations for participants on an electronic display.

The VLT Provisions also add language (underlined below) to R.C. 3770.03(A) that makes it clear that video lottery terminals are encompassed within the term “lottery” under Ohio law:

Sec. 3770.03. (A) The state lottery commission shall promulgate rules under which a statewide lottery may be conducted, which includes, and since the original enactment of this section has included, the authority for the commission to operate video lottery terminal games. Any reference in this chapter to tickets shall not be construed to in any way limit the authority of the commission to operate video lottery terminal games. Nothing in this chapter shall restrict the authority of the commission to promulgate rules related to the operation of games utilizing video lottery terminal[s] as described in section 3770.21 of the Revised Code. * * *

Thus, the VLT Provisions expressly recognize that a VLT is an already-authorized lottery device that is to be used to create revenue for the School Fund, and appropriates that revenue to the School Fund to pay the State’s current obligations for School Expenses. And the new revenues created by the VLTs are needed by the State immediately to meet its current obligations for the School Expenses under the new State budget. If those VLT revenues are not produced for the School Fund, the Educators are put at immediate and substantial risk that their salaries and benefits, and the costs of providing the quality public education to Ohio children that they are responsible for providing, will not be paid by the State.

For this very reason, the General Assembly enacted Section 812.20 of Am. Sub. H.B. No. 1, the Immediate Effect Provision, to acknowledge that these appropriations for current expenses take effect immediately upon Am. Sub. H.B. No. 1 becoming law:

Section 812.20. The amendment, enactment, or repeal by this act of the sections listed below is exempt from the referendum because it is or relates to an appropriation for current expenses within the meaning of Ohio Constitution Article II, Section 1d and section

1.471 of the Revised Code, * * * , and therefore takes effect immediately when this act becomes law

Sections . . . 3770.03, [and] 3770.21

B. Relators' Complaint In Mandamus To Delay The VLT Provisions From Becoming Law.

By their Complaint for Writ of Mandamus, the Relators seek to have this Court issue a writ of mandamus to the Ohio Secretary of State, compelling her to ignore the Ohio General Assembly's Immediate Effect Provision, and instead, subject the appropriation provisions embodied in the VLT Provisions to a referendum that Relators wish to file. The improper delay that Relators seek to impose on the State's funding of its current obligations for School Expenses imposes direct and substantial damage to the Educators. They are immediately put at risk that the State will not be able to adequately fund its current obligation to pay their School Expenses and prevent them from providing a quality education to Ohio's school children.

For these reasons, the School Educators are entitled to intervene in this action as respondents, as a matter of right, to protect their direct and substantial interests and the interests of Ohio's school children in a quality education.

II. Law and Argument

A. The Educators Are Entitled To Intervene In This Action As Of Right Pursuant To Civ.R. 24(A)(2).

The Educators are entitled to intervene in this action as of right pursuant to Civ.R. 24(A)(2), which states:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Civ.R. 24 must be liberally construed in favor of intervention. See *State ex rel. Smith v. Frost* (1995), 74 Ohio St.3d 107.

An applicant seeking intervention under Civ.R. 24(A)(2) must establish the following:

. . . the application must be timely, and the applicant must show that it has an interest relating to the property that is the subject of the action, that the applicant is so situated that disposition of the action may as a practical matter impair or impede its ability to protect that interest, and that the existing parties do not adequately represent its interest.

State ex rel. Gray Road Fill, Inc. v. Wray (1996), 109 Ohio App.3d 812, 815. The Educators meet each of these requirements for intervention under Civil Rule 24(A)(2).

1. *The Educators' Application For Intervention Is Timely.*

In determining whether an application to intervene is timely, "the basis of the alleged right to intervene is balanced against trial convenience and potential prejudice to the rights of the original parties." *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 352. "Factors to consider include the point to which the suit has progressed, the length of time the applicant knew or should have known of the pending suit, and the reason for the delay in attempting to intervene." *Gray Road Fill, supra*, 109 Ohio App.3d at 816. "Whether an application to intervene is timely is determined from the facts and circumstances of a particular case." *Id.* at 815.

The Complaint for Mandamus was filed on July 20, 2009. The Educators' counsel became aware of this action on July 21. This motion is being filed promptly – four (4) days after the filing of the Complaint. Respondent's answer is due next Monday, July 27, and the Educators have tendered their proposed answer with this motion. The Educators' intervention will not delay this proceeding in any way. Accordingly, no prejudice will be suffered by any party by the Educators' intervention. This motion to intervene is timely.

