

STATE OF INDIANA
VIGO CIRCUIT COURT
2007 TERM

KEVIN D. BURKE,

CAUSE NO. 84C01-0711-MI-145

Petitioner,

v.

DUKE BENNETT,

Contestee.

VIGO COUNTY CLERK
TERRE HAUTE, INDIANA

DEC 21 2007

PATRICIA R. MANDLER
CLERK

FACTS

Duke Bennett and Kevin Burke were the only two candidates for the office of Mayor of Terre Haute, Indiana in November of 2007. Bennett was elected Mayor in 2007 by a 107 vote margin over Burke, with Bennett receiving 6055 votes and Burke receiving 5948 votes. Burke sought a recount in this Court in a separate action, and following a ten (10) day recount, a Recount Commission declared Bennett the winner by a 110 vote margin, with Bennett receiving 6054 votes and Burke receiving 5944 votes. On November 19, 2007 Burke filed a Verified Petition Contesting Election under I.C. 3-12-8-2 (1) and (5) alleging 1) Bennett was ineligible, and 2) a deliberate act or series of actions occurred making it impossible to determine the candidate who received the higher number of votes cast in the election. Since Burke presented no evidence on the allegation of I.C. 3-12-8-2 (5) at the Contest Trial, the Court considers the same waived. The Contest Petition specifically alleges Bennett was ineligible as a candidate under I.C. 3-8-1-5 (C)(6)(A). I.C. 3-8-1-5 (c)(6)(A) prohibits certain individuals subject to the Hatch Act from being candidates in partisan elections.

Bennett is the Director of Operations at the Hamilton Center, Inc., a non-profit corporation, headquartered in Terre Haute, Indiana. Hamilton Center has approximately 650 employees in seven counties housed in over thirty facilities. Hamilton Center's operating budget in 2007 is approximately Thirty-Two Million Dollars (\$32,000,000.00). The Hamilton Center provides primarily mental health and addiction services in the counties it serves. Bennett has been Director of Operations at all times relevant hereto, and he is still currently employed as the Hamilton Center's Director of Operations. As Director of Operations, his duties include responsibility for overseeing new construction, facility maintenance and security.

Bennett also works part-time as an official for high school and collegiate sports, but his job at the Hamilton Center is his only full time job, and it is the job to which he devotes the majority of his time and from which he derives the majority of his income. Duke Bennett reports directly to Mel Burks, Executive Director for Hamilton Center, Inc., who in turn reports directly to Galen Goode, CEO of Hamilton Center, Inc. Robb Johnson, Facilities Manager for Hamilton Center, Inc., reports directly to Duke Bennett.

Since 1995 Hamilton Center has received a federal grant for the Early Head Start Program in Vigo County. In May 2007, the Hamilton Center received a Head Start grant in the amount of \$861,631.00 for the July 1, 2007-June 30, 2008 fiscal year. In light of a cost of living adjustment, the Hamilton Center's 07-'08 Head Start grant was subsequently increased to \$874,237.00. Hamilton Center, Inc., annual budget exceeds \$32,000,000 resulting in the Early Head Start program accounting for 2.8% of the annual budget.

The Early Head Start program utilizes three separate facilities, totaling approximately 5,500 square feet. Hamilton Center, Inc., has a total square footage of facilities under roof of

approximately 250,000 square feet. The Early Head Start facilities comprise 2.2% of the total square footage of facilities under roof of Hamilton Center, Inc.

Anita Lascelles is the Director of Early Intervention with Hamilton Center, Inc., and is responsible for the Early Head Start Program. Anita Lascelles reports directly to Dr. Robe Fazekas, Executive Director for Hamilton Center, Inc., who in turn reports directly to Galen Goode, CEO of Hamilton Center, Inc. Anita Lascelles is responsible for the grant application for Early Head Start funds. Duke Bennett plays no role and has no duties in the application process for Early Head Start funds. Duke Bennett is not listed as a Hamilton Center, Inc., Early Head Start employee. Anita Lascelles creates the budget for the Early Head Start program and is aware of where all monies are spent and is responsible for the approval of the same. Duke Bennett has no authority to expend Early Head Start dollars without the direction and approval of Anita Lascelles. Anita Lascelles, on occasion, would contact Duke Bennett or Robb Johnson, indicating that certain work needed to be done at an Early Head Start facility, indicating the amount that she would spend for the project, and ask for either Robb Johnson or Duke Bennett to locate someone to complete the work under those requirements. Following the initiation of this suit, utilizing a calculation factor recommended by U.S. Department of Health and Human Services, it was determined that 1.84% (\$2,041.00) of Bennett's salary could be attributed to the Early Head Start Program. Such attribution derived from the proration of general administrative expenses from the grant throughout Hamilton Center.

