PREPARED BY THE COURT

Bethany Murranko, Mark Murranko, Michael McKitish, Joanne McKitish, Jeremy Whaley, David Matticoli, John Muka, Lisa Werdel, Patricia Johnson, and Grace Asagra Stanley Plaintiff v. Mercer County Board of Elections, Mary Corrigan, Martin J. Jennings, Jill Moyer, Charles Farina, Nathaniel Walker, and Walker Worthy Defendant	SUPERIOR COURT OF NEW JERSEY COUNTY OF MERCER LAW DIVISION, CIVIL PART Docket MER-L-324-24 CIVIL ACTION ORDER

This matter being opened to the Court and for good cause shown;

IT IS ON August 29, 2024 ORDERED THAT:

1. Counts 1 and 2 as to the Board of Elections and the six individual defendants in their official capacities can continue for prospective injunctive relief only;
2. Counts 1 and 2 as to the six individual defendants continue in their personal capacities;
3. Count 3 as to all parties continues;
4. Plaintiff may file a motion to file an amended complaint within 20 days;
5. the reasons are as set forth ☒herein ☐on the record this same date;
6. filing in eCourts is deemed service on attorneys in the case.

/s/ William Anklowitz, J.S.C.

OPINION:

State and federal civil rights violations are alleged in plaintiffs' complaint filed on February 14, 2024. Defendant County Clerk has since been dismissed with prejudice by stipulation of dismissal filed on July 19, 2024. Plaintiffs are suing the Board of Elections and the people that were the Superintendents and members of the Board of Elections in their official and personal capacities.

The Board of Elections and the individual defendants moved to dismiss for failure to state a claim on June 17, 2024. Moving papers were submitted by all parties. Oral argument was heard on the record.

Mercer County has both a Board of Elections and a Superintendent of Elections. They each have different roles.

The Board of Elections is referred to in the statutes as the county board. *N.J.S.A.* 19:1-1(defining the County Board as the Board of Elections). When the Board of Elections sits to count votes the Board of Elections becomes the Board of Canvassers. *N.J.S.A.* 19:6-26.

An Election District is the geographical area in which a voter casts a vote. *N.J.S.A.* 19:1-1(defining election district). In each Election District or polling location there is a District Board made up of 4 or 6 members. *N.J.S.A.* 19:6-1; *N.J.S.A.* 19:1-1(defining the District Board and Election District). The District Board members are appointed by the Board of Elections. *N.J.S.A.* 19:6-3.

The Superintendent of Elections is also the Commissioner of Registration. *N.J.S.A.* 19:32-49. The Superintendent of Elections is responsible for turning over the

voting machines, *N.J.S.A.* 19:32-53, and for preparing the electronic poll books, *N.J.S.A.* 19:31-37.

The complaint can be summarized in part as alleging the following. Plaintiffs alleged that the Superintendent did not provide properly working machines. Plaintiffs also alleged that the District Boards did not handle the malfunctions by using the correct types of ballots and procedures. Plaintiffs further alleged that the Board of Elections did not count all the votes that were supposed to be counted.

Plaintiffs' brief filed July 12, 2024 sets out two particular rights that are claimed to have been violated. See Plaintiff's Opposition to Motion at 12. The first right is the well-established right to vote. N.J. Const. art. II, 1, ¶ 3; *Gangemi v. Berry*, 25 N.J. 1, 11 (1957)(paragraph 3 of Article II of the Constitution insures the right of suffrage to every citizen of the given age and residence qualifications). The second right is the "right to have that vote counted." *In re Gray-Sadler*, 164 N.J. 468, 474 (2000)

The three counts in the complaint are:

count 1, state civil rights, *N.J.S.A.* 10:6-2,

count 2, federal civil rights, 42 U.S.C.A. § 1983, and,

count 3, declaratory judgment, *N.J.S.A.* 2A:16-50 to 62.

Defendants moved to dismiss for failure to state a claim upon which relief can be granted. In determining whether a plaintiff has failed to state a claim upon which relief can be granted under *Rule* 4:6-2(e), the Court must limit its examination to evaluating the legal sufficiency of the facts alleged on the face of the complaint. *Rieder v. Dept. of Transp.*, 221 N.J. Super. 547, 552 (App. Div. 1987). The Court is to "search the complaint in depth and with liberality to ascertain whether the fundament of a cause of

action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *DiCristoforo v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 252 (App. Div. 1957). The Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint at this preliminary stage of the litigation; therefore, plaintiffs are entitled to every reasonable inference of fact. *Independent Dairy Workers Union v. Milk Drivers Local 680*, 23 N.J. 85, 89 (1956). In short, "the test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989).

Ordinarily, a dismissal for failure to state a claim is without prejudice. The court has the discretion to permit the Plaintiff to amend the complaint to allege additional facts in an effort to state a cause of action. *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 116 (App. Div. 2010).

Defendants moved to dismiss on grounds of qualified immunity.

