Supreme Court of Ohio Clerk of Court - Filed September 10, 2015 - Case No. 2015-1456

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *ex rel.*	)	**CASE NO. 2015-1456**
KATHRYN WILEN, *et al.*,	)	
	)	
Relators,	)	Original Action in Mandamus-
	)	Expedited Election Case
-vs.-	)	
	)	
CITY OF KENT	)	
	)	
Respondent.	)	

MERIT BRIEF OF RELATORS

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Introduction

The City of Kent's Charter definition of "qualified voters" conflicts with the definition of "qualified voters" in Article XVIII § 14 of Ohio's Constitution. Kent violated Relators' legal rights when, on advice of its Law Director, its Council refused to certify a proposed Charter Amendment to the Portage County Board of Elections for the November 3, 2015 ballot. See Complaint, Ex. B; Ex. C, pp. 7-8.

I. Statement of Facts

Relators are Kent voters and taxpayers who circulated an initiative petition for a charter amendment according to the constraints and requirements of the Constitution of Ohio, Article XVIII § 14. If passed, the amendment would establish a "Democracy Day" in October each year an election is held in Kent. See Complaint, Ex. A. On that day, the City would hold a public hearing to examine the impact of corporate campaign contributions on the City, the State, and the Nation. *Id.* After the hearing, the Clerk of Council would send a letter to elected state and federal officials summarizing the testimony and stating that Kent's citizens voted in November 2015 to support an initiative calling for an amendment to the U.S. Constitution declaring:

> "Only human beings, not corporations, are legal persons with Constitutional rights, and; Money is not equivalent to speech, and therefore, regulating

political contributions and spending does not equate to limiting political speech." *Id.*

Once 3/4 of state legislatures ratified a Constitutional amendment reflecting these principles, the hearings would no longer be required. *Id.*

In the last preceding Kent municipal general election, 3324 people voted. Complaint, Ex. D; See also Appendix, certified copy of Portage County Board of Elections Official Canvass Nov. 5, 2013 Election. Under Ohio's Constitution, 10% of that number, or 333 valid signatures, are required for Council to certify an issue to the Portage County Board of Elections for inclusion on the November ballot. Ohio Const. Article XVIII § 14.

The Petition contained 791 signatures of which the Board of Elections found 621 valid. Complaint, Ex. E. Despite having enough valid signatures, Kent's Law Director advised Council against certifying the issue to the Board of Elections. Council followed this advice. Complaint Ex. B; Ex. C, pp. 7-8.

II. Law and Argument

In 1995, this Court stated, "Where a municipal legislative authority erroneously either fails to submit a charter amendment when it is presented with a legally sufficient petition or fails to make a prompt determination on the sufficiency of the petition within the constitutional time period, this court has issued writs of mandamus to order placement on the next regular election ballot."

Huebner v. W Jefferson Village Council, 75 Ohio St.3d 381, 385 (1995); see also State ex rel. Comm. for the Charter Amendment, City Trash Collection v. Westlake, 97 Ohio St.3d 100 (2002); *State ex rel. Committee for Charter Amendment Petition v. Avon, 81 Ohio St.3d 590 (1998). State ex rel. Ebersole v. Powell, 141 Ohio St.3d 17 (2014).* R.C. 2731.01 defines mandamus as "a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." In its Answer, Respondent states its Charter reads as follows:

> Initiative petitions for Charter changes may be circulated by any elector or electors of the City in accordance with the Constitution of Ohio and under the jurisdiction of the Ohio Revised Code. City Council shall not pass any ordinance or resolution to impair the circulation and submission to the voters of any initiative petitions for Charter changes. At least 10 percent of the qualified electors of the City registered to vote at the next preceding regular Municipal election must sign the initiative petitions for Charter change prior to submission to the Clerk of the City Council. City Council shall immediately follow procedures set forth in the Ohio Revised Code for placement on the ballot at the next regular or special election. Answer p. 1; Also see Appendix, *City of Kent Charter Section 7A.*

The Charter, in accordance with Ohio's Constitution, created a legal duty for Council to immediately certify an issue to the Portage County Board of Elections if an initiative petition for a Charter change signed by at least 10 percent of the qualified electors was submitted to the Council Clerk. However, the Charter violates Ohio's Constitutional requirement by defining qualified electors as 10 percent of the registered voters as of the next preceding municipal election.

