

The Honorable Stephanie Arend
Monday, December 20, 2004
9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

WASHINGTON STATE REPUBLICAN
PARTY, et al.,

Plaintiffs,

v.

KING COUNTY, et al.,

Defendants.

and

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE, et. al,

Intervenors.

No. 04-2-14599-1

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF AMENDED
TEMPORARY RESTRAINING
ORDER

I. RELIEF REQUESTED

At oral argument on Plaintiffs' motion for a temporary restraining order, Defendants argued that more evidence was needed before the court could reach a decision on Plaintiffs' motion, and Intervenor, Washington State Democratic Central Committee ("WSDCC"), argued that a large bond should be posted as a condition of the court's entering the requested order. The court directed the parties to present any argument regarding the appropriate bond on Monday, December 20, 2004, at 9:00.

Plaintiffs hereby request that the court enter the attached amended temporary restraining order, which sets the required bond amount, sets a hearing date for a motion for

1 a preliminary injunction, and provides for the taking of depositions in aid of the
2 preliminary injunction hearing to allow the court to make a decision on a more complete
3 record.

4 II. ARGUMENT AND AUTHORITY

5 A. Only King County is Entitled to a Bond.

6 Under Civil Rule 65(c), only the party actually enjoined is entitled to the protection
7 of a bond. According to that rule,

8 “[e]xcept as otherwise provided by statute, no restraining order or
9 preliminary injunction shall issue except upon the giving of security by the
10 applicant, in such sum as the court deems proper, for the payment of such
11 costs and damages as may be incurred or suffered *by any party who is found
12 to have been wrongfully enjoined or restrained*

13 Accordingly, the rule contemplates that the amount of an injunction bond reflect the
14 amount of harm that could be incurred by the party who may be wrongfully enjoined or
15 restrained.

16 Although the WSDCC as intervenor is technically a party, the TRO in no way
17 enjoins or restrains it. According, the WSDCC is not entitled to demand that a bond be
18 posted for its protection.

19 Although there appears to be no controlling Washington authority on the issue, in
20 *Powelton HOA v. Dept. of H.U.D.*, 284 F. Supp. 809 (D. Pa. 1968), the Court found that a
21 local government agency, allowed to join an original suit as a party was not entitled to
22 demand the posting of security where the agency itself was not restrained by a temporary
23 injunction. Applying the substantially similar Fed. R. Civ. P. 65, the court said:

24 It is clear that the Redevelopment Authority has not been
25 enjoined by this Court; thus it cannot have been wrongfully
26 enjoined; and therefore it is not entitled to demand security
27 under F.R.Civ. P. No. 65(c).

Likewise, in *Commonwealth of Puerto Rico v. Price Commission*, 343 F. Supp. 1311 (D.
P.R. 1972), the Court found that one who was not a party and who had not been restrained

1 in any way had no standing to challenge the amount of security posted as condition to
2 issuing a temporary injunction. The court stated: “[i] is crystal clear to this Court that a
3 party against which a temporary restraining order does not run, has no standing to demand
4 security.”

5 **B. The Amount of the Bond Should be Limited Because the Only Potential Harm**
6 **to the County is the Possibility of an Additional Canvassing Board Meeting.**

7 There is no basis for requiring a bond of more than \$10,000, as the only additional
8 costs imposed on the county, if the Supreme Court overturns the injunction, would be the
9 necessity of holding an additional canvassing board meeting to consider further the ballots
10 at issue. The costs of further recanvassing and tabulating if the Supreme Court overturns
11 the injunction are costs the county would have incurred had the injunction not been entered
12 in the first place, so those costs should not be considered in setting the bond amount. *C.f.*,
13 *Democratic Party of Guilford County v. Guilford County Board of Elections*, 342 N.C.
14 856, 467 S.E.2d 681, 683 (N.C. 1996) (although not explicitly adopting or ruling on the
15 trial court's order, the opinion cites to the lower court's reasoning for denying both the
16 issuance of a bond and the existence of damages: "that the *alleged damages claimed by*
17 *defendants were part of their legal duty to supervise and conduct elections* and are not
18 recoverable from private citizens or groups... and that *awarding damages against private*
19 *citizens or groups would impermissibly repress their constitutional rights to contest*
20 *election improprieties and to vote.*") (emphasis added).

21 The County may argue that the bond should also be sufficient to cover its
22 attorneys' fees incurred in a successful effort to overturn this court's decision. While such
23 fees may be recoverable in some circumstances, this court would have the discretion to
24 award or deny such fees. The purpose of CR 65's security requirement is to prevent
25 parties from abusing the TRO / preliminary injunction process. *See Cheney v. City of*
26 *Mountlake Terrace*, 20 Wash. App. 854 (1978). Here, the circumstances demanded
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1 immediate relief, and a trial on the merits after full discovery and motions practice would
2 have been impossible. In addition, there is no evidence of bad faith on the part of
3 Plaintiffs' in seeking preliminary injunctive relief. There should be no equitable award of
4 fees, even if the Supreme Court ultimately reverses this court, under these circumstances.
5 *See Democratic Party of Guilford County*, 467 S.E. at 685 (although parties in an election
6 may seek damages for improperly entered temporary restraining orders, the court will not
7 order such damages "in the absence of evidence of bad faith on the part of the party or
8 person(s) obtaining the orders.").

9 **C. Preliminary Hearing Should be Set and Discovery Allowed.**

10 Both Defendants and Intervenors argued at the TRO hearing that additional
11 evidence would assist the court in evaluating the merits of Plaintiffs' motion. Plaintiffs
12 disagree that any additional information was required for the court to rule on the temporary
13 restraining order, which pursuant to Rule 65(b) is effective for a period of 14 days, unless
14 extended.

15 Plaintiffs do agree, however, that prior to determining whether to convert the TRO
16 to a preliminary injunction, it would be beneficial for this court to receive additional
17 evidence regarding, *inter alia*, King County's past practices with respect to ballots of the
18 type at issue and the fact that the decision to reject the ballots at issue was not an error but
19 a decision made by defendants. Plaintiffs believe discovery, including a limited number of
20 depositions, will reveal that the testimony offered by Defendants is inaccurate or
21 incomplete. In addition, Intervenors offered testimony regarding alleged events in other
22 counties. Again, Plaintiffs believe that an opportunity for discovery will reveal the full
23 context of those alleged events, which will be important to evaluating the legal significance
24 of the facts asserted. This evidence will be valuable to this court as it decides whether to
25 convert the temporary restraining order to a preliminary injunction. It will also assist the
26 Supreme Court—which is almost certain to review this matter—to have a more complete
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1 record available, and it is only possible for the necessary record to be developed in this
2 court.

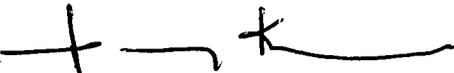
3 Plaintiffs therefore propose setting a hearing date on or about December 30, 2004,
4 and the opportunity to take up to 7 depositions. Plaintiffs propose taking depositions on 48
5 hours notice, provided the parties attempt to schedule depositions at mutually agreeable
6 times.

7 **III. CONCLUSION**

8 Plaintiffs respectfully request that this Court entered the amended temporary
9 restraining order setting a reasonable bond, a hearing date for a motion for preliminary
10 injunction, and allowing depositions to be conducted on 48 hours notice.

11 DATED this 19th day of December, 2004.

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