

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS _____

NIKITA VIDAL MACKEY)
)
Plaintiff,)
)
v.)
)
BOARD OF COMMISSIONERS OF)
MECKLENBURG COUNTY)
)
Defendant.)
)
_____)

COMPLAINT FOR DECLARATORY JUDGMENT

Pursuant to the provisions of N.C.G.S. § 1A-57 and N.C.G.S. §§1-253 and 1-254, Plaintiff moves the Court to enter a Declaratory Judgment in this matter. In support of this Complaint for Declaratory Judgment, the Plaintiff shows the Court the following:

I. PARTIES

1. Plaintiff is a citizen and resident of Mecklenburg County, North Carolina.
2. Defendant is the duly-elected, governing body of Mecklenburg County, North Carolina, authorized under G.S. § 153A-12 to exercise each power, right, duty, function, privilege and immunity vested in the inhabitants of this County as a body politic and corporate under G.S. §153A-11.
3. Plaintiff seeks a declaratory judgment by the Court as to his rights as nominee for Sheriff to completion of the nomination process and the obligation of the defendant under N.C.G.S. § 162-5.1 (2007) to abide by that nomination process.

II. JURISDICTION

4. The trial court has jurisdiction to render declaratory judgment when the complaint shows (1) that real controversy exists between or among the parties to the action, (2) that such controversy arises out of opposing contentions of parties, made in good

faith, as to validity or construction of a statute, and (3) that parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in controversy, and may be determined by judgment or decree in the action. See *Majebe v. North Carolina Bd. of Medical Examiners*, 106 N.C.App. 253, 416 S.E.2d 404 (1992).

5. Jurisdiction of this Court is further invoked pursuant to N.C.G.S. §§ 1-253 and 1-254.

III. FACTS

6. On or about October 1, 2007, James Pendergraph, duly nominated and elected as the Democratic candidate for Sheriff of Mecklenburg County, resigned his office effective December 1, 2007. He thereby vacated the office pursuant to N.C.G.S. § 162-3.
7. Pursuant to N.C.G.S. § 162-5.1, which expressly governs the appointment of any vacancies in the Sheriff's office in Mecklenburg County, the chair of Defendant Board of County Commissioners requested in writing that the Executive Committee of the Mecklenburg County Democratic Party nominate someone to fill the vacant office of County Sheriff. See Stipulation 2 of the Stipulations of the Democratic Council for Review, attached as Exhibit A.
8. On December 6, 2007, pursuant to N.C.G.S. § 162-5.1, Plaintiff was elected to fill the vacancy at the Mecklenburg County Democratic Party Executive Committee meeting.
9. On December 6, 2007, David Erdman, chairman of the County Democratic Party, provided hand-written notice to the defendant that Plaintiff was the Party's nominee.
10. By its plain language, N.C.G.S. § 162-5.1 imposed a mandatory, ministerial duty upon the Defendant to appoint the person elected by the County Democratic Party as interim Sheriff.
11. N.C.G.S. § 162-5.1, read in conjunction with N.C.G.S. § 162-5, directs that appointment should have occurred at the next regular meeting of the Board of County Commissioners. It did not.
12. Instead, members of the County Commission, without any discussion of the formal notice of the Mecklenburg County Democratic Party's nomination, responded to informal allegations that the election had not followed party rules in the organizing of voting precincts.
13. Various members of the Defendant Board stated their intention to scrutinize the party election process before naming Mackey as Sheriff and declared that the Democratic Party's Council of Review be given ample time to examine any grievances filed in the matter.

