

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

IN THE MARION CIRCUIT COURT
CAUSE NO. 49C011012MI055881

IN RE: ELECTION CONTEST)
INDIANA DEMOCRATIC PARTY,)
By its Chairman, DANIEL J. PARKER,)
)
Petitioner)
)
vs.)
)
CHARLES WHITE, in his individual capacity,)
and THOMAS E. WHEELER, BERNARD L. PYLITT)
and GORDON DURNIL as members of the)
Indiana Recount Commission,)
)
Respondents)

FILED
228 DEC 21 2011
Charles R. White
CLERK OF THE MARION CIRCUIT COURT

OPINION AND JUDGMENT

This matter comes before this Court for judicial review of the Indiana Recount Commission's (Commission) denial of a Petition to Contest the election of Charlie White as Secretary of State. The Court has reviewed the Record below, considered the legal memoranda of counsel, as well as the arguments made on November 23, 2011, by Karen Celestino-Horseman and William Groth for the Indiana Democratic Party and by Betsy Isenberg in behalf of the office of the Secretary of State. Charlie White entered his appearance pro se. Mr. White filed a brief, but did not appear for oral argument.

Based on the above submissions this Court has determined that the Commission erred and that its decision should be set aside. The Court will summarize the facts and procedural history and then discuss the legal basis for its decision.

FACTS AND PROCEDURAL HISTORY

The Court has based its decision on the facts as found by the Indiana Recount Commission (Commission). The Court summarizes here the Commission findings most salient to the legal discussion below.

White was married to Nicole Mills from 1998 to 2006. They had one child born in 2001. White and Mills made their home at 7527 Broad Leaf Ave, Fishers, Indiana (Broad Leaf). Broad Leaf is in the 12th precinct of Delaware Township.

White and Nicole divorced in December of 2006. As a result, White left the Broad Leaf residence, renting an apartment in Fishers on 6994 Pintail Ave. (Pintail) Nicole continued to live at Broad

Leaf with their son. Mr. White and Nicole had joint physical and legal custody of their son. White remained at Pintail. Pintail is in the 14th precinct of Delaware Township.

After his divorce, White did not pay mortgage and tax expenses related to Broad Leaf. In January of 2007, White quitclaimed his interest in Broad Leaf to Nicole. He remained on the mortgage until 2009.

In January of 2009, White became an active candidate for the Republican nomination for Secretary of State. At that time, White was a councilman who represented the 2nd District of the Fishers Town Council. In 2009, White received \$12,000 as a councilman. Both Pintail and Broad Leaf are within the 2nd District.

In May of 2009, White terminated his lease at the Pintail apartment and moved his belongings to the basement of the Broad Leaf house. Having been provided with the security access code and a key, White had unfettered access to the house. He used the Broad Leaf address as a mailing address.

In June of 2009, Mr. White became engaged to Michelle Quigley. Michelle lived with her two children. In the meantime, Nicole remarried.

The agreed duration of White's stay at Broad Leaf was to be the date of his forthcoming wedding to Michelle. Mr. White and his fiancée resolved to live apart until they were married. Initially, the wedding was set for March of 2010, but was later pushed back sometime after February of 2010 to late May of 2010 or shortly after the primary election.

A few months after moving to the Broad Leaf house, White was preparing his departure. He located a condo unit to be his marital residence at 13086 Overview Dr., Fishers Indiana. (Overview condo). The Overview condo lies outside of the 2nd District of Fishers. He signed an agreement to purchase the condo in September of 2009. In November of that year, he entered into a lease for the Condo. Mr. White paid rent of \$1700 per month for the period of November 2009 through February 2010. During December 2009 and January of 2010, White completed applications for mortgage financing. White closed on the purchase of the Overview property on February 26, 2010, taking title in his own name. The Mortgage required that White was obliged to occupy and use the condo as his principal residence within sixty days of the signing of the Mortgage.

As the campaign intensified toward the end of 2009, White was often out of town. On these occasions, he often slept in his car. After Ms. Quigley-White and her two children moved into the condo in November, he would stay at the Overview address once or twice a week. The principal place where Mr. White lived during the period of June 2009 through May 28, 2010, was, however, Broad Leaf.

The issue of the legality of Mr. White's registration was extensively publicized during the campaign after September 2010.

