

IN THE CHANCERY COURT FOR MONROE COUNTY, TENNESSEE
AT MADISONVILLE

BILL BIVENS,
Plaintiff,

V.

RANDY DWAIN WHITE, MONROE
COUNTY ELECTION COMMISSION,
DWAYNE MARTIN, CARL WILLIAMS,
ALAN HAWKINS, CHARLES
RIDENOUR, and ROBERT LONG
Defendants,

No. 18,651

FILED

OCT 16 2014

TIME 9:30
TERESA A. CHOATE
CLERK & MASTER MONROE CTY.

ORDER

This matter came before the court on the 6th day of October, 2014, on complaint of the plaintiff Bill Bivens, and on separate motion to dismiss filed by defendants. After hearing the presentation and argument of counsel, as well as the record as a whole, finds as follows.

A. MOTION TO DISMISS FILED BY DEFENDANT WHITE

1. White moved this court to dismiss the complaint, arguing the complaint should be barred by laches. White asserts Bivens was aware of a Knoxville News Sentinel story, published in April, 2014, questioning whether White had the prerequisite three in ten years of full-time law enforcement experience. White argues because Bivens chose not to make a complaint to the Monroe County Election Commission during a period of time before the ballots were prepared, Bivens knowingly and intentionally waited to file suit through the time frame in which the Election Commission could remove a name for cause.

2. The doctrine of laches "is an equitable doctrine that bars an action where a party's unexcused or unreasonable delay is prejudicial to its adversary." *Wilkinson v. Wilkinson*, No. W2012-00509-COA-R3-CV., (Tenn. Ct. App. February 19, 2013). In order to successfully assert the defense, "the defendant must show not merely the length of time which has elapsed, but that 'because of such lapse of time, the party relying on laches as a defense has been prejudiced by the delay.'" *Id.* (citing *Brister v. Brubaker's Estate*, 336 S.W.2d 326, 332 (Tenn. Ct. App. 1960)). The plaintiff's delay must be inexcusable, negligent, and unreasonable. *Gleason*

v. Gleason, 164 S.W.2d 588, 592 (Tenn. Ct. App. 2004). Whether the party seeking to employ laches as a defense has been prejudiced by an unreasonable delay is decided “on the facts and circumstances of each individual case.” *Long v. Board of Professional Responsibility of Supreme Court of Tennessee*, No. M2013-01042-SC-R3-BP (Tenn. June 4, 2014).

3. Prejudice to the party asserting the defense of laches may involve “situations where the delay in prosecuting the claim made the claim harder to defend against, or where money or valuable services will be wasted as a result of the delay.” 30A C.J.S. Equity § 147 (2013). White asserts that he will be prejudiced by Bivens’ delay because “he has expended significant expenses and time in running for the Office of Sheriff” (Motion to Dismiss, ¶ 39). Because the time and expenses of running for office would have been expended regardless of the filing of this suit, this court finds they are not sufficient to show the extraordinary prejudice required to successfully employ the doctrine of laches.

4. The language of T.C.A. § 2-17-101, expressly provides an incumbent office holder or candidate may contest the results of an election, subject to certain timing requirements. The complaint must be filed within five days after certification of the election, and the trial must be held not less than fifteen and not more than fifty days from the day the complaint is filed. T.C.A. § 2-17-105. The present action was timely filed pursuant to T.C.A. § 2-17-105.

5. White’s reliance on *Taylor v. Lawrence County Tennessee Election Commission, et al.*, No. M2010-02406-COA-R3-CV (Tenn. Ct. App. May 23, 2011) is misplaced. Unlike the unsuccessful candidate in *Taylor*, who had knowledge of and had expressed concern regarding his opponent’s qualifications for six months prior to the election, Bivens took all reasonable and appropriate steps to raise the issue of White’s lack of qualification(s) prior to the election. Bivens first heard rumors of White’s ineligibility in March 2014, and raised concerns with POST Commission Executive Director and Chief POST Investigator on or about April 3, 2014 at the Sheriff’s association meeting in Nashville, Tennessee. Bivens also called the POST Commission multiple times in the weeks following in an attempt to get White’s name removed from the ballot. Despite his early attempts, the POST Commission did not rescind White’s certification to appear on the ballot until July 18, 2014, which was past the date on which White’s name could be removed.

