

IN THE SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT
STATE OF GEORGIA

THIRD SECTOR DEVELOPMENT, INC.,
et al,

Petitioners,

v.

BRIAN P. KEMP, in his official capacity
as Secretary of the State of Georgia; et al,

Respondents.

CIVIL ACTION FILE
NO. 2014CV252546

JUDGE BRASHER



FINAL ORDER

The above-styled case came before the Court on October 24, 2014 for a hearing to determine the merits of the Petitioners' request for a writ of mandamus against the Respondents. Because the Petitioners have not been denied the performance of a clear legal duty, and because, in some cases, the actions sought to be enforced by the Petitioners are premature, the Court rules as set forth herein.

Liberty cannot conceive of a call more important than that of the people to be heard. Likewise, liberty cannot conceive of a grievance more urgent in its need for redress than that the people's voice is not being heard. Indeed, "[t]he right to vote is fundamental, forming the bedrock of our democracy." *Favorito v. Handel*, 285 Ga. 795, 796, 684 SE2d 257, 260 (2009). It is imperative that the Courts guard the rights of individuals to cast their votes effectively, and to have their votes count in the electoral process. *See, e.g., Williams v. Rhodes*, 393 US 23, 30, 89 S. Ct. 5, 21 LEd2d 24 (1968). A person whose vote is not counted has the right to seek mandamus to have his vote count. *Thompson v. Willson*, 223 Ga. 370, 372-73, 155 SE2d 401, 403 (1967).

It is with these principles in mind that the Court has heard and ruled upon this case expeditiously, and it is against this backdrop that the Court reviews the petition before it.

New Georgia Project (the “NGP”) has worked for some time to register new eligible voters in Georgia, particularly members of underrepresented classes of voters. According to NGP, it has collected registration forms from over 81,000 new registrants and has submitted the forms to the relevant county boards of election registrars for processing. All of this took place prior to the October 6, 2014 voter registration deadline for processing in advance of the November 4, 2014 elections. Of the registrations submitted, NGP alleges that approximately 36,983 were submitted to Fulton County, 11,308 to DeKalb¹, 6,742 to Chatham², 11,222 to Muscogee, and 3,157 to Clayton.

NGP claimed that as of the date of the filing of the instant Petition it could not find 56,001³ applicants’ names on the Secretary of State’s list of eligible voters list, or list of pending applications, as follows: 26,916 received by Fulton County, 7,481 by DeKalb, 4,466 by Chatham, 6,899 by Muscogee, and 2,105 by Clayton.

The Georgia State Conference of the National Association for the Advancement of Colored People (the “Georgia NAACP”) also conducted voter registration drives for the 2014 election cycle. It represented in the petition that it collected and submitted “thousands” of voter registration applications in advance of the October 6, 2014 registration deadline. The “Georgia NAACP is informed and believes and thereon alleges that it is likely that significant numbers of

¹ DeKalb County has been dismissed from this action.

² Chatham County has also been dismissed from this action.

³ Petitioners assert that the total number is now, by extrapolation, 40,000. At the hearing, the Petitioners presented a handful of examples of applicants they say have been unable to register and have their names appear on the statewide elector list. Respondents disagree with these examples.

voter registration applicants who submitted registration forms during Georgia NAACP's registration drives are not on the State's voter registration list." (Petition, ¶24.)

As alleged by the Petitioners,

Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of electors.

GA Const, Art. II, Sec 1, Para 2.

This constitutional mandate is carried out via a statutory scheme enacted by the Georgia legislature. OCGA § 21-2-1, *et. seq.*, a/k/a the "Georgia Election Code." The Georgia Election Code provides that persons desiring to register to vote shall do so using one of the methods set out in OCGA § 21-2-220. The respective counties' boards of election registrars receive and process election registrations. *Id.*

If an applicant fails to provide all of the required information on the application for voter registration with the exception of current and valid identification, the board of registrars shall notify the registrant in writing of the missing information. The board of registrars shall not determine the eligibility of the applicant until and unless all required information is supplied by the applicant. If the initial application is received prior to the close of voter registration prior to an election, if the applicant supplies the necessary information on or prior to the date of the election, and if the applicant is found eligible to vote, the applicant shall be added to the list of electors and shall be permitted to vote in the election and any run-off elections resulting therefrom and subsequent elections; provided, however, that voters who registered to vote for the first time in this state by mail must supply current and valid identification when voting for the first time as required in subsection (c) of this Code section. In the event the elector does not respond to the request for the missing information within 30 days, the application shall be rejected.

