

September 28, 2004 in this matter. The Court now makes the following additional findings of supplemental facts concerning events following the entry of that Temporary Restraining Order.

2. On October 1, 2004 a representative from the law firm of House Minority Leader Brian Bosma filed with the Indiana Election Division a second candidate withdrawal form on behalf of Jeffrey M. Lee at 8:06 a.m.

3. Lee testified that he signed that candidate withdrawal form on the afternoon of Thursday, September 30, 2004, before a notary public in Bosma's law office with the understanding that it would be submitted on his behalf to the Election Division the following morning.

4. In his second candidate withdrawal form (Plaintiff's Exhibit A To Plaintiffs' Supplemental Complaint), Lee declared that on the date he signed that form, September 30, 2004, his residence was located at 420 S. Stratton Street, Sullivan, Indiana; however, the evidence is uncontroverted that on that date and at the time he signed that second candidate withdrawal form he had not slept over a single night at that location, signed the lease for that residence, or moved any of his possessions into that residence.

5. Lee testified that he and his family spent a second night at the family residence of his business partner in Farmersburg, Indiana, on Monday, September 27, 2004. By Lee's own admission, and in accordance with Judge Bolk's previous findings, this living arrangement with his business partner in Farmersburg, Indiana, was only temporary.

6. The following three nights, Tuesday, September 28; Wednesday, September 29; and Thursday, September 30, 2004 Lee remained in his temporary living arrangement with his business partner in Farmersburg. However, on each of those three nights his wife and children stayed with Lee's parents, who own a farm in Vigo County, Indiana, within the boundaries of House District 46.

7. Lee testified that the Bopp Law Firm had advised him that it would be "simpler" if he were to file a second candidate withdrawal form with the Election Division. Therefore, on Thursday, September 30, 2004, Lee drove to Bosma's law office in Indianapolis and signed the second candidate withdrawal form in front of a notary public in that law office. On the way to Indianapolis he received a phone call from R. Brooks LaPlante, during which the two of them discussed his imminent second withdrawal.

8. At some unspecified time on Thursday, September 30, 2004, Lee's wife, Christie M. Lee, signed a fixed-term residential lease (Defendant Kittle's Exhibit I) for a 3-bedroom residence located at 420 S. Stratton Street, Sullivan, outside House District 46.

9. Lee himself did not sign the lease until some date after October 2, 2004. Lee was unable to recall the precise date on which he signed the lease but he was certain it was after his second candidate withdrawal form had already been filed on his behalf with the Election Division. Lee backdated his signature on the lease to September 30, 2004 to give the impression that both he and his wife had signed the lease on the date, rather than after October 1, 2004.

10. Lee never spoke with the landlord or property owner of the 420 S. Stratton Street property before signing the lease, nor did he negotiate or discuss any of the terms of the lease before his wife signed it on September 30, 2004.

11. On Friday, October 1, 2004, Lee and his family stayed the night in his Riley, Indiana apartment located at 6344 S. State Road 159, located in Vigo County within House District 46. At that time, they still had several of their possession in their Riley apartment, including their beds, washer and dryer, and several guns.

12. Lee testified that the lease on his Riley apartment lease did not expire until October 10, 2004.

13. Lee testified that Saturday, October 2, 2004, was "moving day". On that day he moved most of the rest of his belongings, except his washer/dryer and the guns, to the 420 S. Stratton Street residence in Sullivan, Indiana.

14. Lee's children continued to be enrolled in and attend Vigo County Public Schools until an unspecified date in mid-October, 2004, at which time he enrolled his children for the first time in the Sullivan County public school system.

15. At some unspecified date after the September 27 hearing before Judge Bolk, Lee was paid \$700, plus a per diem and expenses, to make a business trip to Louisiana as an independent contractor for a company, Doughmakers, in which LaPlante is a principle. Lee was also paid a percentage of receipts, plus a \$100 commission, for working a day at the Parke County Covered Bridge Festival in a sales position for Doughmaker on an unspecified day in mid-October, 2004.

16. Lee testified that he is still considering moving for personal business reasons to Gwinnett County, Georgia, and that his company is and continues to be a member of the Chamber of Commerce in that community.

CONCLUSIONS OF LAW

1. A certified candidate for a state legislative office is required to withdraw as a candidate no later than noon on July 15 prior to the General Election unless the candidate has "moved from the election district" and has "file[d] a notice of withdrawal immediately after changing the candidate's residence." I.C. §3-8-7-28.

2. Defendant Lee did not first seek to withdraw as a candidate for House District 46 until September 16, 2004, long after the statutory July 15 deadline for filing a withdrawal. Accordingly, Lee could lawfully withdraw as a candidate only if it is demonstrated both that (1) he moved from the election district, and (2) he filed a notice of withdrawal immediately after changing his residence.

3. Indiana Code §3-5-5-4 provides that a candidate who has established residency in a precinct retains residency in that precinct until he abandons it by (1) having the intent to abandon the residence, (2) having the intent to establish a new permanent residence, and (3) acting as provided in this intent by actually establishing a residence in a new precinct.

4. Indiana Code §3-5-5-11 establishes a rebuttable presumption that the place where a candidate's immediate family resides is that person's residence. I.C. §3-5-5-6.

5. Lee and his immediate family have continuously resided in Riley, Indiana at 6344 S. State Road 159 through the filing of this action, and through at least October 2, 2004.

6. Defendants Lee and/or Kittle bear the burden of proving that Lee's residence is something other than his previously admitted and established residence in Riley, Indiana. Once acquired, a candidate's domicile is presumed to continue. *State Election Board v. Bayh*, 521 N.E.2d 1313 (Ind. 1988); *see also*, I.C. §§3-5-5-6 and 3-5-5-11.