6. Considering the express language of T.C.A. § 2-17-101, et seq., and the facts of this particular case, this Court finds the equitable defense of laches is without merit.

7. This court further finds counsel for Bivens has fulfilled the notice pleading requirements. Pursuant to Tenn. R. Civ. P., Rule 8.01, a pleading for relief “shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.” It is not necessary that a pleading “contain detailed allegations of all the facts giving rise to a claim,” but is sufficient that the allegations show the plaintiff is entitled to the relief sought. *Harman v. University of Tennessee*, 353 S.W.3d 734, 736 (Tenn. 2011). A motion to dismiss pursuant to Tenn. R. Civ. P., Rule 12.02(6) should only be granted when, after liberally construing the complaint and presuming all factual allegations to be true, “it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Webb v. Nashville Area Habitat for Humanity*, 346 S.W.3d 422, 427 (Tenn. 2011).

8. Bivens’ complaint provides White with sufficient notice of the claims he is alleging and sufficiently pleads a legal cause of action. As such, White’s motion to dismiss is denied.

B. MOTION TO DISMISS FILED BY DEFENDANTS MONROE COUNTY ELECTION COMMISSION, MARTIN, WILLIAMS, HAWKINS, RIDENOUR, and LONG

1. Defendants Monroe County Election Commission, Martin, Williams, Hawkins, Ridenour, and Long also move to dismiss, arguing Bivens fails to state a claim upon which relief can be granted against these defendants.

2. As stated above, A motion to dismiss pursuant to Tenn. R. Civ. P., Rule 12.02(6) should only be granted when, after liberally construing the complaint and presuming all factual allegations to be true, “it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Id.*

3. Plaintiff fails to state a claim upon which the Election Commission or its individually named members have taken action which would entitle Plaintiff to damages from these parties. Plaintiff further fails to provide any basis to show the Election Commission acted or failed to act out of its authority under the law. As such, Defendants Monroe County Election Commission, Martin, Williams, Hawkins, Ridenour, and Long are hereby dismissed as defendants in this cause.

C. FINDINGS OF FACT

1. Randall Wayne Kirkland, Chief of Police, City of Vonore Police Department, submitted a written request to the Peace Officers Standards and Training Commission (hereinafter "POST Commission") to re-certify White as a full-time officer with the Vonore Police Department on March 28, 2012. Kirkland further requests that the POST Commission recertify White without requiring his attendance to the POST Transitional School. This application was approved by the POST Commission.

2. On November 22, 2013, White signed and submitted an Affidavit for Election or Appointment to the Office of Sheriff and the Checklist for Candidates for Tennessee Sheriff's Election. Upon receiving these documents around November 25, 2013, the POST Commission verified that White was POST certified and certified White to appear on the ballot as a candidate for the office of Sheriff of Monroe County.

3. After certifying White as a candidate, the POST Commission received a verbal complaint alleging (1) defendant White's application contained false information, (2) defendant White did not meet the minimum qualifications to be certified as a full-time police officer, (3) defendant White had received a salary supplement to which he was not entitled, and (4) defendant White did not meet the minimum qualifications to run for Sheriff because he had not worked three years as a full-time officer in the last ten years.

4. The POST Commission launched a formal investigation into these allegations under its authority to verify the validity of the sworn affidavit and other forms submitted by White. This investigation revealed that White's employment with the City of Vonore Police Department was not his primary source of income, as defined in T.C.A. § 38-8-406, and White therefore, did not qualify as a "full-time" as required under T.C.A. § 8-8-102(a)(9).

5. On July 18, 2014 the POST Commission held a meeting wherein the POST Commission rescinded White's certification to appear on the ballot for the office of Sheriff of Monroe County.

6. The POST Commission advised the Monroe County Election Commission of the POST Commission's de-certification of White's candidacy by letter dated July 22, 2014. This letter stated in part,

"... this investigation revealed that White is not a full-time officer with the City of Vonore Police Department since his employment with the City did not comply

with the requirement T.C.A. § 38-8-101 (2). Subsequently, Mr. White does not possess three (3) years of full-time experience as a Certified Law Enforcement Officer within the previous ten (10) years pursuant to T.C.A. § 8-8-102 (a)(9)(A). Based on the results of the investigation, on July 18, 2014 the POST Commission rescinded Mr. White's certification to appear on the ballot for the office of Sheriff of Monroe County. This action does not affect Mr. White's POST Certification as a Law Enforcement Officer."