OCGA § 21-2-220(d).

Once fully processed, a qualified voter's name is placed on a list of official statewide electors maintained by the Secretary of State.⁴ OCGA § 21-2-211. Interestingly, there is no express time limit for placement of a voter's name on the statewide qualified elector list. This is in direct contrast to the express statutory deadlines set out for 1) the deadline placed upon a potential elector to register to vote (OCGA § 24-2-224); and 2) the time limit during which a potential elector must respond to a county registrar's request for additional information in order to process an application (OCGA § 21-2-220(d)).

If for any reason a potential voter's name does not appear on the list of registered electors when he presents himself to vote, the voter is entitled to cast a provisional ballot. OCGA § 21-2-418(a). If the voter has received a letter requesting missing information as contemplated in OCGA § 21-2-220(d) and the election falls within the 30-day cure period, the voter may bring the missing items with him to the election. Otherwise, the voter may cast a provisional ballot and bring the missing items within three days of the election to have his ballot counted in the official election results. OCGA § 21-2-419(c)(1). This is yet another express statutory deadline placed upon a potential elector.

In all of this, the State and county officials are held to a standard of substantial compliance. *Banker v. Cole*, 278 Ga. 532, 533, 604 SE2d 165, 167 (2004). Where an election is held in substantial compliance with the law, it will not be rendered void unless it appears that the failures complained of changed the results of the election. *Id.*

⁴ Counsel for the Secretary of State made clear at the hearing that, though maintained by the Secretary of State, the list of electors contemplated by OCGA § 21-2-211 is actually populated by action of the several county election officials completing the task of processing applications for registration, rather than by some actions of officials employed by the Secretary of State's office. In other words, when a county election official approves a potential voter, that voter's name is automatically added to the statewide list; it is not transmitted to the Secretary of State's office for separate addition to the list by that office.

As of September 17, 2014 the Secretary of State informed the Petitioners that over 50 of the voter registration applications submitted by NGP were either fraudulent or were suspected of being fraudulent. Approximately three weeks later, the Secretary of State informed the Petitioners that 134 applications were possibly fraudulent. Ultimately, by the time the Petition was filed, 50 applications were deemed to be fraudulent, 49 were suspicious, and 39 were legitimately submitted.

The Petitioners remind the Court and the Respondents that

¶33. The investigation of potentially invalid or suspect forms does not relieve the Secretary [of State] or the [county boards of election registrars] of the unequivocal and nondiscretionary duties to evaluate each application on its own merits and to notify applicants if their applications are deemed to have missing information in sufficient time for the applicants to supply the missing information and vote in the November 4 election.

NGP's concerns that these individual evaluations were not taking place led it, on October 3, 2014, to seek a meeting with the Secretary of State.

The Secretary of State declined NGP's invitation on October 6, 2014.

As you are likely aware, all voter registration applications in Georgia are processed at the county level, including any registrations submitted by the New Georgia Project or any other third-party group. The investigation of the New Georgia Project does not in any way interfere with the processing of applications submitted by them or any other group. In fact, many of the confirmed forgeries that our office has identified have come to the counties' attention through voters whose applications were processed, who were sent communication from their county, and who contacted the county because they had not actually submitted an application. The voter then confirmed with our office that the signature on the submitted application was not his or her signature.