7. Under Indiana caselaw, a change of domicile requires both an intent to go to a given place and to remain there, and an "actual moving". *State Election Board v. Bayh*, 521 N.E.2d at 1317.

8. A self-serving statement or declaration of intent is insufficient to find that a new residence has been established or to rebut the presumption that a person continues to be domiciled in the precinct where he filed his candidacy. To establish a new domicile, both intent and conduct must converge to rebut the presumption of continued residency in that precinct. *Bayh*, 521 N.E.2d at 1318.

9. Lee represented to the voters and to the Election Division when he filed his Declaration of Candidacy that he was a resident of House District 46; therefore, it is the burden of the party asserting a change in that domicile to rebut

that presumption flowing from that declaration, by demonstrating both intent to change domicile and conduct taken to implement that intent by the operative date (October 1) of the purported withdrawal. I.C. §3-5-5-6.

10. The undisputed evidence shows that Lee and his immediate family had not actually moved into, nor did they reside at the 420 S. Stratton Street residence in Sullivan, either at the time he signed his second candidate withdrawal form on September 30, 2004, or on the date that the second candidate withdrawal form was filed for him with the Election Division the following morning, Friday, October 1, 2004 at 8:06 a.m.

11. Defendants Kittle and Lee failed to rebut the presumption that Lee's domicile remained at his Riley, Indiana residence in District 46 at the time his second candidate withdrawal form was filed at 8:06 a.m. on October 1, 2004.

12. The undisputed evidence demonstrates that Lee filed his second notice of withdrawal of his candidacy before he and his immediate family had changed their domicile from Riley, Indiana, or actually moved outside District 46. Therefore, the second candidate withdrawal that was filed on October 1, 2004, like the first candidate withdrawal filed on September 16, 2004, did not legally effectuate his withdrawal as a candidate because it was not submitted in compliance with I.C. §3-8-7-28(c).

13. Because Lee had not permanently abandoned his residence in Vigo County nor actually moved into a new permanent residence outside District 46 immediately before his second candidate withdrawal form was filed on October 1,

2004, Lee remained the certified Republican candidate for House District 46, and Defendant Kittle and the Republican Party could not replace him pursuant to State law.

14. The Court concludes, after examining the Indiana statutes governing candidate withdrawals, that those statutes should be strictly enforced so as to prevent political parties from using chicanery or coercion to deprive the voters who selected a particular candidate in the primary election of their choice. Therefore, the Court concludes that a candidate may withdraw and be replaced by his political party only if that candidate has both abandoned his previous residence within the election district and actually moved into a new permanent residence outside the district immediately prior to the filing of his candidate withdrawal form, which is the operative date for making such a determination. The evidence unequivocally shows that Lee and his immediate family had not actually moved to a new permanent residence outside the election district at the time his second candidate withdrawal form was filed with the Election Division; thus, his second candidate withdrawal was also ineffectual.

15. Accordingly, Defendant Kittle and those acting in concert with him did not lawfully select a replacement candidate for Lee in House District 46, on October 11, 2004, since a caucus for the purpose of naming a replacement candidate may only be held ten (10) days after there is a lawful candidate vacancy, I.C. §§3-13-1-7 and -8, and here there was no candidate vacancy on October 1,

2004, because Lee and his immediate family continued to live in House District 46 at that time.

16. Defendants Robertson and King, the Co-Directors of the Indiana Election Division, may not lawfully certify any replacement candidate for House District 46 because no candidate vacancy exists. Lee remains the only lawful Republican Party candidate for House District 46.

17. The Defendants who are members of the County Election Boards for Clay, Monroe, Owen and Vigo counties may not lawfully place the name of any Republican candidate for House District other than Lee upon the ballots for the November 2, 2004 General Election.

18. The Plaintiffs are not required to prove irreparable harm or that the balance of harms is in their favor in order to obtain a preliminary injunction because the "*per se*" injunction standard applies where, as here, the act sought to be preliminarily enjoined violates a statute. *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 953 (Ind. Ct. App. 2004); *Indiana Family and Social Services Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002). Under that standard, the Plaintiffs need only prove a reasonable likelihood of success on the merits and that the public interest will not be disserved by the issuance of a preliminary injunction.

19. The Plaintiffs have demonstrated a reasonable likelihood of success on the merits.

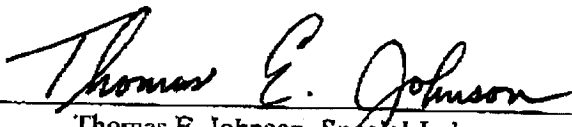
20. The public interest will not be disserved by issuance of the requested preliminary injunction.

PRELIMINARY INJUNCTION

Defendants Kristi Robertson and J. Bradley King, the Co-Directors of the Indiana Election Division, and all those acting in concert with them, are hereby preliminarily enjoined from certifying any replacement candidate of the Republican Party in House District 46 for the General Election scheduled for November 2, 2004.

Defendants Patricia Mansard, Dean Myers, Tom Lorey, Mary C. Brown, Holly Froderman, Gary Wolfe, Jim Fielder, Steve Hogan, Jack Davis, Nick Robertson, Margaret Stockwell and Margaret Tucker, in their Official Capacities as Members of the Vigo, Clay, Monroe and Owen County Election Boards, and all those acting in concert with them, are hereby restrained from printing, using or distributing any ballots that contain the name of any Republican Party candidate for House District 46 other than Defendant Jeffrey M. Lee for the General Election scheduled for November 2, 2004.

SO ORDERED this 27th day of October, 2004.


Thomas E. Johnson, Special Judge
Vigo Superior Court

Copies to:

All counsel of record