Duke Bennett's principal employment with Hamilton Center, Inc., is not related to the Early Head Start Program. The majority of Duke Bennett's time as an employee is devoted to responsibilities not related with the Early Head Start Program. Only 1.84%, or \$2,041, of Duke Bennett's annual salary at the Hamilton Center is derived from Early Head Start federal funding.

Only 2.6%, or \$125,000, of the Hamilton Center's overall administrative costs of \$4.8 million is derived from Early Head Start federal funding. Only 2.6%, or 8,590 of Hamilton Center's overall costs for facilities management of \$465,000 is derived from Early Head Start federal funding. Less than 1% or, about \$2,000, of Hamilton Center's overall maintenance budget for facilities of \$345,000 is used for Early Head Start facilities. Only 2.2%, or 5,500 square feet of the Hamilton Center's 250,000 square feet of facilities is dedicated for Early Head Start use.

For each annual Head Start grant application, the Hamilton Center signed an affirmation on behalf of the agency that the Hamilton Center "[w]ill comply with the provisions of the Hatch Act (5 U.S.C. 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds." The Hamilton Center is an agency which assumes responsibility for planning, developing, and coordinating the Early Head Start program in Vigo County and receives assistance under the Head Start Act.

The Hatch Act and Little Hatch Act prohibit certain political activities for employees of the federal, State and local governments. In addition, certain federal agencies in making grant awards to non-governmental agencies impose restrictions on the grantees with respect to the grants. Here Bennett, unquestionably is NOT an employee of a governmental unit. The Hatch Act and Little Hatch Act apply by virtue of the grant Award for Early Head Start by the United States Department of Health and Human Services. The Early Head Start Grant award to Hamilton Center, Inc. requires Hamilton Center to comply with the provisions of the Hatch Act and Little Hatch Act. Even though the grant requires Hamilton Center to comply with the Act, none of the executive management team were familiar with the details or requirements of the Act, nor was there an employee in Hamilton Center who educated employees about the Act or ensured compliance with the Act. Bennett has

ever been part of executive management at Hamilton Center. The undisputed evidence revealed no concerns by any employee of Hamilton Center, nor any inquiries by the federal government regarding possible Hatch Act violations of any Hamilton Center employee.

In 2003 Bennett ran for the office of Mayor of the City of Terre Haute in both the primary and general election (where he lost to Burke). No issues were raised concerning his candidacy and the Hatch Act. Bennett became concerned about the possible applicability of the Hatch Act to him in 2007 when local media reports focused on Hatch Act status of various candidates. He spoke to the CEO of Hamilton Center. He performed a Google search on the Hatch Act, placed two anonymous phone calls to the Office of Special Counsel, and had conversations with people who have no Hatch Act expertise. During one of Bennett's anonymous phone calls with the OSC, he was told that a person employed by a not for profit agency with a Head Start program may be subject to the Hatch Act. Bennett failed to obtain a written OSC opinion or a lawyer's opinion on the matter. The United States Office of Special Counsel ("OSC") is the federal agency charged with issuing advisory opinions to people seeking advice about political activity under the Hatch Act. 5 U.S.C. § 1212(f); *see also* www.osc.gov.

Both Bennett's compensation and funds that he controls were included in overhead calculations submitted in support of the Hamilton Center's Early Head Start grant applications and it is by such overhead calculations that the Hatch Act is implicated.

DISCUSSION AND ANALYSIS

The Hatch Act, 5 U.S.C. 7321-7326, and the Little Hatch Act, 5 U.S.C. § 1501 *et seq.*, govern the political activity of certain governmental employees. Covered employees are prohibited, amongst other things, from being candidates for a partisan public offices.

5 U.S.C. § 1502 provides that:

- (a) A State or local officer or employee may not—
 - (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
 - (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
 - (3) be a candidate for elective office.

The Hatch Act applies to officers and employees of State and local governmental agencies whose activities are financed in whole or in part by loans or grants made by the United States or a Federal agency. 5 U.S.C. § 1501(4); *but see* 5 U.S.C. § 1502(c) (excluding incumbents, such as the serving Mayor, from Hatch Act coverage).