All voter registration applications submitted to this office or to Georgia counties are handled the same way, including any applications submitted by the New Georgia Project. Georgia utilizes a verification procedure pursuant to the Help America Vote Act of 2002 ("HAVA"), 42 USC § 15483. The verification

procedure was precleared by the United States Department of Justice in 2010. For the vast majority of voters, this verification process takes less than a day. For incomplete or illegible applications, the process can take longer, but the county still processes those applications and attempts to contact the applicant to clarify any issues needed to add the voter to the rolls. Any applicant that is placed in pending status due to an inability to verify their identifying information or citizenship status can still vote in the upcoming election, either by bringing the proper identifying information the polls or casting a provisional ballot and then clearing up any issues with the county elections office.

Georgia counties are continuing to process all applications they receive, and all voters who are eligible, who have completed and turned in an application, and who are verified through the precleared procedure will be able to cast a ballot for this election.

(Emphasis supplied.)

The Petitioners were not satisfied with the Secretary of State's explanation of its procedures, or with the Secretary's assurances that all eligible voters would be able to cast a ballot for this coming election. The same day they received the Secretary of State's letter, the Petitioners responded.

While you indicate in your letter that applicants would have an option to cast a provisional ballot, we do not consider that to be an adequate remedy for eligible Georgians who submitted timely and facially complete applications and have the right to cast a regular ballot.

This is particularly true in light of the serious problems that occurred in Fulton County during the 2012 general election with respect to provisional ballots. These problems were described in detail during a December 17, 2013 State Election Board meeting and it appears that a large number of persons who were forced to cast provisional ballots were disenfranchised.

The Petitioners repeated their request for a meeting with the Secretary of State, at which meeting they expected assurances that all submitted registrations would be processed.

The Secretary of State responded three days later, again by letter.

The Secretary of State's office is in communication with the county election officials daily. Any applications that are received by the Secretary of State's office are immediately sent to the counties for processing and determination of eligibility. We are not aware of any county registrar who believes that his or her respective office will be unable to process all timely submitted applications in accordance with state and federal law – including any applications received from your client or any other third-party group. To date, we also have not received any indication from county election officials that any voter registration applicant who timely submitted an application and provided information necessary to determine eligibility will be left off the voter rolls.

The Secretary invited the Petitioners to submit any information they had to the contrary, and further particularized the procedures for supplementing incomplete or illegible registration applications. The Secretary also declined the Petitioners' request for a meeting, explaining that due to the "responsibilities in administering the election, a meeting regarding your generalized concerns is not possible until after this election cycle."

The Petitioners did not submit any information rebutting the Secretary's assurances that the applications were being processed. Instead, the Petitioners expressed their frustration at having their meeting requests rebuffed, and once again requested a meeting with representatives from the Secretary of State's office.

The Petitioners now bring this Petition for writ of mandamus, contending that the Respondents have breached the following clear unequivocal, and nondiscretionary legal duties: (a) the duties owed by the county boards of election registrars to process properly filed registrations, and to notify in writing those applicants whose applications are not properly filed of the relevant problems so that those problems can be timely remedied; and (b) the duty owed by the Secretary of State to place the names of all qualified voters on its official list of electors. The Petitioners seek a writ of mandamus ordering the Respondents to:

(a) Promptly process all pending applications for voter registration submitted by [NGP] and Georgia NAACP[;]

(b) Provide notice to applicants who have submitted their applications prior to the close of registration of the information that is missing from their applications in sufficient time for the applicants to submit missing information prior to the date of the election[;]

(c) If applicants supply the necessary information on or prior to the date of the election, and if the applicants are found eligible to vote, add the applicants to the list of electors and permit them to vote in the election taking place on November 4, 2014[; and]

(d) Add applicants who are eligible and qualified to be registered electors in Georgia to the Secretary of State's official list of electors used in all elections in Georgia.

The requirements for the issuance of a writ of mandamus are set out in OCGA § 9-6-20.

“All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights.” Thus, “[m]andamus is a remedy for improper government inaction -- the failure of a public official to perform a clear duty. The writ of mandamus is properly issued only if (1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief.” (Citations and punctuation omitted.) *Bibb Cnty. v. Monroe Cnty.*, 294 Ga. 730, 755 SE2d 760, 766 (2014).

(a) *No other adequate legal remedy.* Mandamus will not lie where the petitioner has another avenue for pursuing the relief sought that is equally convenient, complete and beneficial. ...