2. *The Educators Have Direct and Substantial Interests In The Subject Of This Action – As Do the Ohio School Children to Whom The Educators Have a Duty to Provide a Quality Education.*

As noted, the Educators' salaries and benefits, and the costs the Educators incur to provide a quality education to Ohio's public school children, will be funded by the revenues produced by the VLT Provisions. By their Complaint, Relators improperly seek to delay the VLT Provisions from becoming law. The Ohio General Assembly determined that the VLT Provisions must immediately go into effect, pursuant to the Immediate Effect Provision, because the VLT Provisions are appropriation provisions that are needed to produce revenue so that the State can meet its current obligations to the Educators and Ohio's school children. Relators seek to frustrate the State's funding of those obligations merely to serve their own political agenda. But the delay Relators seek to impose is not only improper, it directly harms the Educators' pecuniary interests and the interests of Ohio's school children to whom the Educators have a duty to provide a quality education. They have a right to protect those interests under Civ.R. 24(A).

3. *The Educators Are So Situated That Disposition Of This Action May, As A Practical Matter, Impair And Impede Their Ability To Protect Their Interests and the Interests of Ohio's School Children.*

Delay in the effective date of the VLT Provisions, and in the State's ability to obtain the revenue needed to pay the School Expenses pursuant to those provisions, is the relief sought by Relators in this action. That requested delay is precisely what will cause economic harm to the Educators and impair their ability to provide a quality education to Ohio's school children. Thus, the Educators may be damaged by the Court's decision in this action if they are not given the opportunity to protect their substantial interests in this case. Disposition of this action in their absence clearly may impair or impede their rights and interests.

4. *The Educators' Substantial Interests and the Interests of Ohio's School Children Are Not Adequately Represented By The Existing Parties.*

The Educators' substantial interests, and the interests of Ohio's school children, are not adequately represented by the existing parties to this action. No other party in this action faces the loss of salary or employment benefits that the Educators may suffer if the Relators were to obtain the improper delay that they seek. No other party in this action has a legal responsibility to provide a quality education to Ohio's school children. As noted, Respondent Ohio Secretary of State has no such direct pecuniary interest or legal responsibility. And more importantly, the Ohio Secretary of State has obligations to constituencies other than the Educators and Ohio's school children that preclude her from having undivided "loyalty" to the Educators' and their students' interests.

No existing party has the same interests as the Educators and Ohio's school children. No existing party adequately represents the Educators' and the school children's interests. Furthermore, a party need only make a "minimal" showing to satisfy this requirement under Civ.R. 24(A). *See Frost, supra* at 108. The Educators have satisfied this requirement for intervention.

B. Alternatively, the Educators Should Be Granted Leave to Intervene Under Civ.R. 24(B)(2)

Civ.R. 24(B)(2) alternatively provides for permissive intervention. Civ.R. 24(B)(2)

states:

Upon timely application anyone may be permitted to intervene in an action... (2) when an applicant's claim or defense and the main action have a question of law or fact in common. ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

For the same reasons discussed above, and in the alternative, the Educators should be granted leave to intervene under Civ.R. 24(B)(2). Disposition of this action may have an adverse

impact on the Educator' ability to protect their own interests and the interests of Ohio's school children. The Educators' defenses and Relators' claim seeking a writ of mandamus clearly share common questions of law or fact. The Educators' intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. The Educators' answer is attached and ready for immediate filing. As a result, the Educators should be granted leave to intervene under Civ.R. 24(B)(2) to protect their interests.

III. Conclusion

For the reasons set forth above, the Court should grant the School Employees leave to intervene as respondents in this action, as a matter of right. They satisfy the requirements for such intervention under Civ.R. 24(A)(2). In the alternative, the Court should permit them to intervene pursuant to Civ.R. 24(B)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

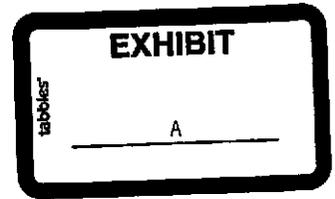
The undersigned hereby certifies that on the 24th day of July, 2009, a copy of the foregoing was served via e-mail and facsimile, upon the following:

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Relators,)

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HONORABLE JENNIFER BRUNNER,)
Ohio Secretary of State,)

Respondent,)

and)

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and)

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and)

EVE BOLTON)
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Intervenors-Respondents.)

