

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

SHELBY COUNTY BOARD OF EDUCATION, *

Plaintiff, *

and *

DR. SNOWDEN CARRUTHERS, *

MR. MICHAEL WISSMAN, *

MR. DAVID REAVES, *

MR. JOSEPH CLAYTON, and *

MR. DAVID PICKLER, *

Intervening Plaintiffs, *

vs. *

MEMPHIS CITY SCHOOLS, et al., *

Defendants. *

NO. 2:11-cv-02101-SHM-ege

MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

NOW COME Dr. Snowden Carruthers, Mr. Michael Wissman, Mr. David Reaves, Mr. Joseph Clayton, and Mr. David Pickler, hereinafter “the Movants”, by and through counsel, upon the Verified Complaint herein and pursuant to Rule 65 of the *Federal Rules of Civil Procedure*, and move this Court for:

1. A Temporary Restraining Order restraining the defendant, Shelby County Commission, its officers, agents, employees, and all persons in active concert or in participation with it, from modifying the number of members of the Shelby County Board of Education.

2. A Temporary Restraining Order restraining the defendant, Shelby County Commission, its officers, agents, employees, and all persons in active concert or in participation with it, from naming or seating any new members on the Shelby County Board of Education.

3. A Temporary Restraining Order restraining the defendant, Shelby County Commission, its officers, agents, employees, and all persons in active concert or in participation with it, from removing the current members of the Shelby County Board of Education.

This Temporary Restraining Order is requested to be issued by this Court pending a hearing and determination of the Movants' Motion for Preliminary Injunction, on the grounds that immediate and irreparable harm and injury will result to the Movants and their property interests in their positions as elected members of the Shelby County Board of Education.

The Movants also respectfully move the Court for the following:

1. A Preliminary Injunction enjoining the defendant Shelby County Commission, its officers, agents, employees, and all persons in active concert or in participation with it, from modifying the number of members of the Shelby County Board of Education, except as specifically provided by Tennessee law.

2. A Preliminary Injunction enjoining the defendant, Shelby County Commission, its officers, agents, employees, and all persons in active concert or in participation with it, from naming or seating any new members on the Shelby County Board of Education, except as specifically provided by Tennessee law.

3. A Preliminary Injunction enjoining the defendant Shelby County Commission, its officers, agents, employees, and all persons in active concert or in participation with it, from removing the current members of the Shelby County Board of Education, except as specifically provided by Tennessee law.

In further support of this Motion, the Movants have filed contemporaneously a Memorandum of Law.

WHEREFORE, PREMISES CONSIDERED, these Movants respectfully pray this Court to grant their Motion and grant a Temporary Restraining Order and Preliminary Injunction to prevent the irreparable harm that would otherwise occur to the Movants.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY RELIEF BY THESE MOVANTS IN THIS CAUSE.

Respectfully submitted,

LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC

BY: /s/ D. Scott Bennett

D. SCOTT BENNETT – TNBPR: 015988

MARY C. DECAMP – TNBPR: 027182

801 Broad Street, Third Floor

Chattanooga, TN 37402

Telephone: (423) 265-0214

Telecopier: (423) 266-0594

Scott.bennett@leitnerfirm.com

Mary.decamp@leitnerfirm.com

BY: /s/J. Gregory Grisham

J. GREGORY GRISHAM – TNBPR: 013810

The Brinkley Plaza, Suite 800

80 Monroe Avenue

Memphis, Tennessee 38103

Telephone: (901) 527-0214

Telecopier: (901) 527-8224

Greg.grisham@leitnerfirm.com

Attorneys for Movants

CERTIFICATE OF CONSULTATION / ATTEMPT TO SCHEDULE

Pursuant to Local Rule 65, on March 21, 2011, counsel for the Movants contacted or attempted to contact the counsel of record for each of the parties to this action via electronic mail and telephone regarding the substance of this application and their desire to schedule the hearing of this motion on March 24, 2011. Counsel for Shelby County advises that he opposes our motion.

It should be noted that counsel for the Movants made these efforts three days before the date on which it wishes for this Motion to be heard.

This 21st day of March, 2011.

/s/ J. GREGORY GRISHAM
J. GREGORY GRISHAM

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, a copy of the foregoing Motion for Temporary Restraining Order and Preliminary Injunction was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

/s/ D. Scott Bennett
D. SCOTT BENNETT

UNITED STATES DISTRICT COURT
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SHELBY COUNTY BOARD OF EDUCATION, *

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MEMPHIS CITY SCHOOLS, et al., *

Defendants. *

NO. 2:11-cv-02101-SHM-ege

**MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

NOW COME Dr. Snowden Carruthers, Mr. Michael Wissman, Mr. David Reaves, Mr. Joseph Clayton, and Mr. David Pickler, hereinafter “the Movants”, by and through counsel, and, pursuant to Rule 65 of the *Federal Rules of Civil Procedure*, submit the following Memorandum in Support of their Motion for Temporary Restraining Order and Preliminary Injunction.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On or about February 28, 2011, the Shelby County Commission adopted a series of resolutions pursuant to which it intends to respond to the decision by the Memphis City Schools to cease operations before the end of the 2010-2011 school year. As part of the Commission’s plan, it intends to create, on its own initiative, a new 25 member board of education. The

Commission intends to name these new board members who would take office on March 28, 2011. (¶ 6 of Intervening Complaint).

