

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham County

Rockingham Superior Court

Daniel Richard v Daniel A. Goonan, Town Administrator Town of Auburn, et al

218-2022-CV-00676

ORDER ON REQUEST FOR PRELIMINARY INJUNCTION

Considering the arguments and evidence submitted at the hearing, the Court finds that a preliminary injunction is not warranted at this time. The Court is not convinced that the plaintiff demonstrated irreparable harm as argued at the hearing in this matter. Thus, the Emergency Motion for Preliminary Injunction is DENIED.

Background

Before the Court is Mr. Richard's request for an order enjoining the Town of Auburn and the State of New Hampshire from using "computerized equipment" to tally voting results until the ultimate trial in this matter is held. In support of his request for preliminary relief, he argues that the "computerized equipment" currently used ("AccuVote" machines) are improperly maintained and serviced, and, thus, violate OSHA and other regulations. Consequently, he maintains, they are unsafe and pose a risk of harm to anyone that uses them or is near them. In support of this claim, he has submitted a Criminal Complaint Affidavit (Exhibit C of the Petition), a copy of his "remonstrance" submitted to the Town, and an expert report by an industrial safety specialist, Wayne Saya.¹ The alleged risk of physical harm, he argues, impairs his right to vote.

The State and Town object. The Town, by offer or proof, informed the Court that the Town, during the 9-13-22 primary election, will have a ballot box available that will be counted by hand for any qualified voter who wishes to use it. Thus, no registered voter in the Town will be required to use the voting machines. The State argues that there is no evidence, anecdotal or otherwise, that the electronic voting machine used in the state have ever caused harm to anyone, that there is not a single documented case of machines "exploding" or causing risk of shock or harm to anyone, and that granting the request would not be consistent with longstanding case law that holds that preliminary injunctions are intended to maintain the "status quo" between the parties while a case is pending.

A hearing was held on Friday, 9-9-22 at 1:30pm. The Court left the record open until midday Saturday on 9-10-22 to allow the parties additional time to submit argument and evidence to review, given the relatively short time noticed for the hearing.

Analysis

¹ The Defendant moved to allow this witness to testify at the hearing. The State objected on the ground that the witness was disclosed less than two days prior to the hearing. The Court granted the motion in part, and denied it in part. The Court allowed the plaintiff to submit the expert report as evidence and the Court would review it (the Court actually reviewed it prior to the hearing). Given that the hearing was to occur less than two business days before the election that was subject to the election, a continuance was not requested by either party.

A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits. Kukene v. Genuardo, 145 N.H. 1, 4, 749 A.2d 309 (2000). "Because preliminary injunctions serve only to preserve the status quo until a trial on the merits is held, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Spengler v. Porter, 144 N.H. 163, 168, 737 A.2d 1121 (1999) (Brock, C.J., dissenting)(cleaned up).

The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy. A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits. An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law. Also, a party seeking an injunction must show that it would likely succeed on the merits. It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007)(Cleaned up)(citing with approval Justice Brock's dissent in Spengler).

Applying this framework, the Court finds that the plaintiff has fallen short of sustaining his burden at this stage of the proceeding.

Even assuming that the Plaintiff's evidence submitted on the issue of the OSHA and regulatory violations concerning the AccuVote machines is true, it does not follow that an immediate danger of irreparable harm to the plaintiff exists. Even the expert report is vague in describing whether Electrostatic Discharge ("ESD") is more harmful to the electronics or to humans. The report also established that such ESDs occur during the course of routine, every day occurrences (like petting a dog). There is no cogent evidence that feeding a paper ballot into a machine would provide a suitable conductor for ESD or that such a discharge creates an irreparable risk of harm. Any theoretical risk of harm to the plaintiff is nullified by the fact that the Town will have a ballot box available and he does not need to use the "computerized equipment" he complains about. For the same reasons, the Court finds that Mr. Richard has failed to show a likelihood of success on the merits with respect to this argument. In many civil cases, the facts surrounding a dispute are not contested and the likely result of the case is very clear. In such a case, a preliminary injunction may be entirely appropriate. This is not such a case.

To the extent that his written motion addresses the reliability of the AccuVote machines in accurately counting votes – which is different than what he argued at the hearing (which focused on "safety") – the Court finds that the record is insufficient, at this point, to grant the relief requested. While there was some discussion from the witnesses about the "Windham Audit" and other ballot/voting irregularities in that past election, the evidentiary record does not support the granting of a preliminary injunction that would volcanically disrupt the status quo the day before an election and be tantamount for a full judgment on the merits based on a woefully inadequate factual record. The law simply does not support such a conclusion and that is not the intended purpose of a preliminary injunction.

According, the request for a preliminary injunction is DENIED.



Date: September 12, 2022

Hon. David W. Ruoff

Clerk's Notice of Decision
Document Sent to Parties
on 09/12/2022