Relators submitted to the Council Clerk an initiative petition to change the Charter with signatures of over 10 percent of the qualified electors as defined by Ohio Constitution Article XVIII § 14. Complaint, Ex. A. Ignoring the State Constitution, Council refused to certify the issue claiming it had no duty because (1) Relators lacked the required number of signatures based on the Kent City Charter, and (2) the proposed Charter change had nothing to do with running the Kent government. Relators are entitled to a writ of mandamus to require the Respondent to comply with its Charter and the Ohio Constitution because (1) Relators had enough signatures under Ohio Constitution Article XVIII § 14 and (2) Council lacked authority to review the substance of the proposed ballot measure.

<u>Proposition of Law No. 1</u>: Relators presented enough valid signatures to create a legal duty by the Respondent to submit the proposed Charter change to the Board of Elections for inclusion on the November ballot.

In *Huebner*, this Court held that "in determining the number of valid part-petition signatures necessary to establish a right to the placement of a proposed amendment of a municipal charter before the voters, Sections 5, 8, 9, and 14, Article XVIII of the Ohio Constitution must be construed in *pari materia*. Accordingly, the percentage of electors required to sign such part-petitions is ten percent of the electors of the municipality based upon the total number of votes cast at the last preceding general municipal election." *Huebner, 75 Ohio St.3d at 384.* This Court applies this rule to decide whether to issue writs of mandamus to city councils when they fail to certify ballot issues due to a misunderstanding of signature requirements. *See Comm. for the Charter Amendment, City Trash Collection, Ohio St.3d at 107 (holding 735 valid signatures was sufficient signatures when the total number of votes casts in the last election was 5,383); State ex rel. Comm. for the Charter Amendment Petition v. Hamilton, 93 Ohio St.3d 508 (2001) (holding 1,044 valid signatures was not sufficient when the total number of votes cast in the last election was over 10,660).* Applying the rule in this case, the 621 valid signatures are sufficient because 3,324 people voted in the last Kent municipal general election therefore the petition exceeded the required number of signatures by 289. Complaint, Ex. D; Appendix, p. 1.

Respondent's argument that 1,707 signatures are required is an erroneous interpretation of "qualified electors" as all registered voters in a municipality—in

this case 17,067. This Court held a "charter must be construed so as to harmonize its provisions with Sections 8, 9, and 14, Article XVIII of the Ohio Constitution, and language used in the charter should be construed according to its ordinary and common usage." *Comm. for the Charter Amendment, City Trash Collection, Ohio St.3d at 105.* To be in harmony with Ohio's Constitution, "qualified electors" means the "number of votes cast at the last preceding general municipal election," rather than the number of registered voters. *Id at 106.*

<u>Proposition of Law No. 2</u>: Respondent may not review the substance of a proposed ballot measure.

In *State ex rel. Ebersole v. Powell* this Court held, "It is not the role of the city council to substitute its judgment for that of the voters as to which matters should appear on the ballot. Nor can the city council assess the constitutionality of a proposal, because that role is reserved for the courts." *State ex rel. Ebersole, 141 Ohio St.3d at,19.* Municipal legislative authorities have "no authority determine what substantive errors, if any, are grave enough to warrant the withdrawal of a whole issue from the electorate." *State ex rel. Polcyn v. Burkhart, 33 Ohio St.2d 7, 292 N.E.2d 883 (1973).* Respondent's argument that the proposed charter amendment "has nothing to do with running the city government of Kent, Ohio and should, therefore, not be submitted to the voters of Kent, Ohio as a Charter amendment" alleges a substantive error that the proposal is not related enough to

City government as a reason for its rejection. This reason for rejecting the charter amendment exceeds City Council's ministerial role limited to a review of the "the form of the petition." *Huebner, 75 Ohio St.3d at 385.* Respondent cannot reject an initiative petition based on its substance.

III. Conclusion

The initiative petition submitted to the Kent City Council had sufficient signatures and was in the correct form to create a non-discretionary legal duty for Respondent to certify the petition to the Portage County Board of Elections. Respondent's explanation for its failure to do its duty is a meritless abuse of discretion. Due to the proximity of the election Relators have no adequate remedy under the usual course of law. Relators are entitled to a writ of mandamus to compel Respondent to fulfill its duty so the ballot issue may be certified in time to be voted on this November and an award of attorney fees.

