

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, STATE OF FLORIDA**

ANNE-MARIE SHAFFER,

Plaintiff,

vs.

JOHN F. POLLINGER, Candidate for
Flagler County Sheriff and KIMBERLE
WEEKS, Supervisor of Elections,

Defendants.

CASE NO.: 2012 CA 735

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**ORDER DENYING PLAINTIFF'S VERIFIED MOTION FOR EMERGENCY
PERMANENT OR TEMPORARY INJUNCTION**

Plaintiff's Verified Motion for Emergency Permanent or Temporary Injunction came before the Court for hearing on June 4, 2012.

Plaintiff filed a Complaint for Declaratory and Injunctive Relief on May 17, 2012. The relief requested in the Complaint relevant to the instant motion is a temporary injunction enjoining Defendant Kimberle Weeks (hereinafter "Supervisor of Elections") from placing Defendant, John F. Pollinger (hereinafter "Pollinger") on the August 14, 2012 primary ballot as a Republican candidate for Flagler County Sheriff.

The Plaintiff's Verified Motion for Emergency Permanent or Temporary Injunction was filed on May 29, 2012. Pollinger filed his Response to Verified Motion for Emergency Permanent or Temporary Injunction on June 1, 2012. The qualification period for candidates for Flagler County Sheriff was June 4, 2012 through June 8, 2012. The Supervisor of Elections plans to send the August 14, 2012 primary ballot to the printer by June 13, 2012. Absentee ballots to overseas military voters and others are required to be mailed by June 30, 2012.

Pollinger in his response and at the June 4, 2012 hearing raised several issues including Plaintiff's standing and whether Plaintiff's Complaint was adequately pled. Pollinger advised that a responsive pleading or motion addressing the Complaint was not yet due or filed in the case. (Pollinger has filed an Answer and Affirmative Defenses on June 8, 2012.) The Court took the issues raised in Pollinger's Response to Verified Motion under advisement and proceeded with the evidentiary hearing on the merits of Plaintiff's Verified Motion on the request for a temporary injunction.

Based upon the time restraints of qualifying, printing and sending ballots, and the primary election on August 14, 2012, the Court finds that it was appropriate to proceed with the evidentiary hearing on June 4, 2012, and to issue this order on the merits of Plaintiff's request for a temporary injunction. As the Court is denying the request for temporary injunction on its merits there is no need to address the merits of the issues raised in Pollinger's Response at this juncture of the proceedings.

Plaintiff introduced two exhibits into evidence at the June 4, 2012, evidentiary hearing. Plaintiff's Exhibit "1" was a certified copy from the records of the New Jersey Statewide Voter Registration System of Pollinger's "Voter Profile". The voter profile in part provides:

"Party Information:
Current Party: Democratic*
Party Privilege Date: _____"

"Current Status: Deleted
Date Last Voted: 11/06/2007
Deleted Date: 01/17/2012
Deleted Reason: Moved out of state"

Plaintiff's Exhibit "2" was a certified copy from the records of the Monmouth County Commissioner of Registration/Superintendent of Elections. Exhibit "2" is a letter dated January 17, 2012, from Pollinger to the Monmouth County Voter Registration requesting removal from

the voter registration record. The letter proceeds to state "I established residency and a registered voter in Florida as of August of 2008 and have been a full time resident since then."

Pollinger was the only witness to testify at the hearing. Pollinger testified that he moved his residence from New Jersey to Florida in 2008. He stated that in August, 2008 while applying for a Florida Driver's License he registered to vote in Flagler County, Florida. In August, 2009, Pollinger changed his party affiliation to the Republican Party. Since August, 2009, Pollinger remained a resident of the State of Florida and his Florida voter registration has not changed.

Subsequent to the evidentiary hearing of June 4, 2012, Pollinger has filed with the Supervisor of Elections the Oath of Candidate stating that he is a candidate for the office of Sheriff, Flagler County, and the Statement of Party (Section 99.021, Florida Statutes) stating that he is a member of the Republican Party and had not been a member of any other political party for 365 days before the beginning of qualifying preceding the general election.

The Plaintiff must establish the following requisites for the issuance of a temporary injunction: "(1) a likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) public interest considerations. [citation omitted]" Naegele Outdoor Advertising Company v. City of Jacksonville, 659 So.2d 1046, 1047 (Fla. 1995).

The Court finds the third requirement of a showing of a substantial likelihood of success on the merits by the party seeking relief to be dispositive. The Plaintiff alleges that Pollinger was a registered member of the Democratic Party within 365 days before June 4, 2012 (the first day of the qualifying period). Plaintiff argues that because Pollinger's New Jersey "voter profile" (Plaintiff's Exh. "1") reflects that the "current status" was not changed until January 17, 2012, Pollinger was a member of the Democratic Party until January 17, 2012. Plaintiff argues

that the fact that Pollinger has been registered to vote in Flagler County, Florida as a Republican since August of 2009, is irrelevant. Plaintiff further asserts that Pollinger was a member of the Democratic Party in New Jersey as evidenced by his “voter profile” despite the fact that it would be illegal for Pollinger to vote in New Jersey because Pollinger is not a resident of New Jersey and is currently registered to vote in Florida.