(b) *Clear legal right.* A clear legal right to the relief sought may be found only where the claimant seeks to compel the performance of a public duty that an official or agency is required by law to perform. Where performance is required

by law, a clear legal right to relief will exist either where the official or agency fails entirely to act or where, in taking such required action, the official or agency commits a gross abuse of discretion.

(Citations omitted; Emphasis in original.) *Id.* To reiterate, in order to be entitled to a writ of mandamus, a party must have a clear legal right to have an act performed, which performance has been denied, and no other adequate legal remedy. *Bibb Cnty., supra. Bedingfield v. Adams*, 221 Ga. 69, 72, 142 SE2d 915, 918 (1965).

Notably, “[m]andamus will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless, nor will it be granted on a mere suspicion or fear, before a refusal to act or the doing of a wrongful act.” OCGA § 9-2-26.

In this case, for each Respondent, the Petitioners have failed to set out a denial of the performance of a clear legal duty which performance has been denied. Instead, they have merely set out suspicions and fears that the Respondents will fail to carry out their mandatory duties.

The Petitioners have failed to allege, much less show, the counties’ registrars past or continued failure to process voter registration applications. The Petitioners assume that no Respondent is carrying out its mandatory duty because the Petitioners do not see a small sample of new voters’ names appearing on certain lists. This assumption is not appropriate, is entirely devoid of evidentiary support, and cannot be used as a legal basis for the grant of a writ of mandamus. OCGA § 9-6-26.

Likewise, the Petitioners have failed to allege, much less show, the Secretary of State’s past or continued failure to place eligible voters’ names on the State’s voter rolls. As with the County election registrars, the Petitioners ask this Court to presume that the Secretary has failed to carry out this mandatory duty because the Petitioners do not see new names appearing on the

state-wide elector list.⁵ Yet once again, the Petitioners have failed to come forward with evidence showing that the Secretary of State has failed to carry out this duty, or even that this duty is ripe, since it can only be carried out after the various counties' election registrars register an eligible voter.

Not only is there no proof that the Respondents have failed to fulfill their duties, but there is also affirmative proof to the contrary. The Secretary of State and the county registrars have supplied evidence in their responsive pleadings, in their motions to dismiss, and at the hearing on this matter that they have fulfilled, and that they are continuing to fulfill, their mandatory statutory duties regarding newly-registered voters. In point of fact, attached to the petition itself is a letter from the Secretary of State stating that both it and the Respondent counties were carrying out their duties at the time of the pre-litigation discussion between the parties. Thus, even prior to filing suit the Petitioners knew, or reasonably should have known, that the Respondents were processing the subject applications.

The Petitioners have requested a meeting with the Secretary of State in order to receive assurance that the various counties are properly processing new voter registrations. The Secretary of State has declined to meet with the Petitioners. The Petitioners assert that by its actions the Secretary has invited this litigation. In fact, the Secretary of State does not have a legal duty to meet with the Petitioners. Though the Petitioners have not sought mandamus to compel this meeting, the Court notes that had the Petitioner sought such an Order, the request would have been denied. Where the law does not compel a duty, mandamus will not lie. *Bedingfield v. Adams*, 221 Ga. 69, 72, 142 SE2d 915, 918 (1965).

⁵ On the contrary, the required presumption in Georgia law for the entirety of this State's jurisprudence has been that public officers are discharging their duties in compliance with the law where there is no proof to the contrary. *Doe v. Peeples*, 1 Ga. 1, 2 (1846).

The Petitioners have not proven that any discrepancy with the statewide elector roll is the fault of the Respondents.⁶ In any case, these un-registered voters are not without remedy. Voters whose names do not appear on the list of qualified electors may cast provisional ballots, as discussed above. While the Petitioners do not consider this an adequate remedy, this is not for them or this Court to decide. Instead, it is a decision for the legislature. The existence of an alternate remedy alone mandates the denial of a petition for writ of mandamus. *Bibb Cnty.*, 294 Ga. at 730, 755 SE2d at 766. Furthermore, mandamus is improper because the undisputed evidence shows that the various government officials have carried out their mandatory duties in substantial compliance with the law in processing the registrations. *Banker*, 278 Ga. at 533, 604 SE2d at 167.

