

STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT – CIVIL DIVISION
811 Port Street, St. Joseph, MI 49085 Telephone: 269-983-7111 Ext. 8764

In re City of Benton Harbor Mayoral
Recall Election

File No. 2014-0117-AW
Hon. John E. Dewane

Donna B. Howard P57635
Berrien County Corporate Counsel
Attorney for Petitioner Berrien County Clerk
701 Main Street
St. Joseph, MI 49085
269-983-7111 Ext. 8416

Randy S. Hyrns P31333
Richard A. Racht P66945
Bittner, Hyrns, Daly & Riemland, PC
Attorneys for Interested Parties Benton
Harbor City Clerk Kimberly Thompson
and the City of Benton Harbor
610 Ship Street, PO Box 290
St. Joseph, MI 49085
269-983-0551

Mayor James Hightower
Interested Party
450 E. Britain Avenue
Benton Harbor, MI 49022
269-757-6229

John Anthony LaPietra P72121
Atty for Cornelius
386 Boyer Court
Marshall, MI 49068
269-781-9478

Commissioner Marcus Muhammad
Interested Party
453 Cherry Street
Benton Harbor, MI 49022
269-861-6504

Mark P. Fancher P56223
Staff Attorney, Racial Justice Project
ACLU Fund of Michigan
Attorney for Amicus Curiae
2966 Woodward Avenue
Detroit, MI 48201
313-578-6822

**OPINION AND ORDER DENYING WRIT OF MANDAMUS AND ORDERING
RECALL ELECTION**

OPINION

I find that the testimony of the Michigan State Police forensic document examiner, Detective Sergeant Mark Goff, as supplemented by his report, is credible, and when coupled with the WSBT-TV 22 video, is, indeed, compelling evidence that the dates of the 12 signatures on recall petition sheet 38 were actually made on Friday, November 8, 2013, but that the dates on sheet 38 were then altered to either November 18, 2013, or

November 28, 2013. I find the testimony of Helen Jones and Evelyn Canaga not credible as to the date they signed. In addition to being inconsistent with the documentary evidence, is unlikely that a petition signer would remember the date on which she signed the petition. I believe Ms. Jones' testimony that she signed on the same date as Mr. Sherman. However, when the dates were altered, a 1 was inserted in front of the 8 for Ms. Jones, but a 2 was inartfully inserted in front of the 8 for Mr. Sherman. This inconsistency reinforces my conclusion that Ms. Jones' testimony is not credible. The Clerk did not count one of these stale signatures, Antonio Sherman's, because he signed more than one sheet.

I find that the same alterations occurred on the following lines on sheets 18, and 19, changing the date to November 18, 2013, for signatures actually made on November 8, 2013:

Sheet 18 Line 5 James Willis (already not counted as not registered)
 Line 6 Lila Scott

Sheet 19 Line 5 Roshanda Scott
 Line 6 Charles Davis
 Line 7 Kevin Tucker
 Line 8 Otha Anderson

I find that similar alterations occurred on lines 3, 4, 5, 6 and 7 on sheet 34 changing a blank unknown date to November 22 or 26, 2013. While I find Detective Sergeant Goff's testimony and report credible, from this evidence regarding sheet 34 I can only speculate or conjecture that these questioned signatures were stale. Given that unquestioned signatures on lines 1 and 2 at the top of sheet 34 and the unquestioned signatures on line 26 at the bottom of sheet 34 are all dated November 26, 2013, a rational conclusion is that the intervening signatures on lines 3 through 11 were made on November 26, 2013, but the signer either left the date blank or put in an incorrect date. The blanks were then filled, sometimes incorrectly, with a different pen than used by the signer or the incorrect date corrected, sometimes with another wrong date, with a different pen. The unquestioned signatures 9, 10 and 11 are not in chronological sequence leading me to conclude they were actually made on November 26, 2013, rather than on November 25, 2013, as stated. Willie Davis circulated sheet 34, as well as sheets 35 and sheets 36, all of which were certified by Willie Davis on November 26, 2013. 22 of the 24 signatures on sheets 22 and 24 are dated November 26, 2013. The 2 signatures on sheet 35 dated November 22, 2013, are out of chronological order indicating that they were obtained on November 26, 2013, but incorrectly dated. The change on the date on line 8 is a clear correction of an error made by entering January 26, 2013, rather than November 26, 2013, through omission of the first 1 in 11. However, clerk did not count the signatures on line 2 (Carlos King) because it did not match the signature in the Qualified Voter File, the signatures on lines 9 (Brielle Gibson), 11 (Maxene Smith) and 12 (Martha Wigbel) because they resided outside the City of Benton Harbor and the signatures on lines 3 (Erick William), 5 (Douglas Behen) and 7 (Treasha Lewis) because they were not registered.