The Hatch Act was originally enacted in 1939, “in response to controversies over coercion of political donations from federal employees and the misuse of federal funds in the 1936 and 1938 campaigns.” Bloch, *supra*, *The Judgment of History*, 7 U. Pa. J. Lab. & Emp. L. at 231. “Preventing corruption, ensuring a professional civil service, preserving respect for the government, and protecting employees from being coerced into political activity are the most cited reasons for the Act.” *Id.* at 271.

Employees of private, nonprofit agencies are subject to the Hatch Act if a statutory source of the agency’s federal funding specifically states that employees of the recipient organization are State or local government employees for purposes of the Act. The statutes authorizing Head Start Grants specify that recipients of the grants are State or local government agencies for the purposes of the Hatch Act.

The statute that applies the Hatch Act to Head Start Grant recipients is 42 U.S.C. §

1851, which states: “[f]or purposes of Chapter 15 of title 5, United States Code [the Mini-Hatch Act] any agency which assumes responsibility for planning, developing, and coordinating Head Start programs and receives assistance under this subchapter shall be deemed a State or local agency.” An agency that operates a Head Start program and receives federal grants to assist with the program is treated as a local government agency funded through Federal grants or loans, meaning that the agency and its employees’ political activities are subject to the restrictions of the Hatch Act.

“State or local officer of employee” is defined under 5 U.S.C. § 1501(4) as:

- an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include –
 - (A) an individual who exercises no functions in connection with that activity; or
 - (B) an individual employed by an educational or research institution, establishment, agency or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

“It has long been established that an officer or employee of a state or local agency is subject to the Hatch Act if, as a normal and foreseeable incident of his principal position or job, he performs duties in connection with an activity financed in whole or in part by federal funds.” September 27, 1996 opinion letter from OSC Director of Legislative and Public Affairs Michael G. Lawrence (citing *In re: Hutchins*, 2 P.A.R. 160, 164 (1944); *Special Counsel v. Gallagher*, 44 M.S.P.R. 57 (1990). (*Gallagher*); *Hutchins* opinion unavailable.)

The OSC defines “principal employment.” as used in 5 U.S.C. § 1501(4), as “that employment to which an individual devotes the most time, and from which he derives the most

Income.” June 5, 1996 opinion letter from OSC Senior Trial Attorney Ralph B. Eddy (citing *Anderson v. U.S. Civil Service Commission*, 119 F. Supp. 567, 567-577 (D. Mont. 1954); *Matturi v. U.S. Civil Service Commission*, 130 F. Supp. 15, 16-17 (D.N.J. 1955), *aff’d*, 229 F.2d 435 (3rd Cir. 1956); *Smyth v. U.S. Civil Service Commission*, 291 F. Supp. 568 (E.D. Wis. 1968)).

Duke Bennett’s job as the Director of Operations for the Hamilton Center is his principal employment.

The Hatch Act applies to the Hamilton Center, because it is an “agency which assumes responsibility for planning, developing, and coordinating Head Start programs.” 42 U.S.C. § 9851.

Bennett’s job is “financed in whole or in part by loans or grants made by the United States or a Federal agency.” 5 U.S.C. § 1501(4). Specifically, \$2,041 of Bennett’s salary and benefits for this fiscal year were charged directly to the Hamilton Center’s Head Start grant, although such calculation tracing the funds to Bennett was not undertaken until after the 2006 general election. Based on Bennett’s job description, testimony at the December 18 hearing, and the evidence in the record, Bennett performs functions in connection with the Hamilton Center’s Early Head Start program making him subject to the Act.

The inquiry does not end with the determination of whether a candidate is subject to the Hatch Act. Burke contends that if Bennett is subject to the Hatch Act he is precluded from assuming office. An examination of I.C. 3-8-1-5 (c) fails to support Burke’s contention. IC 3-8-1-5(c), in relevant part, states that a person is disqualified “from assuming or being a candidate for elected office if: (6) the person is subject to: (A) 5 U.S.C. § 1502 (the Little Hatch Act); . . . and would violate either federal statute by becoming or remaining the candidate of a political party for nomination or election to an elected office or a political party office.”