This letter was sent four days after early voting had begun.

7. The general election for the office of Sheriff of Monroe County, Tennessee was held on August 7, 2014. White received the majority of the votes cast, winning the election by 703 votes.

8. The Election Commission of Monroe County certified the election results on August 18, 2014, pursuant to T.C.A. § 2-8-101 (a), as shown by the returns of the election in writing.

9. Bivens filed his complaint to contest the election on August 19, 2014, pursuant to T.C.A. § 2-17-10, for the purpose of being declared the duly elected winner or to have the election declared void.

10. This court conducted a status conference on September 23, 2014, setting this matter for trial on October 6, 2014. This is within the time required by T.C.A. § 2-17-106(a) that these matters shall be heard within fifty (50) days of the complaint's filing date.

11. At the hearing on October 6, 2014, Chief Kirkland testified he discussed with White before March 28, 2012, the full-time employment of White with the Vonroe Police Department in an effort to help White obtain experience to qualify for sheriff knowing there was an issue concerning three years at full-time service.

12. Chief Kirkland testified he received approval at that time from the Commissioner who oversaw the Police Department and the Mayor contingent upon limited compensation of approximately twenty dollars per week. Mayor of Vonroe, Tennessee, Larry Summey, testified the city approval for hiring full time employees included full board approval, but this did not take place due to the low level of compensation for White.

13. White testified this job with the Vonroe Police Department was not his primary source of income since he was working full-time as EMS Director. His job duties as a full-time

police officer were to take place Monday, Wednesday, Friday, and some weekends. This work would commence after his regular work at the EMS Department.

14. Time sheets from April 2, 2012, through September 21, 2012, were entered into evidence. Chief Kirkland testified he prepared these time sheets after White provided the information regarding work. A thorough review of time sheets show White never worked more or less than an eight hour shift. After September 21, 2012, Mr. White did not either provide any more time sheets or contact Chief Kirkland to prepare any timesheets.

15. Chief Kirkland testified White's primary responsibility would be to sit on Highway 411 to slow down traffic. During the time Mr. White would be sitting on Highway 411, Chief Kirkland further advised White not to write tickets since he was going to run for Sheriff and he should focus on being seen. White wrote six tickets in April and one in June.

16. Chief Kirkland told Investigator Mark Hall the duties assigned to White included vehicle stops, writing tickets, working accidents, providing backup for other officers, and working Meth labs. White was also required to check in with dispatch, or 10-8, every day when he began work. The proof showed no documentation White ever called in to verify he was beginning his shift after June 2012, backed up any calls, worked accidents or investigated Meth labs.

17. Approximately four officers testified they saw White in his police uniform but were unable to verify the number of hours worked. There was contradictory testimony from these officers in regard to what time White's shift ended. Three affidavits from officers, generic at best, prepared by Chief Kirkland, were introduced saying White was working full-time. Two of the affidavit-signing officers testified and were unable to give the basis for their determination of full-time work.

18. Chief Kirkland testified he observed White working on various Sundays during September, October, and November. White, who testified he rarely worked on Sundays, contradicted this testimony. This habit was supported, based upon White's presentation, by a review of the existing time sheets which show White worked only one Sunday during the period of time White kept timesheets.

D. CONCLUSIONS OF LAW

Having made the aforementioned findings of fact, this court makes the following conclusions of law:

1. T.C.A. § 8-8-102 includes the following requirements to qualify for the office of sheriff:

(a) Under subdivision (a)(9)(A), the candidate must have at least three (3) years of full-time experience as a POST commission certified law enforcement officer in the previous ten (10) years, or, at least three (3) years of full-time experience as a state or federal certified law enforcement officer with training equivalent to that required by the POST commission in the previous ten (10) years.

(b) Under subdivision (b)(1), the candidate must file an affidavit which includes his or her affirmation he or she meets the requirements of T.C.A. § 8-8-102,

(c) Under subdivision (b)(2), the POST commission shall have authority to verify the validity of the aforementioned affidavit and form.