The Petitioners' request, at its core, is not just that the Respondents be ordered to perform their mandatory election-related duties. Through this petition the Petitioners seek to control how the Respondents' duties are carried out. The Petitioners consider the process designed and instituted by the Secretary of State to be unsatisfactory. They contend that where some applicants appear to be neither pending nor approved, there should exist some standards regarding the timeliness of the performance of the mandatory registration-processing duties. They further argue that the Secretary of State ought to rework this process to be error free and transparent. But mandamus is not available for compelling the manner of official action. Mandamus lies only the compelling of the legally mandated action itself. *Bland Farms, LLC v. Georgia Dept. of Agriculture*, 281 Ga. 192, 193, 637 SE2d 37 (2006). The manner of the Respondents' actions in carrying out their duties, as established by the legislature, cannot be

⁶ It is possible that some registrations were incomplete when submitted to the county election registrars, letters were sent to the registrants requesting the missing information, but the missing information was not supplied within the 30-day time limit set out in OCGA § 21-2-220(d). This could have resulted in the rejection of the applications. *Id.*

reviewed here, as the manner of their actions is set out by statute. “Our responsibility, and the only authority this court has, is to interpret the law as it was written by the General Assembly. The wisdom of legislation rests in the General Assembly.” (Citations omitted.) *Wilson v. Bd. of Regents of Univ. Sys. of Georgia*, 246 Ga. 649, 650, 272 SE2d 496, 497-98 (1980).

With regard to each of the Petitioners requests, the Court finds as follows:

(a) The Petitioners ask the Court to require the Respondents to process all pending applications. The evidence shows that the Respondents are already processing all pending applications. Therefore, the request for a writ of mandamus is unnecessary and is DENIED because there has been no failure of a clear legal duty.

(b) The Petitioners ask the Court to require the Respondents to provide notice to applicants who have submitted their applications prior to the close of registration of the information that is missing from their applications in sufficient time for the applicants to submit missing information prior to the date of the election. The evidence shows that the Respondents are already performing this duty. Therefore, the request for a writ of mandamus is unnecessary and is DENIED because there has been no failure of a clear legal duty.

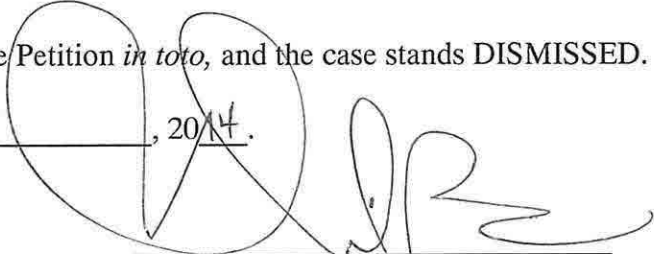
(c) The Petitioners ask the Court to require the Respondents (the Court assumes this to be the Secretary of State) to add qualified voters to the list of electors and to permit them to vote in the November 4, 2014 election. The evidence shows that the Respondents are already performing this duty. Therefore, the request for a writ of mandamus is unnecessary and is DENIED because there has been no failure of a clear legal duty. Additionally, in some cases this request may not be ripe, since the initial burden lies with the various county boards of election registrars to determine whether a voter is qualified before the Secretary of State can add the

voters' names to the list of qualified electors. Thus, to the extent that the request is premature, it is also DENIED. *Voyles v. McKinney*, 283 Ga. 169, 170, 657 SE2d 193, 194 (2008).

(d) Finally, the Petitioners ask the Court to require the Respondents to add applicants who are eligible and qualified to be registered electors in Georgia to the Secretary of State's official list of electors used in all elections in Georgia. This request is identical to the previous request. For the same reasons, it is DENIED.

In sum, the Court has DENIED the Petition *in toto*, and the case stands DISMISSED.

This 26th day of October, 2014.



The Honorable Christopher S. Brasher
Fulton County Superior Court
Atlanta Judicial Circuit

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