Several options are available to challenge the qualifications of a candidate. Ind. Code 3-8-1-2 (c) and (e) permits a County Election Board, upon the filing of a Declaration of Candidacy, to determine whether a candidate is qualified to seek office. Qualifications may be challenged by a voter in the district (3-8-1-2 (c)). The County Election Board also has the authority to investigate and conduct a hearing regarding the alleged violation of any provision of the election laws. I.C. 3-6-5-31. Wilson v. Montgomery County Election Board, 642 NE2d 258, (Ind. App. 1995). Neither Burke, nor anyone else, sought to have Bennett disqualified from being a candidate for office.

Instead, after the election, Burke filed this contest action and asks the Court to find that Bennett was ineligible. Burke further requests that should the Court determine Bennett was ineligible he be certified the eligible candidate receiving the most votes and, therefore, remain Mayor of Terre Haute (I.C. 3-12-8-17; see also Patterson v. Dykes, 804 NE2d 849, (Ind. App. 2004)). I.C. 3-8-1-5 (2005) governs disqualification of candidates.

The statute lists six (6) basis for disqualifying one from assuming or being a candidate for an elected office. The statute provides:

Sec. 5 (a) This section does not apply to a candidate for federal office.

(b) As used in this section, "felony" means a conviction in any jurisdiction for which the convicted person might have been imprisoned for at least one (1) year. However, the term does not include a conviction:

- (1) for which the person has been pardoned; or
- (2) that has been:

- (A) reversed;
- (B) vacates;
- (C) set aside; or
- (D) not entered because the trial court did not accept the person's guilty plea.

(c) A person is disqualified from assuming or being a candidate for an elected office if:

(1) the person gave or offered a bribe, threat, or reward to procure the person's election, as provided in Article 2, Section 6 of the Constitution of the State of Indiana;

(2) the person does not comply with IC 5-8-3 because of a conviction for a violation of the federal laws listed in that statute;

(3) in a:

(A) jury trial, a jury publicly announces a verdict against the person for a felony;

(B) bench trial, the court publicly announces a verdict against the person for a felony; or

(C) guilty plea hearing, the person pleads guilty or *nolo contendere* to a felony;

(4) the person has been removed from the office the candidate seeks under Article 7, Section 11 or Article 7, Section 13 of the Constitution of the State of Indiana;

(5) the person is a member of the United States armed forces on active duty and prohibited by the United States Department of Defense from being a candidate; or

(6) the person is subject to:

(A) 5 U.S.C. 1502 (the Little Hatch Act); or

(B) 5 U.S.C. 7321-7326 (the Hatch Act);

and would violate either federal statute by becoming or remaining the candidate of a political party for nomination or election to an elected office or a political party office.

(d) The reduction of a felony to a Class A misdemeanor under IC 35-50-2-7 or IC 35-38-1-1.5 does not affect the operation of subsection (c).

Subsections one and three are based on the Indiana Constitution. Subsection (1) prohibits a candidate who gave or offered a bribe to get elected from assuming office or being a candidate. Subsection (4) prohibits one who is removed from office from running for that office again. Subsections (2) and (3) concern convictions for felony charges and certain federal charges. Subsection (5) concerns prohibitions by the Federal Government Department of Defense for members of the United States armed forces on active duty. Subsections (1), (2) and (3) have been the subject of prior litigation that reached the appellate stage. *Fields v. Nicholson*, 197 Ind. 161, 150 NE 53 (1906). *Taylor v. State*

Election Board, 616 NE2d 380 (Ind. App. 1993). *Wilson v. Montgomery County Election Board*, 642 NE2d 258 (Ind. App. 1995). *Patterson v. Dykes*, 804 NE2d 849 (Ind. App. 2004). *Tinker v. Wallace*, 1906, 79 NE 355, 63 Ind. 592. Subsections (4) and (5) are straightforward and present no particular problems in their meaning or application.

Subsection (6), however, has no Indiana case law construing it in this jurisdiction and no case law has been provided or found from another jurisdiction construing similar language. Subsection (6) applies to individuals subject to the Hatch Act 5 USC 1502 and 5 USC 7321-7326 the Hatch Act. Such makes this a case of first impression.

Although the Court finds Bennett was subject to the Hatch Act, it is clear that the violation was not willful or intentional. Whether Bennett was blissfully ignorant, lulled into believing the Act did not apply to him by virtue of his three previous election bids (Primary 2003, General 2003 and Primary 2007), relied upon his own research, conversations with Hamilton Center CEO, discussions with his campaign committee, his conclusion that the Hatch Act does not apply to him was erroneous.