Florida Statute section 99.021(1)(b) states in pertinent part:

“[A]ny person seeking to qualify for nomination as a Candidate of any political party shall, at the time of Subscribing to the oath or affirmation, state in writing:

....

2. That the person has not been a registered member of any other political party for 365 days before the beginning of qualifying preceding the general election for which the person seeks to qualify....”

The purpose of this section of the statute was to establish party loyalty. As pointed out by the Plaintiff the statute was amended in 2010 to lengthen the time period to 365 days after Charlie Crist changed his party affiliation. To borrow a term from the Plaintiff, the “evil” sought to be prohibited by this statute was any flip flopping of party affiliation within 365 days of opening of qualifying as a candidate for an elected office.

Injunctive relief has been considered an appropriate remedy where a candidate is found to be unqualified under this section. See Polly v. Navarro, 457 So.2d 1140 (Fla. 4th DCA 1984). In order to establish that Pollinger is not qualified pursuant to section 99.021(1)(b), Plaintiff must show that Pollinger was in fact a member of the Democratic Party in New Jersey until January 17, 2012.

It was uncontradicted that in 2008 Pollinger moved from New Jersey, established himself as a Florida resident, applied for a Florida Driver’s License, and registered to vote in Flagler County. Further, Pollinger changed his Florida voter registration to Republican in August, 2009.

Pollinger has been registered to vote as a Republican in Flagler County, Florida since August, 2009.

Pollinger's New Jersey "voter profile" reflects that Pollinger last voted in New Jersey on November 6, 2007, and that the last action was changing status to deleted on January 17, 2012. There is no activity reflected in the New Jersey "voter profile" between November 6, 2007 and January 17, 2012. Since 2008 upon establishing himself as a Florida resident Pollinger was not eligible to vote in New Jersey and his New Jersey voter registration was not legally valid notwithstanding the "voter profile" not reflecting deletion until January 17, 2012.

Plaintiff maintains that from 2008 through January 17, 2012, Pollinger had dual registration. Registering to vote in two states at the same time is not permitted. To register to vote in Florida you must be a legal resident of the State of Florida and the county in which you seek to be registered. Florida Statute section 97.041(1)(a). The Court is unaware of any circumstance in which there may be legal dual registration. In addition, the Court is unaware of any circumstance in which you may register to vote as a Democrat and a Republican at the same time. On the standard form Florida Voter Registration Application under Party Affiliation there is an instruction to check only one party affiliation.

There was insufficient evidence presented at the evidentiary hearing that Pollinger was legally registered to vote both as a Democrat and as a Republican simultaneously. Further there is no evidence that Pollinger intended to illegally maintain his New Jersey registration after moving from New Jersey in 2008.

The Court finds that Pollinger did not intend and in fact did not "flip flop" his party registration within 365 days of the June 4, 2012 qualifying start date. Pollinger registered to vote in Flagler County, Florida in 2008 and changed the party affiliation to the Republican Party

of Florida on his registration in August, 2009. There is no evidence that his party affiliation has changed on his valid Florida voter's registration since August, 2009.

Plaintiff maintains that Florida Statute 99.021 is a strict liability statute, and therefore because the New Jersey "voter profile" did not delete Pollinger until January 17, 2012, he was still a member of the Democratic Party in New Jersey. Plaintiff argues that it is irrelevant that the New Jersey registration would be invalid upon Pollinger moving his residence from New Jersey in 2008.

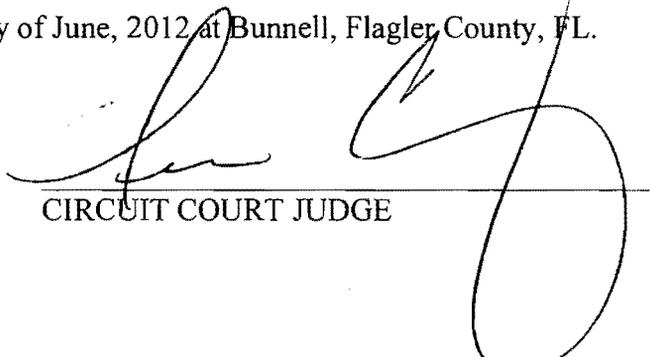
The Court cannot find legal authority to support Plaintiff's position that Florida Statute 99.021 is a strict liability statute. It appears that the legislative intent of this section is as stated by Plaintiff to stop the change of party affiliation within 365 days before qualifying commences. The "evil" to be prohibited was the flip flopping of party affiliation on the eve of an election. In this case, Pollinger did not engage in this behavior. Pollinger has had a valid Flagler County, Florida voter's registration with the party affiliation of the Republican Party of Florida since August, 2009.

The legislative intent was not to disqualify an otherwise qualified candidate based upon an invalid, outdated, out of state record which did not reflect accurate information.

ORDERED AND ADJUDGED:

Plaintiff's Verified Motion for Emergency Permanent or Temporary Injunction is denied.

IT IS SO ORDERED this 11th day of June, 2012 at Bunnell, Flagler County, FL.


CIRCUIT COURT JUDGE

Copies furnished to:
Ronald Hertel, Esq.
Jonathan D. Kaney, Esq.
Ronald A. Labasky, Esq.