Respectfully submitted,

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Certificate of Service

I certify a copy of the foregoing was served by email and fax on 9-10-15 upon:

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APPENDIX

Election Summary Report
Portage County, Ohio
General Election
November 5, 2013
Summary For Jurisdiction Wide, All Counters, All Races
Portage County's Official Canvass

Registered Voters 108594 - Cards Cast 31662 29.16%

Num. Report Precinct 133 - Num. Reporting 133 100.00%

Mayor, Kent City

		Total	
Number of Precincts		21	
Precincts Reporting		21	100.0 %
Vote For		1	
Times Counted		3324/17067	19.5 %
Total Votes		2626	
Jerry Fiala		2626	100.00%

Council at Large, Kent City

		Total	
Number of Precincts		21	
Precincts Reporting		21	100.0 %
Vote For		3	
Times Counted		3324/17067	19.5 %
Total Votes		7168	
Doria Daniels		1410	19.67%
Michael A. DeLeone	DEM	1964	27.40%
Melissa M. Long	DEM	1625	22.67%
Roger B. Sidoti	DEM	2169	30.26%

Council at Large, Tallmadge City

		Total	
Number of Precincts		2	
Precincts Reporting		2	100.0 %
Vote For		3	
Times Counted		36/243	14.8 %
Total Votes		91	
James M. Donovan		25	27.47%
Robert Maguire		20	21.98%
James Nuznoff		12	13.19%
Kim Ray		17	18.68%
John D. Rensel		17	18.68%

Municipal Court Judge

		Total	
Number of Precincts		133	
Precincts Reporting		133	100.0 %
Vote For		1	
Times Counted		31662/108594	29.2 %
Total Votes		21147	
Barbara R. Oswick		21147	100.00%

Council at Large, Ravenna City

		Total	
Number of Precincts		10	
Precincts Reporting		10	100.0 %
Vote For		2	
Times Counted		2121/7585	28.0 %
Total Votes		3201	
Fred Berry		1027	32.08%
Katie Hayes		982	30.68%
Amy Michael		1192	37.24%

Council Ward 1 Ravenna City

		Total	
Number of Precincts		2	
Precincts Reporting		2	100.0 %
Vote For		1	
Times Counted		457/1453	31.5 %
Total Votes		444	
Steven R. Bailey		167	37.61%
Sharon Spencer		277	62.39%

Council Ward 2, Ravenna City

		Total	
Number of Precincts		3	
Precincts Reporting		3	100.0 %
Vote For		1	
Times Counted		620/2266	27.4 %
Total Votes		497	
Frank Seman		497	100.00%

Mayor, Aurora City

		Total	
Number of Precincts		14	
Precincts Reporting		14	100.0 %
Vote For		1	
Times Counted		4588/11733	39.1 %
Total Votes		4516	
Mark J. Demyan		121	2.68%
Delbert D. Dunbar		125	2.77%
John J. Kudley, Jr.		720	15.94%
John Monroe		1182	26.17%
Tom Plunkett		818	18.11%
Ann Womer Benjamin		1550	34.32%

Council At Large, Aurora City

		Total	
Number of Precincts		14	
Precincts Reporting		14	100.0 %
Vote For		1	
Times Counted		4588/11733	39.1 %
Total Votes		4314	
Joseph Kastelic		1090	25.27%
Amy McDougald		1519	35.21%
Lynn McGill		847	19.63%
Scott Wolf		858	19.89%

Council Ward 1 Aurora City

		Total	
Number of Precincts		2	
Precincts Reporting		2	100.0 %
Vote For		1	
Times Counted		401/1272	31.5 %
Total Votes		362	
Richard Duncan		123	33.98%
James L. Vaca		239	66.02%

Council Ward 3 Aurora City

		Total	
Number of Precincts		3	
Precincts Reporting		3	100.0 %
Vote For		1	
Times Counted		831/2626	31.6 %
Total Votes		555	
Reva Barner		555	100.00%

Council Ward 5 Aurora City

		Total	
Number of Precincts		3	
Precincts Reporting		3	100.0 %
Vote For		1	
Times Counted		912/2100	43.4 %
Total Votes		850	
Kathleen Grandillo		556	65.41%
Jim Tasker		294	34.59%

This is a true and accurate copy of page one of Portage County's Official Canvass for the November 5, 2013 election.

Theresa Nielsen
Deputy Director

SECTION 7A. AMENDING THE CHARTER BY INITIATIVE PETITION

Initiative petitions for Charter changes may be circulated by any elector or electors of the City in accordance with the Constitution of Ohio and under the jurisdiction of the Ohio Revised Code. City Council shall not pass any ordinance or resolution to impair the circulation and submission to the voters of any initiative petitions for Charter changes. At least 10 percent of the qualified electors of the City registered to vote at the next preceding regular Municipal election must sign the initiative petitions for Charter change prior to submission to the Clerk of the City Council. City Council shall immediately follow procedures set forth in the Ohio Revised Code for placement on the ballot at the next regular or special election. (Added 11-7-95)