No evidence indicates Bennett willfully flouted the Act. No one from Office of Special Counsel informed him that he was precluded from running. No one from Hamilton Center told him the Act precluded him from being a candidate. His role with Early Head Start was essentially non-existent. Hamilton Center did not consider Bennett an employee of Early Head Start. Bennett approved work orders for minor repairs on two facilities. It appears that only after the initiating of this litigation and after Hamilton Center was forced to calculate the apportionment of overhead was it revealed or discovered that part of Bennett's salary was attributed to the Early Head Start grant award. The Hatch Act has administrative penalties

provisions which allow the imposition of sanctions on a violation, including requiring termination of the employee and penalties against an agency for failing to remove the employee.

The question for the Court to decide herein is whether Bennett is disqualified from assuming office. Burke conceded at the contest trial that this is the issue herein. Bennett cannot be disqualified under IC 3-8-1-5(c) because he is no longer a candidate and does not intend to become one within the immediate future. The mayor election is over and he has, pursuant to a certificate of election, been declared the winner. As such, he is mayor-elect, not a candidate, and does not fall within the scope of IC 3-8-1-5(c)'s candidacy requirement. Bennett cannot be disqualified under IC 3-8-1-5(c) because he has not yet assumed office and will not do so until January 1, 2008. Mayor of Terre Haute is a full-time position. At the time of taking mayoral office, Bennett will no longer be employed at the Hamilton Center. Thus, when he is assuming office, he will no longer be employed by the Hamilton Center and, consequently, will not be subject to the Little Hatch Act. He does not yet fall within the reach of IC 3-8-1-5(c). The Little Hatch Act prohibition against being a candidate for elective office does not apply to the Mayor of a city or an individual holding elective office.

Indiana case law has previously addressed whether a candidate who was disqualified from running could assume office provided the disqualifying basis had been remedied. Hoy v. State, 1907, 169 Ind. 506, 81 NE 509 (1907), concerned the 1905 election for city council in Lebanon. Two council members were to be elected from the four candidates. The third place finisher alleged that since the second place finisher was an officer of a company that

had a contract with the city, making him ineligible to occupy any office pursuant to statute. the third place finisher should be deemed elected. The Court held that ineligibility must exist at the time the term of the office begins, Hoy 169 at 513 citing Smith v. Moore (1883), 90 Ind. 294. Connell v. State ex rel. (1925) 196 Ind. 421, 148 NE 407 confirmed that such remained the law in Indiana, although not directly deciding the issue.

...where claimants were ineligible to the offices sought at the time of being elected thereto by reason of having voluntarily borne arms against the United States, or because they were then holding judicial offices, or for other reason, but were capable of procuring the disability to be removed, and had become eligible when the time arrived for taking possession of their offices, qualifying and entering upon the performance of their official duties, the Court of Indiana and of many other states have held them eligible to fill such offices (*citations omitted*).

Several other cases addressing the issue turn on the issue of whether the electorate was aware of the disqualification (e.g. State ex. rel. v. Ross (1908), 170 Ind. 704 84 NE 150; Fields v. Nicholson (1926) 197 Ind. 161; 150 NE 53; State ex. rel v. Clawson (1907), 169 Ind 61; 82 NE 69). Here, neither Bennett, his employer, his opponent or the electorate knew of the Hatch Act violation.

The only recent case that discusses the issue of a disqualified candidate is Patterson v. Dykes, 804 NE 2d 849 (Ind. App. 2004). Patterson and Dykes ran against each other in the 2004 general election for a seat on Madison County Council. Dykes, the incumbent, lost to Patterson by 450 votes. Following the election, Dykes filed suit seeking declaratory judgment and permanent injunction that Patterson was ineligible to hold office because of a prior felony conviction. The court found Patterson ineligible to assume office and ordered Dykes to hold over the seat for another term.

One argument posited by Patterson was that he was seeking a pardon from the Governor and that should the pardon be received he would be eligible to serve. The Court rejected the argument and in dicta found that it would be against public policy to allow a post election pardon to make a candidate eligible to serve.


The facts in the case at bar are clearly distinguishable from Patterson.

Bennett is eligible to assume office, and should prevail in this Contest

JUDGMENT

Comes now the Court, and pursuant to Ind. Code 3-12-8-16, and declares as elected Duke A. Bennett as the qualified candidate who received the highest number of votes in the 2007 general election of the Office of Mayor of the City of Terre Haute and renders judgment accordingly.

SO ORDERED this 21st day of December, 2007.


DAVID R. BOLK, Judge

Distribution to:

All counsel of record

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