14. Plaintiff met the statutory qualifications for holding the office under G.S. §162-2. He was of sufficient age and resided in this County. The only other qualifications are that the sitting Sheriff not practice law or serve in the General Assembly. Despite his statutory qualification for the position, members of the Defendant Board refused to appoint Plaintiff as Sheriff because they did not believe he was qualified for the job.
15. The day after the election, Commissioner James stated, "I am not going to support someone who is incompetent and has questionable ethics and give them the power to arrest or release people from jail."
16. Commissioner Dan Ramirez stated that he hoped to delay the review process as long as possible during the fact finding period following the election and to keep acting Sheriff Bailey in power. "The problem I have is [Mackey] is very adamant that he's going to be the Sheriff, and as far as I'm, concerned I will not, will not, vote for him as sheriff," Ramirez said.
17. On December 14, 2007, 8 days after the election, Board of Commissioners Chairperson Jennifer Roberts was quoted as stating, "First of all, we don't know he is the nominee of the Democratic Party because those procedures have come into serious question. There have been two grievances filed by party leaders against their own procedures and against some of the things that happened during the campaign while Nick Mackey was organizing precincts. We have to hear that out."
18. Also on December 14, 2007, Defendant Parks Helms was quoted as saying, "He [Mackey] would have done himself, the African-American community, the Democratic party and the citizens of this community a great service to have respectfully withdrawn his nomination."
19. In response to grievances and at the encouragement of the Defendant, the North Carolina State Democratic Party convened a Council of Review to scrutinize the precinct organizing by both Mr. Mackey's and Mr. Bailey's campaigns.
20. Understanding that the Commissioners would allow the Council of Review to resolve any issues in the process, and that the Council would either uphold the election or decide to hold another vote, Plaintiff decided not to seek a Writ of Mandamus forcing the Commission to appoint him. He understood and believed in good faith that the Commission would abide by the decision of the Council of Review.
21. The Council of Review convened a hearing to consider the matter on February 2, 2008.
22. County Democratic Chairman David Erdman testified to the Council that he had officially sanctioned, by a vote of the Board of the County Democratic Party, the precinct organizing process that both Mr. Mackey and Mr. Bailey relied on and used to organize precincts after October 1, 2007.

23. Mr. Erdman testified that the process he sanctioned had been used by his predecessors and approved by his parliamentarian, a lawyer.
24. John Cotham, one of Mr. Erdman's predecessors, corroborated that testimony and stated that the precinct organization process at issue had been used for approximately eight years prior to 2007.
25. The Council of Review found that all votes in the election were "invalid". See Order of Democratic Council of Review, attached Exhibit B.
26. The Council of Review set out a procedure in an Order, dated February 2, 2008, directing the County Democratic Party to hold a new election to nominate the successor to Sheriff Pendergraph within 30 days in compliance with the procedures of the party set out in the North Carolina State Democratic Party Plan of Organization. See, Exhibit B.
27. On February 4, 2007, an "ad hoc" group of the County Commission, consisting of Commissioners Helms, Mitchell, Bishop, and Roberts, met in closed session and subsequently announced in open session that the "ad hoc" group would recommend that the Commission appoint the losing candidate of the December 2007 Executive Committee election, Daniel "Chipp" Bailey, as Sheriff.
28. The four Republican Commissioners, James, Bishop, Ramirez and Bentley, issued a press release on February 3, 2008, stating that if the Democrats did not appoint Bailey as Sheriff "without further delay, Republicans will."
29. The issue has been placed on the Board's agenda for its regular meeting scheduled for February 5, 2008.
30. Seven of the nine members of the Defendant Board have declared their intent to appoint Bailey as Sheriff on February 5.
31. Defendant refused without legal authority to accept the Plaintiff's nomination when provided by the Democratic Party on December 6, 2007, and now, after declaring the Democratic Party would be allowed to resolve the election controversy, refuses to allow the Democratic Party to complete the nominating process established in its February 2, 2008, Order.
32. Thus, plaintiff has been denied appointment under the election procedures outlined to both candidates and used for at least the past eight years. The Commission now intends to deny him any opportunity to be nominated again in a new election under the procedures now prescribed by the Democratic Party.