> In determining whether qualified immunity applies in a particular case, a court ordinarily must address two issues: (1) whether the evidence, viewed in the light most favorable to the plaintiff, establishes that the official violated the plaintiff's constitutional or statutory rights, and (2) whether the right allegedly violated was "clearly established" at the time of the officer's actions. [*Baskin v. Martinez*, 243 N.J. 112, 128 (2020).]
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> If the official did not violate clearly established constitutional or statutory law, he or she would have immunity. But if the official violated "clearly established law," the focus then shifts to a consideration of "extraordinary circumstances" that require the official to "prove that he [or she] neither knew nor should have known of the relevant legal standard." *Harlow v. Fitzgerald,* 457 U.S. 800, 819, 102 S.Ct. 2738, 73 L.Ed.2d 396, 411. The "clearly established law" requirement has a

> temporal component that obligates a court to judge an official's conduct based on the state of the law and facts that existed at the time of the alleged statutory or constitutional violation. [*Schneider v. Simonini*, 163 N.J. 336, 354–55 (2000)]

New Jersey's "qualified immunity doctrine tracks the federal standard, shielding from liability all public officials except those who are 'plainly incompetent or those who knowingly violate the law.'" *Brown v. State*, 230 N.J. 84, 98 (2017). Both the NJCRA and §1983 causes of action have the same analysis for qualified immunity. *Morillo v. Torres*, 222 N.J. 104, 116 (2015). "The doctrine of qualified immunity operates to shield 'government officials performing discretionary functions generally ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Morillo*(*quoting Harlow*, *supra*, 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410 (citation omitted)). The immunity is meant to avoid trial and, so, can be raised at a motion to dismiss or motion for summary judgment as may be appropriate. *Wildoner v. Borough of Ramsey*, 162 N.J. 375, 387 (2000). Discovery might be needed to determine where along the continuum any given activity might fall. Good faith in carrying out the law is a valid defense. *Ibid*.(*citing* N.J.S.A. 59:3-3). Qualified immunity applies to both NJCRA and § 1983 claims. *Perez v. Zagami, LLC*, 218 N.J. 202, 213-15 (2014).

The Board of Elections has not had the fortune of having a case on point as to whether it is a state entity. As such, several factors must be considered. *See Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989)(discussing 3 factors versus 9 factors of considerations to decide if an entity is a state entity versus a

nongovernment entity). Factors for consideration as stated in *Fuchilla v. Layman*, 109 N.J. 319, 326 (1988) are:

> the nine Urbano factors, as they are known, are: (1) local law and decisions; (2) whether, in the event plaintiff prevails, the judgment will have to be paid out of the state treasury; (3) whether the entity has the funds or the power to satisfy the judgment; (4) whether the entity performs a proprietary or a governmental function; (5) whether the entity has been separately incorporated; (6) the entity's degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether the entity's property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the entity's operations.

The Board of Elections is funded by the county, *N.J.S.A.* 19:6-17(b) and 19:45-4, created by state statute, *N.J.S.A.* 19:6-17 to 25, carries out a distinctly government purpose of counting votes, *N.J.S.A.* 19:6-26 to 27, and the commissioners are appointed by statewide political parties, *N.J.S.A.* 19:6-17. Heavy consideration is given to the fact that it counts votes in state and local elections according to the method provided in Title 19 of New Jersey Statutes. *N.J.S.A.* 19:16-2 to 19: 22-8.

The heaviest weight is given to the fact that the board members are nominated by the parties and commissioned by the governor. *N.J.S.A.* 19:6-18 and 19. If the party does not make a nomination, the governor fills the seat. *N.J.S.A.* 19:6-20. The Board's funding is from the county just like the Superintendent. In some similarity to the Superintendent, Board nominations are by statewide parties, on commission of the governor, and meant to protect against corruption. For those reasons, the Board is a state entity and an arm of the state.

42 U.S.C.A. § 1983 defines a "person" who can be sued as a government official. New Jersey law provides the same. *N.J.S.A.* 10:6-2. The official must be acting "under

color of law." *Perez v. Zagami*, 218 N.J. 202, 216 (2014). "To state a claim under [42 U.S.C.A § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citations omitted). The New Jersey Civil Rights Act parallels the federal statute and only allows suits as to persons acting under color of law. *N.J.S.A.* 10:6-2. Further, the Eleventh Amendment prohibits federal suits for violations of federal law against state officials in their official capacities. *Quern v. Jordan*, 440 U.S. 332, 337, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979).

Since the Board of Elections is not a person or official, the Board of Elections is not a person that can be sued for civil rights violations except for prospective injunctive relief. Except such prospective injunctive relief, counts 1 and 2 are dismissed as to the Board of Elections because the Board is entitled to qualified immunity. The Board did not move to dismiss the declaratory judgment action and, so, that count remains.

The other officials are persons that can be sued for civil rights violations. New Jersey's "qualified immunity doctrine tracks the federal standard, shielding from liability all public officials except those who are plainly incompetent or those who knowingly violate the law." *Brown v. State*, 230 N.J. 84, 98 (2017).

Plaintiffs' reply brief limited the relief plaintiffs are seeking: only prospective injunctive relief as to the officials or they are being sued in their individual capacities. "On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985).

A defense to such personal liability could be "objectively reasonable reliance on existing law." *Id*. at 167.

Also, "while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Id*. Attorney's fees cannot be recovered against a government entity from a personal capacity case. *Id*. at 168. For the foregoing reasons, the sovereign immunity defense requires dismissal of claims of damages for any money from defendants in their official capacity. Prospective injunctive relief can be obtained in their official capacity. *Gormley v. Wood-El*, 218 N.J. 72, 115 (2014). As defendants had not raised the declaratory judgment count in their motion, that count remains.

Defendants sought dismissal because a challenge to the election would be out of time pursuant to *N.J.S.A*. 19:29-1. As plaintiff correctly pointed out, plaintiff is not suing for that relief or under that legal theory. As such, that part of the motion is denied.

Plaintiffs have not proposed that any amendments to the complaint could address any of the issues raised in the moving papers. Whether plaintiff can or cannot do so is for plaintiffs to consider. Plaintiffs can file a motion to file an amended complaint within 20 days based on the information plaintiffs have available at this time. Whether to file such a motion is for plaintiffs to decide.