(d) Under subdivision (b)(3), the POST commission shall verify peace officer standards and training certification of any person seeking office to sheriff to the extent subdivision (a)(9), also mentioned above, requires such person to have certification. If the candidate does not have certification, the POST commission shall certify whether the candidate has three (3) years full time experience as a POST commission certified law enforcement officer and whether certification is current. If the candidate does not have a current certification, or if the person has the law enforcement experience as a state or federal law enforcement officer equivalent to that required by the POST commission, then the candidate shall certify with the county election commission by the withdrawal deadline their exemption.

2. As enacted by T.C.A. § 38-8-104, the POST commission:

(a) shall issue certification to persons who, by reason of experience and completion of in-service, advanced education or specialized training, are especially qualified for particular aspects or classes of police work (subdivision (a)(9)).

(b) is vested with the power and is charged with the duty of observing, administering, and enforcing all the provisions of Title 38, Chapter 8, regarding the employment and training of police officers.

(c) shall have the authority to establish criteria for determining whether to grant an exception to or waive the qualifications of minimum standards as provided in T.C.A. §38-8-106, based on a person's previous law enforcement experience and training.

(d) shall adopt rules and regulations in accordance with the provisions of the Uniform Administrative Procedures Act to implement the decisions with regard to its determination whether to grant an exception to or waive the qualifications of § 38-8-106.

3. The qualifications to be employed as a full-time police officer, as a part-time, temporary, reserve, or auxiliary police officer, or as a special deputy are enumerated in T.C.A. § 38-8-106. The definition of full-time police officer is provided within § 38-8-101(2), as follows:

“(2) ‘Full-time police officer’ means any person employed by any municipality or political subdivision of the state of Tennessee whose primary responsibility is the prevention and detection of crime, and the apprehension of offenders, and whose primary source of income is derived from employment as a police officer.”

4. It is within the discretion of agencies such as the POST commission to determine what proof is required to meet the specific requirements of those items conferred upon the agency by statute, such as qualifications for employment as a police officer or the office of sheriff. *Sanfil of Tennessee, Inc., v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn.1995). *See also* Tenn. Op. Atty. Gen. No. 01-124 (Tenn. A.G.).

5. The Court of Appeals of Tennessee previously addressed the standard of reviewing a decision of the POST commission, citing T.C.A. § 4-5-322(h), in *Boyce v. Tennessee Peace Officer Standards and Training Com'n*, 354 S.W.3d 737 (Tenn. Ct. App. 2011). In *Boyce*, the Sheriff Boyce was not certified by POST, as the qualifications at the time did not include POST certification, and Boyce petitioned the court to review the POST commission's denial of his certification. In review of the constitutionality of POST certification as applied to sheriffs, the Court concludes

“it makes sense that an agency such as POST be given discretionary authority with respect to subjects requiring flexibility and expertise to keep up with changing needs, especially in areas having to do with public safety. In T.C.A. § 8-8-102 (a)(9)(A), the General Assembly essentially provided that sheriffs are to meet the current professional standards for peace officers as determined by POST.”

Boyce, 354 S.W. at 743, citing *Bean v. McWherter*, 953 S.W.2d 197, 200 (Tenn.1997); *State v. Edwards*, 572 S.W.2d 917, 919 (Tenn. 1978).

6. The court is “not allowed to weight the factual evidence and substitute their judgment and conclusions for that of the administrative agency.” *Estate of Street v. State Bd. Of Equalization*, 812 S.W.2d 583, 587 (Tenn. Ct. App. 1990). It is not proper for this court to “disturb a reasonable decision of an agency.” *Id.*

7. In a suit contesting the results of an election, the court shall give the following judgments under T.C.A. § 2-17-112(a):

- “(1) Confirming the election;
- (2) Declaring the election void;
- (3) Declaring a tie between persons who have the same number of votes if it appears that two (2) or more persons who have the same number of votes have, or would have had if the ballots intended for them and illegally rejected had been received, the highest number of votes for the office; or
- (4) Declaring a person duly elected if it appears that such person received or would have received the highest number of votes had the ballots intended for such person and illegally rejected been received.”

8. T.C.A. § 2-17-113 provides, “If the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of constitutional disqualifications on that person's part or for other causes, the election shall be declared void.”

E. RULING

1. As the incumbent candidate, Bivens has statutorily prescribed standing to initiate an election contest against White, pursuant to T.C.A. § 2-17-101(b). Bivens properly brought this action in the Chancery Court of Monroe County and met all statutory filing requirements. The court finds that standing and jurisdiction are proper.