IV. ACTION FOR DECLARATORY JUDGMENT

33. In support of this Complaint for Declaratory Judgment Plaintiff shows the Court that:

- a. A real controversy exists between Plaintiff and Defendants.
 - i. Mr. Mackey asserts that his rights arise pursuant to N.C.G.S. § 162-5.1 (2007). Defendants have a clear duty to comply with § 162-5.1, which states that “[i]f the sheriff were reelected as a nominee of a political party, the board of commissioners shall consult the county executive committee of that political party before filling the vacancy, and **shall elect** the person recommended by the county executive committee of that party, if the party makes a recommendation within 30 days of the occurrence of the vacancy.”
 - ii. Mr. Mackey was recommended by the county executive committee of the Democratic Party on December 6, 2007.
 - iii. Defendants did not appoint Mr. Mackey as Sheriff after receiving the nomination.
- b. The controversy arises out of opposing contentions of the parties, made in good faith, as to validity or construction of N.C.G.S. § 162-5.1.
 - i. The statute states that the Board “shall elect” the person recommended by the county executive committee.
 - ii. As used in the North Carolina General Statutes, the word “shall” is generally imperative or mandatory. See *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979).
 - iii. Mr. Mackey asserts that Defendant had a ministerial duty to appoint him upon receipt of the recommendation by the county executive committee.
 - iv. The county executive committee recommended Mr. Mackey to fill the vacancy for Sheriff on December 6, 2007, and the Mecklenburg Board of County Commissioners received the recommendation soon after.
 - v. The Executive Committee did not withdraw the nomination or ask the Board to delay the appointment process.
- c. Mr. Mackey has legal rights as the original nominee, and has a protectible interest as a candidate for the nomination under the Council of Review-ordered election. The Defendant is under legal liabilities which are involved in controversy, and may be determined by a declaratory judgment or in this action.

34. Although there is no universal rule for determining whether a statutory provision is imperative or directory, beyond the fundamental rule that it depends on the scope and object of the enactment, it is generally held that if a statute that grants a new power prescribes how it shall be exercised, the statute can lawfully be exercised in no other way. The requirement is usually regarded as imperative where compliance is made a condition precedent to the exercise of a special privilege. A statute which affects the public interest or the claims *de jure* of third persons or that promotes justice is construed with practical unanimity to be more than directory; for, wherever public policy favors the imperative meaning, the word "shall," according to the prevailing rules, will be construed as mandatory. *Davis v. Board of Education*, 186 N.C. 227, 119 S.E. 372 (1923).
35. Also, where a statute provides for an action which is required by justice or public duty, as where it invests a public body, municipality, or officer with power and authority to take some action which concerns the public interests or the rights of individuals, though the language of the statute be merely permissive in form, it will be construed as mandatory, and the execution of the power may be insisted upon as a duty. See *Jones v. Commissioners*, 137 N.C. 579, 50 S.E. 291 (1905).
36. N.C.G.S. § 162-5.1 requires the Mecklenburg Board of County Commissioners, in the name of justice and their public duty, to elect Mr. Mackey. Their duties concern the public interest in having this matter resolved expeditiously. Therefore the word "shall" used in the statute should be construed as mandatory, and the court must insist that the Mecklenburg Board of County Commissioners act on their duty immediately.

WHEREFORE, Plaintiff prays the Court that:

1. The Court issue immediately a Temporary Restraining Order and, within 10 days, a Preliminary Injunction;
2. Upon trial of the matter, declare that the word "shall" as used in N.C.G.S. § 162-5.1 is a mandatory requirement.
3. Declare that the Defendant lacked statutory authority to reject the nomination of Plaintiff, as its duties at that time were solely ministerial;
4. Declare that the Defendant allow the Executive Committee of the County Democratic Party to elect a nominee for Sheriff as set out in the Council of Review Order of February 2, 2008.
5. That Plaintiff recover the costs and expenses of this action from Defendant; and

6. That Plaintiff recover any further relief that the Court deems appropriate.

This the 5th day of February, 2008.

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John W. Gresham (N.C. Bar #6647)
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