The chronology of White's voting registrations from 2006 to the present was as follows:

Broad Leaf- Before 2006

Pintail- January 2007

Broad Leaf- February 22, 2010

Overview – September 22, 2010. The deadline for changing voter registration was October 4, 2010.

On May 28, 2010, Mr. White married Michelle Quigley. A few days later, he moved his belongings to the Overview Drive condo.

Mr. White was nominated by the Republican Party. The Republican Party certified White's nomination on June 19, 2010. The deadline for filing the Certificate of Nomination was July 15, 2010. The general election results in 2010 for the office of Secretary of State were: Vop Osili 632,129; Mike Wherry 100,795; and Charlie White 976,810.

After Mr. White's election, Petitioner Indiana Democratic Party by its Executive Director, Daniel J. Parker, filed a Petition for Contest in the Indiana Recount Commission naming Mr. White and Robert Kuzman, Gordon Durnil and Todd Rokita members of the Indiana Recount Commission as respondents. The petition alleged that White was not lawfully registered and that he had fraudulently manipulated his voter registration to conceal that he was ineligible to serve on the Fishers Town Council. The Commission dismissed Parker's Petition to Contest on the grounds that it did not state a claim for which relief could be granted. In particular, the Commission held that actual registration, whether lawful or not, was all that was necessary to be a candidate.

Parker filed a Petition for Judicial Review with this Court on December 30, 2010. On April 7, 2011, the Court reversed the Commission's decision and remanded the matter to the Commission for further proceedings. This Court held that in order to satisfy Indiana's eligibility requirements the candidate must be lawfully registered. On May 2, 2011, this Court directed the Commission to decide the contest by July 6, 2011.

Due to Mr. White's recusal, Thomas Wheeler was appointed by the Indiana Republican Party to chair the Commission. Mr. Gordon Durnil continued as a Commissioner. Bernard Pylitt was named by the Indiana State Democratic Party in place of Robert Kuzman.

This Court's April 7 decision was appealed by all respondents.. On May 20, 2011, the Indiana Supreme Court granted transfer of the case and dismissed the appeal on the grounds that this Court's decision was not a final adjudication.

On May 25, 2011, the Commission denied a request originally presented on April 15, 2011 by Parker for the issuance of subpoenas for discovery depositions. The Commission also denied a Motion to Stay Proceedings and a Motion for Use Immunity. This Court affirmed the Commission's decisions regarding the requested Stay and Use Immunity.

On June 21, 2011, the Commission held an evidentiary hearing at which both Parker and White were given a maximum of four hours each to present their respective witnesses and argument. On June 28, 2011, the Commission unanimously denied Parker's Petition on the grounds that White was lawfully registered at all relevant times. The Commission filed Findings of Fact and Conclusions of Law. Commissioner Pylitt filed a concurring opinion.

Parker filed a second Petition for Review on July 28, 2011. After hearing argument from counsel for Parker and for the Secretary of State, the Court took this matter under advisement for 30 days.

I. LEGAL DISCUSSION

When reviewing decisions of administrative agencies, this Court must apply a deferential standard of review as to the agency's findings of fact, but considers the agency's legal conclusions de novo Metropolitan School v. Allen County 752 N.E.2d 54 (Ind. App. 2001). The Court must apply the same limited review whether or not the agency is covered by the Indiana Administrative Orders and Procedures Act IC 4-21.5-1-1 et seq. In particular, the Court must accept those fact findings supported by substantial evidence. Regarding factual issues, the Court may not judge the credibility of witnesses nor reweigh the evidence Andrianova v. Ind. FSSA 799 N.E.2d 5 (Ind. App. 2003). This is the province of the administrative fact-finder.

In the instant case, the Court finds that there is substantial evidence supporting the findings that White principally lived at the Broad Leaf address during the period of June 2009 through June 1, 2010, and conversely did not establish a residence at Overview Dr. until after his wedding to Michelle Quigley-White on May 28, 2010.

The principal question before this Court is whether Charlie White was lawfully registered at Broad Leaf during the period of February 22, 2010, through July 15, 2010, and hence eligible to be a candidate for Secretary of State. The answer to that question depends on the resolution of two issues of law. First, did the facts as found by the Commission establish that Broad Leaf was a temporary residence as defined at IC 3-5-5-7 or a permanent domicile as defined at IC 3-5-2-42.5? Secondly, assuming that White's residence at Broad Leaf was temporary, what was the legal effect of his September 22, 2010, change of registration?