I find that an alteration occurred on line 2 of sheet 41. The date was changed from December 12, 1981, (12-12-81), to December 12, 2013, (12-12-2013). From the chronological context and the date of certification, I find the signature on line 2 (Courtney Robinson) was made on December 2, 2013, but the signer put in 12-12-81, which is likely her birth date. This error was corrected albeit with another wrong date with a different pen than the signer used to write 12-12-81.

James Cornelius, the sponsor of the recall petition, filed the recall petition with the Berrien County Clerk on Wednesday, January 8, 2014. MCL 168.995 provides that the petition shall be signed by 393 registered and qualified electors. The Clerk shall not count a signature on a recall petition sheet if the signature "... was obtained more than 60 days before the filing of the recall petition. MCL 168.961(2)(d). November 8, 2013, was 61 days before January 8, 2014. Therefore the Clerk shall not count the signatures obtained on November 8, 2013. I find 18 signatures were stale because they were obtained on November 8, 2013. The Clerk did not count two of these stale signatures, Antonio Sherman's, because he signed more than one sheet, and James Willis' because he was not registered. Therefore, the Sherman and Willis signatures were not included in the 402 signatures that the Clerk initially counted. Accordingly, I find that the Clerk shall not count 16 stale signatures counted and must deduct these 16 signatures from the Clerk's initial total, leaving 386 signatures.¹

386 signatures still remain. 393 signatures were required. If no other issues were involved, the Clerk would be not be required to call the recall election because the petition was seven signatures short of the required number. MCL 168.963(1). However, another issue has been raised.

Mr. Cornelius, the sponsor of the recall petition, claims that the practice adopted by the Clerk in December 2012 of not counting the first signature of a signer who signs more than once, rather than not counting only the excess signatures obtained after the first signature as was the Clerk's prior practice that remains posted on the Clerk's web site, is problematic. Mr. Cornelius claims that the Clerk is estopped from relying on the new practice because she continued to lead the public to rely on the prior practice by continuing to post it on the Clerk's web site and that the Clerk is not entitled to mandamus because she does not have clean hands as a result of turning over her records to law enforcement without a subpoena. In addition, Mr. Cornelius claims that the new practice violates constitutionally protected rights to free speech² and to petition the government for a redress of grievances³.

¹ MCL 168.954 also provides that "[e]ach signer of a recall petition shall affix his or her signature, address, and the date of signing". I also conclude from this same evidence that the altered dates were not affixed by the signers. However, since MCL 168.961(2) does not provide that the Clerk shall not count such signatures, I do not use this as an additional reason not to count these signatures or any others on the 62 recall petition sheets suffering from the same deficiency.

² US Const, Am I.

³ US Const, Am I.

On May 19, 2014, I held a pretrial conference. All interested parties had notice and an opportunity to participate. All interested parties appeared and participated except for Mr. Cornelius. I observed that no counter claim had been filed challenging the validity of the Clerk's action in not counting a number of the signatures presented on the 62 sheets that were not included in the 402 total. I then inquired if any of the interested parties were challenging the Clerk's action in not counting signatures. All interested parties responded negatively as did counsel Amicus Curiae, ACLU. Mr. Cornelius' challenge to the Clerk's action came at trial.

I should not consider a challenge at such a late date unless it involves solely an issue of law, the facts necessary to decide it are in the record and a manifest injustice would result if I failed to do so. The challenges on the basis of estoppel and unclean hands involve facts which may not be in the record because of lack of notice to the Clerk and that do not rise to the level of a manifest injustice. Moreover, the estoppel challenge appears to rely on the doubtful premise that a member of the public can rely on a public official for a correct interpretation of the law while the unclean hands challenge requires the doubtful condition that the challenger who filed altered petition sheets have clean hands as well. Normally, I would not decide an issue on a constitutional basis if another avenue were open. Since I cannot under these circumstances otherwise dispose of Mr. Cornelius' challenge, my only option left is to consider the constitutional challenge.

Ten persons circulated petition sheets. Seven circulators collected duplicate signatures. Of the three circulators who were duplicate free, one collected 4 signatures on one sheet, 3 in a two day period and 1 two weeks later. Another collected 36 signatures on 3 sheets in one week. The third collected 12 signatures in 5 days on one sheet and 3 signatures in 4 days on another sheet. I can determine from the 62 petition sheets that 22 persons, including Mr. Sherman, signed sheets twice. I have not identified duplicate signatures for Jonathon Wade as designated by the Clerk on sheet 42 as a duplicate signature. I have not found any person who signed more than twice. Of these 22 persons, 2 signed the same sheet on consecutive lines on the same day in the presence of the same circulator for both signatures. One other person signed two different petitions the same day each in the presence of the same circulator. A total of 11 persons signed twice in the presence the same circulator each time, 8 of which were in the presence each time of the Rev. Edward Pinkney, who circulated 33 petition sheets, with one each for Marjorie Carter, Mr. Cornelius and Elza Lee Williams. Without dealing with Mr. Sherman, if the first signatures of the 21 persons who signed twice are counted, the sheets would have been signed by 407 qualified and registered electors, more than the 393 signatures that would mandate the Clerk to call the recall election. MCL 168.393(2).