Case No. 09-1310

Original Action in Mandamus

ANSWER OF INTERVENORS-RESPONDENTS OHIO FEDERATION OF TEACHERS,
OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, JANE SIMON, AN OHIO
TEACHER, AND EVE BOLTON, AN ELECTED CITY SCHOOL DISTRICT BOARD
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*Counsel for Respondent
Ohio Secretary of State Jennifer Brunner*

ANSWER

These Intervenor-Respondents (together, the “Educators”) are the Ohio Federation of Teachers (OFT), an unincorporated association representing for purposes of collective bargaining through affiliated local unions more than 20,000 teachers and employees of Ohio’s public schools; The Ohio School Business Officials Association (OASBO), an association of approximately 1,000 Ohio public school employees including school district treasurers, business managers, food service and transportation directors and other school business officers and confidential employees; Jane Simon, an Ohio teacher employed by the Cincinnati City School District; and Eve Bolton, a retired Ohio public school teacher who serves as an elected School Board Member for the City of Cincinnati Public School District. Collectively and individually, the Educators have an interest in the property and transactions that are the subject of this action because, *inter alia*, they are or represent employees of Ohio public school districts who (a) will receive compensation and benefits paid in part from education funds that will be generated for the State of Ohio from the video lottery terminals (“VLTs”) that are the subject of Relators’ complaint, or, (b) in the case of Intervener Bolton, have a duty to provide a quality public education to Ohio school children that is dependent upon the receipt of such education funds by an Ohio school district. Further, the Educators are so situated that the disposition of the action without their participation may as a practical matter impair or impede their ability to protect their interests.

For their answer to Relators’ Complaint For Writ Of Mandamus (the “Complaint”), the Educators state as follows.

1. The Educators are without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶¶ 1, 2, 3 of the Complaint, and therefore, deny those allegations.
2. The Educators admit the allegations of ¶¶ 4 and 5 of the Complaint.

3. In response to ¶ 6 of the Complaint, the Educators admit that Respondent Ohio Secretary of State is not vested with any jurisdiction to determine the constitutionality of any law. The Educators deny all further allegations of that paragraph.

4. The Educators deny the allegations of ¶ 7 of the Complaint.

5. The Educators admit the allegations of ¶¶ 8 and 9 of the Complaint.

6. The Educators deny the allegations of ¶¶ 10 and 11 of the Complaint.

7. In response to ¶¶ 12 and 13 of the Complaint, the Educators state that the Governor's VLT Directive referred to therein speaks for itself.

8. The Educators admit the allegations of ¶ 14 of the Complaint.

9. In response to ¶ 15 of the Complaint, the Educators admit that on July 17, 2009, the Governor signed Am. Sub. H.B.No. 1 of the 128th Ohio General Assembly.

10. In response to ¶ 16 of the Complaint, the Educators admit that Am. Sub. H.B. No. 1 contains language amending certain provisions of Revised Code Chapter 3770, and that the amendments expressly recognize the already-existing authority of the State of Ohio, under Article XV, Section 6 of the Ohio Constitution, to use a lottery device known as a "video lottery terminal" ("VLT") in the State's operation of the Ohio Lottery.

11. In response to ¶¶ 17 and 18 of the Complaint, the Educators state that Am. Sub. H.B. No. 1 speaks for itself.

12. The Educators admit that ¶ 19 of the Complaint accurately quotes from a portion of Section 812.20 of Am. Sub. H.B. No.1.

13. In response to ¶ 20 of the Complaint, the Educators admit that (a) in compliance with Article II, Section 1d of the Ohio Constitution, Section 812.20 of Am. Sub. H.B.No.1 provides that certain sections of that bill that are comprised of appropriations for the current expenses of the State, including the VLT Provisions that are the subject of this action, became

effective immediately upon Am. Sub. H.B. No.1 becoming law, and (b) Section 812.10 of Am. Sub. H.B. No. 1 provides that certain non-appropriation provisions of that bill become effective at various later dates.

14. The Educators are without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶¶ 21, 22, and 23 of the Complaint, and therefore deny those allegations.

15. The Educators admit that ¶¶ 25 and 26 of the Complaint accurately quote from portions of Article II, Sections 1c and 1d of the Ohio Constitution.

16. The Educators deny the allegations of ¶¶ 27, 28, 29, 30, and 31 of the Complaint.

17. The Educators deny all allegations of the Complaint not expressly admitted herein.

Affirmative Defenses

18. The VLT Provisions of Am. Sub. H.B. No.1 that are at issue in this action constitute “appropriations for the current expenses of the state government and state institutions” under Article II, Section 1d of the Ohio Constitution, and therefore, (a) became effective immediately upon Am. Sub. H.B. No. 1 becoming law, and (b) are not subject to referendum.

19. Relators do not have a clear legal right to the relief they request in their Complaint.

20. Respondent Ohio Secretary of State does not have a clear legal duty to perform the acts that Relators request the Court to compel her to perform.

21. Respondent Ohio Secretary of State does not have the authority under Ohio law to perform the acts that Relators seek to have this Court compel her to perform pursuant to this action.

22. Relators have failed to join in this action certain “indispensable” parties under Civil Rule 19.

WHEREFORE, the Educators pray that Relators’ Complaint be dismissed and that they recover their costs incurred herein, including their attorneys’ fees, pursuant to R.C. 2731.12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of July, 2009, a copy of the foregoing was served via e-mail and facsimile, upon the following:

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