A. WAS BROAD LEAF A "TEMPORARY RESIDENCE" OR A PERMANENT DOMICILE?

The Commission found that it was White's intent to make the Broad Leaf house his principal residence during the period of June of 2009 until he was to be married. The Commission concluded as a matter of law that this intent together with White's use of the premises as his principal location until his marriage established Broad Leaf as his residence for purposes of registering to vote. In drawing that conclusion, Petitioner contends that the Commission misinterpreted the meaning of "residence" for the purposes of IC 3-5-2-42.5.

In 1995, the Legislature enacted "Standards for Determining Residency" P.L. 12 now codified at Ind. Code 3-5-2-42.5 and 3-5-5-1 et seq. These standards are "to be used to determine the residency of: (1) a voter or a person applying to become a voter. (2) a candidate. (3) A person holding an elected office." In Code 3-5-5-1

The word "residence" is defined by the standards at In Code 3-5-2-42.5 as follows:

Sec. 42.5. "Residence" means the place:

- (1) where a person has the person's true, fixed, and permanent home and principal establishment; and
- (2) to which the person has, whenever absent, the intention of returning.

IC 3-5-2-42.5

The key word in the above definition for purposes of this case is "permanent". While that word is not defined by the Standards, its common usage would seem to compel the conclusion that White's stay at the Broad Leaf address was not permanent. The Concise Oxford English Dictionary, 11th Ed. Oxford Univ. Press 2008 defines permanent as "lasting or remaining unchanged indefinitely, or intended to be so, not temporary". White's stay at Broad Leaf was never intended, however, to be lasting or continue indefinitely from the outset, it was intended to be a limited stay. It was understood that Charlie White would relocate as soon as he married Michelle Quigley.

Furthermore, the authors of the standards for determining residence appeared to anticipate arrangements similar to Mr. White's. Section 7 of the standards provides "that a person does not gain residency in a precinct into which the person moves for: (1) temporary employment; (2) educational purposes; or (3) other purposes without the intent of a making a permanent home in the precinct." The finding of the Commission that White intended to reside at the Broad Leaf address until he was married appears to render that house a temporary residence in the same sense as a stay in a school dormitory until studies are completed is temporary or a stay in a motel while searching for or starting a job might be temporary.

The above analysis is supported by the case of State Election Board v. Bayh, 521 N. E.2d 1313 (1988 Ind.). Seven years before the enactment of Ind. Code 3-5-2-1 et seq., the Supreme Court laid out the guiding principles for interpreting residence requirements regarding electoral matters. In Bayh, the Indiana Supreme Court affirmed a trial court's rejection of a challenge to Bayh's candidacy for Governor. The challenge was based on Bayh's alleged failure to satisfy the Indiana Constitution's requirement that a candidate for Governor reside in Indiana for the five years preceding his or her election.

The key holding of this case was that for purposes of Art 5, Sec. 7 of the Indiana Constitution, residence was to be used synonymously with domicile Id. at 1317. The Court quoted Board of Medical

Registration and Examination v. Turner (1960), 241 Ind. 73, 80, 168 N.E.2d 193, 196, to define domicile as: "the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning." "Establishing a new residence or domicile terminates the former domicile. A change of domicile requires an actual moving with an intent to go to a given place and remain there." State Election Board, op cit at 1317.

Applying the above principles to Bayh's circumstances, the Court found that notwithstanding the fact that Bayh had been employed out of state for two years and leased an apartment in Washington D.C., these acts did not necessarily result in a new domicile for Bayh. Instead, the Court affirmed the trial court's ruling that despite his lengthy absence from Indiana, Bayh maintained his intent to return to Indiana and thereby satisfied the five year residency requirement of the Indiana Constitution. The Bayh case illustrates the primacy of an intent to establish or retain domicile at a given site, whether it be a county as in In the Matter of Evrard 333 N.E.2d 765 (1975 Ind), the entire State as in Bayh, op cit, or a precinct as in the instant case.

The circumstances of Mr. White's stay at Broad Leaf are consistent with the Court's conclusion that his stay at Broad Leaf was "temporary residence" as that term is used at IC 3-5-5-7. When White began his stay at the Broad Leaf address, it was the residence of his former wife, Nicole Mills, her new spouse and her child by Charlie White. Furthermore, in June of 2009 White became engaged to Michelle Quigley. Michelle lived with her two children. While the Record illustrates that Nicole and her husband were generous and hospitable toward the Whites, the Record does not suggest that any of the involved parties desired or expected Mr. White's stay to become a permanent arrangement.