2. T.C.A. § 2-17-105 states the filing requirements for an election contest: “The complaint contesting an election under § 2-17-101 shall be filed within five (5) days after certification of the election.” This action was timely filed within five (5) days after certification of the election.

3. The POST Commission has authority to certify whether a candidate is has the requisite experience to qualify under T.C.A. § 8-8-102. White argues a conflict exists between the statutes relied upon by the POST Commission to determine full time employment, Title 38, and the statute setting forth the requirements to qualify for the office of Sheriff, Title 8. As the POST Commission has discretion in determining the underlying requirements of those duties conferred upon them, this court finds no statutory ambiguity or conflict between the qualifications under T.C.A. § 8-8-102 and the definition of "full-time," as relied upon by the POST Commission, T.C.A. § 38-8-101(2).

4. Based on White's failure to obtain the qualification, as verified by the POST Commission, of either at least three (3) years of full-time experience as a POST commission certified law enforcement officer in the previous ten (10) years, or, at least three (3) years of full-time experience as a state or federal certified law enforcement officer with training equivalent to that required by the POST commission in the previous ten (10) years, White lacks the statutorily prescribed qualifications to hold the office of Sheriff of Monroe County.

5. In the alternative, if the Appellate Court determines the court has erred in its ruling the POST Commission has the authority to apply the requirements or statutes it deems relevant in verifying qualifications for sheriff, this court has also reviewed the testimony and law presented by White arguing this court should consider whether White has full-time experience as required under the qualifications of Sheriff. Defendant argues T.C.A. § 38-8-106 is not applicable. Upon such review of the facts and argument presented regarding this issue, this court finds as follows:

(a) White knew he needed to obtain three years of full time experience in order to maintain POST certification and qualify to run for Sheriff.

(b) White and Kirkland discussed White's desire to run for Sheriff and his necessity to be full-time to qualify to run. As a result, they planned for White to work full-time but be compensated twenty dollars (\$20) per week.

(c) White failed to provide any documentation to show he worked full-time, with the exception of his timesheets. Mark Hall, who investigated on behalf of the POST Commission, also reviewed White's schedule and documentation surrounding his work. Mr. Hall testified White worked only minimal hours, if any, after June 2012. Neither the dispatch logs nor any other document show any activity after June 29, 2012.

(d) Including his previous employment as a sheriff deputy, the court finds White worked a total of two years and three hundred forty-nine (349) days full-time, including the period between April 2, 2012, and June 29, 2012, when he was also employed full-time as EMS director.

(e) White lacks sufficient proof to show he worked full-time under any definition presented for the statutorily required three year standard.

(f) Even if the Court agrees with the defendant and finds T.C.A. § 38-8-106 does not apply, based upon the proof submitted, White fails to qualify under T.C.A. § 8-8-102 as he did not obtain a total of three (3) years' experience as required.

(g) The legislature specifically determined the amount of experience required to qualify for sheriff was three (3) years, and, as such, a candidate is not qualified unless the candidate fulfills the requirement of three (3) years' experience, and no less. Sadly, substantial compliance, or almost fulfilling the requirement, does not meet the requirement to qualify to serve as sheriff.

6. Plaintiff relies upon *Forbes v. Bell*, 816 S.W.2d 716 (Tenn. 1991) to support his argument the votes cast for White were illegal votes. However, in the *Forbes* matter, the basis for the election contest is a fraud or irregularity in the ballots. This court finds the present matter is based, however, on the qualifications of a candidate. As such, this court relies upon T.C.A. §2-17-113, regrettably declares the election null due to White not being qualified as a candidate pursuant to T.C.A. § 8-8-102, and declares this election void.

IT IS SO ORDERED, ADJUDGED and DECREED, as follows:

1. The election for office of Sheriff of Monroe County is declared void.
2. The judgment be certified to the officer or body authorized to fill the vacancy or order a new election.
3. Costs are assessed against Plaintiff Bill Bivens.

ENTER, this the 17 day of October, 2014.



HONORABLE DON R. ASH

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing order has been delivered by U.S. Mail, postage pre-paid, to the following at their respective addresses this, the 16th day of October, 2014. 4 Via Fax to ea. Atty's office.

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Deputy Clerk

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