I have received and considered the post-trial affidavit of Christopher M. Thomas, Director of the Michigan Bureau of Elections, supporting the Clerk's practice. I have the upmost professional respect for Director Thomas⁴ who has held that position since

⁴ I need to disclose that I also have the upmost personal respect for Director Thomas, a native of St. Joseph. Since 1980, my family and I have resided across the street from Director Thomas' parents, and Director Thomas is a long-

1981. The state law cited by Director Thomas is compelling on his statutory authority to invoke the practice followed by the Clerk. However, I cannot rely on *Tax Payers for Assessment Cuts v Austin*, 994 F2d 291, 299 (CA 6, 1993) in determining whether the practice passes current constitutional muster. Since 1993, there have been further developments on the constitutional issues involved in a recall election.

I agree with Judge Robert Holmes Bell that the circulation and signing of recall petitions is core political speech.⁵ I find have difficulty conceiving of a more compelling example of manifest injustice than the deprivation of the rights secured to the petition sponsor and signers by the Bill of Rights⁶. Vindication of the rights to free speech⁷ and to petition the government for a redress of grievances⁸ cries out for judicial intervention if jurisdiction is invoked as was done in this case when the Clerk initiated this action by properly filing the Complaint involving an actual case or controversy between adverse parties with standing to address the issue. Determination of this issue involves solely the resolution of an issue of law, whether the Clerk's action deprived the sponsor and the duplicate signers of rights secured by the state or federal constitutions.

The Clerk's recently adopted policy places a significant burden on a core political right. It is obvious to me from the facts recited above that even the same circulator has difficulty detecting that a person is signing more than once, particularly where signatures are obtained on multiple petition sheets over an extend period of time. It is equally obvious that some persons who are qualified and registered voters have difficulty remembering previously signing a petition for the same recall election. Obtaining the signatures of registered and qualified electors equal to not less than 25% of the number of votes cast for candidates for the office of governor at the last preceding general election in the 60 day window provided is an arduous chore made much more difficult by the Clerk's newly adopted practice. The practice must be narrowly tailored to advance a compelling state interest. The Clerk has a compelling interest in the integrity of the recall petition process. However, the Clerk's approach is not narrowly tailored to advance this interest which can be fostered by merely not counting any elector's signature after the first signature as was the Clerks practice until recently. The Clerk continues to perform the administrative chore of filtering the petition sheets for duplicate signatures so insignificant, if any, conservation of administrative resources is fostered by the newly adopted practice. Not counting any signatures after the first is a less drastic but equally effective deterrent. Moreover, deterrence depends on knowledge of the penalty for noncompliance. Here, the Clerk's prior practice of counting the first signature remained on the website. It is unlikely in those circumstances that the Clerk's recently adopted practice would provide any deterrent effect. Accordingly, I find that the Clerk's newly adopted practice is not narrowly tailored to advance the Clerk's compelling interest in the integrity of the recall process.

time family friend. I have not considered Director Thomas' affidavit any differently than I would otherwise because of this relationship.

⁵ *Bogaert v. Land*, 572 F Supp 2d 883, 900 (WD Mich 2008).

⁶ US Const, Am I to X.

⁷ US Const, Am I.

⁸ *Id.*

Therefore, I conclude that the Clerk's newly adopted practice violates the First Amendment rights of not only the sponsor and the circulators but also the electors, including those who signed more than one time, who signed the petition sheets.

407 qualified and registered electors signed the petition when counting the first duplicate signature of each duplicate signer, other than Mr. Sherman. Only 393 signatures were required. Therefore, the clerk shall call the election at the November 4, 2014, election. For the reasons stated, the Clerk is not entitled to a writ of mandamus.

ORDER

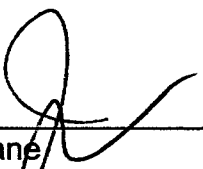
I deny a writ of mandamus. The Clerk shall call the recall election and hold the recall election on next November regular election date, Tuesday, November 4, 2014.

As a public issue is involved, no costs may be taxed.

Pursuant to MCR 2.518(B), each party shall retrieve the exhibits submitted by that party. If a party fails to retrieve the exhibits submitted by that party within 56 days of the entry of this Judgment, the recorder may properly dispose of the exhibits without notice to the parties.

This Judgment disposes of the last pending claim and closes this case.

I so order.



John E. Dewane
Presiding Judge, Civil Division
August 12, 2014