White had no legal interest in the Broad Leaf site. In 2007, he quitclaimed to Nicole his interest in the property. There is no evidence that he signed a written lease. The Record does reveal that he did not pay rent. He was in short a guest, whose invitation could be withdrawn at any time.

During the same period that White was periodically staying at Broad Leaf, he was creating a stake in another property in Fishers, namely a condo unit at Overview Drive. In September of 2009, White entered into a purchase agreement for the Overview Condo. Two months later, White signed a lease from the seller for the Overview Condo. Shortly after the lease was signed, Ms. Quigley and her two children moved into the Condo. On February 26, 2010, White closed the transaction and became the sole owner of the unit.

It is unnecessary for this Court to determine whether White had established residence at the Overview property as of the date of February 22, 2010, (date of registration at Broad Leaf) rather than May 28, 2010, (date of marriage). What is clear from the Record is that at no time after he moved from Pintail did White form the intent to permanently reside at Broad Leaf. Because his physical presence at Broad Leaf did not coincide with an intent to make it his permanent abode, White did not establish the Broad Leaf address as his permanent domicile or residence within the meaning of IC 3-5-5-1. "Intent and conduct must converge to establish a new domicile" Bayh, op cit, p. 1317. For that reason the Court

must conclude that White did not reestablish domicile at the Broad Leaf address and was therefore not lawfully registered at that site.

B. DID WHITE MAKE A TIMELY CHANGE OF REGISTRATION?

In Code 3-8-1-1 sets forth the registration qualification for a candidate as follows:

(b) A person is not qualified to run for:

(1) a state office...

Unless the person is registered to vote in the election district the person seeks to represent not later than the deadline for filing the declaration or petition of candidacy or certificate of nomination.

The deadline for filing the declaration of candidacy or certificate of nomination was July 15, 2010. This is in contrast to the deadline for voters to change their registration, which was October 4, 2010. White was still registered at the Broad Leaf address as of July 15, 2010.

White's registration was changed on September 22, 2010, to Overview. As a result, his registration was in compliance with Indiana law, in that he was registered in the precinct of his permanent abode. Respondents argue that White's September 22 modification of registration was timely since it was before the October 4, 2011, deadline.

It is difficult to reconcile Respondents' position with the language of IC 3-9-1-1. Two questions arise if that position is accepted. First, what is the function of the reference to the filing deadline for Certificates of Nomination? Secondly, if the General Assembly intended candidates to have the same deadline as voters, why wouldn't it so provide?

The Court concludes that the Legislature created different deadlines for voters and candidates. That is the plain meaning of IC 3-8-1-1. In the absence of any ambiguity, this Court must follow the statute as written. His change of registration for purposes of voting was timely. For purposes of being a candidate, however, his change of registration was not timely.

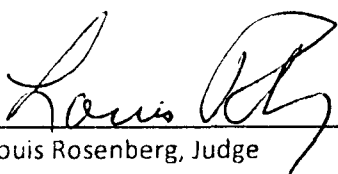
In determining that Mr. White was registered in violation of Indiana law, the Court is not implying that Mr. White's actions were or were not fraudulent or constituted a crime. Those questions are for another court at another time. The fact that Mr. White knowingly registered in the wrong precinct is sufficient to render him ineligible for the office of Secretary of State. Whether or not he believed that his registration complied with the law is not relevant.

In the same vein, this Court is not deciding whether the Commission's denial of Parker's discovery requests was lawful. The Court has not taken up the above issues, because their resolution is unnecessary to decide the present case.

JUDGMENT

Based on the above submissions of the parties mentioned above and for the foregoing reasons, the Court REVERSES and SETS Aside the decision of the Indiana Recount Commission. The Court GRANTS the Election Contest of the Indiana Democratic Party and REMANDS the matter with instructions to said Commission to declare that Charlie White was not eligible to be a candidate for the office of Secretary of State and to certify the candidate who received the second highest number of votes, Vop Osili, as Secretary of State.

SO ORDERED on this 21st day of December, 2011.



Louis Rosenberg, Judge
Marion County Circuit Court

Distribute to: Counsel of Record