In the event the Commission is unable to implement its plan for a new 25 member board of education, it intends to retain its current seven-member board and to appoint an entirely new slate of board members. These board members would take office on March 28, 2011. (¶ 7 of Intervening Complaint).

Without statutory authority, the Commission has assumed the right to treat the seats on the Shelby County Board of Education as if they were vacant and to solicit applications from candidates seeking to fill these purportedly vacant seats. The Commission has even asked the Movants to apply for the right to continue holding the seats to which they have already been elected. (¶ 8 of Intervening Complaint).

These Movants refuse to apply for permission from the Commission to continue holding seats that the voters of Shelby County have already granted to them under the terms of Tennessee law. Accordingly, under the terms of the Commission's plan, the Movants face imminent certainty of being removed from office by the Commission without legal authority and without due process of law. (¶ 12 of Intervening Complaint).

STANDARD OF REVIEW

Under Rule 65(b) of the *Federal Rules of Civil Procedure*, a movant may be granted a temporary restraining order without notice to adverse parties if: (1) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (2) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Further, under longstanding Sixth Circuit case law, preliminary injunctive relief may be granted pursuant to Rule 65(a) of the *Federal Rules of Civil Procedure* after consideration of four elements. The elements to be considered are as follows: (1) whether the movants have shown a strong or substantial likelihood or probability of success on the merits; (2) whether the movants have shown irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing a preliminary injunction. *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256 (6th Cir. 1977).

LAW AND ARGUMENT

I. The Movants are entitled to a Temporary Restraining Order

a. The Movants will be immediately and irreparably harmed

As elected representatives of their respective districts, the Movants have property interests in their positions as board members along with expectations that they would have such interests for the four-year term provided for under *Tenn. Code Ann.* § 49-2-201(a)(1). Given the existence of these property interests, the proposed actions by the Shelby County Commission to diminish or eliminate these interests without due process of law would be a violation of the Fourteenth Amendment of the Constitution of the United States of America. To allow the Shelby County Commission to proceed with its proposed action plan would immediately and directly affect the Movants. It would prevent the Movants from executing the duties for which they were elected, thereby irreparably disrupting, diminishing, or eliminating their terms of service provided under Tennessee statutory law. If the Shelby County Commission performs the actions referenced above, the Movants' property interests will be immediately and irrevocably damaged.

b. Notice to the parties should not be required

As noted above, the defendant Shelby County Commission has expressed plans to unilaterally diminish or eliminate the Movants' property interests without due process in a matter of days. The need for a Temporary Restraining Order to prevent the destruction of these property interests is immediate. Given the time-sensitive nature of the proposed actions of the defendant Shelby County Commission and the gravity of those actions, the Movants cannot comply with the typical requirement of notice, and, therefore, such notice should not be required.

However, the Movants are making every effort to have this matter heard on Thursday, March 24, 2011 along with the hearing for the Scheduling Order and are working to notify counsel for the Shelby County Commission accordingly. Attorney Greg Grisham has spoken personally with counsel for the Shelby County Commission and the City of Memphis, both of whom oppose this Motion.

As an aside, counsel for the Shelby County Commission believes that this Motion is premature since his client has not filed an answer. Also, he questions whether these Movants have standing. Counsel's objections, however, are not well founded.

With regard to whether this Motion is premature, these Movants observe that temporary restraining orders are routinely sought at the outset of an action. It is irrelevant that Shelby County has not filed an answer.

With regard to whether these Movants have standing to seek injunctive relief, note that they have already filed a Motion to Intervene as a matter of right. As explained in that Motion, the essence of this lawsuit implicates the rights these Movants have to their rightfully elected public offices.

Furthermore, note that the drafters of Rule 65 of the *Federal Rules of Civil Procedure* took care to use the word “movant” when outlining injunction procedures, presumably realizing that non-parties to an action might need to pursue injunctive relief until such time as the Court could include them as parties. In contrast, the drafters of Rule 56 used the term “party” to an action precisely because, by definition, only parties to an action are entitled to a judgment. *A fortiori*, if the drafters had intended to restrict the application of Rule 65 to parties to an action, then they could have chosen to write the Rule accordingly; the fact that they did not use this restrictive language reveals an understanding of the need that non-parties such as the Movants have for the injunctive powers of this Court.

II. The Movants are entitled to Preliminary Injunctive Relief

a. There is a substantial likelihood of success on the merits

The laws of the State of Tennessee grant the Movants a property interest in the positions they currently hold as members of the Shelby County Board of Education. *Tenn. Code Ann.* § 49-2-201(a)(1). The only grounds for removal from these elected positions are outlined in *Tenn. Code Ann.* § 8-47-101, and no one has accused these Movants of any such misconduct. Accordingly, Tennessee law gives them a protected interest in continuing in office for the duration of their term.

In contrast, there is no legal authority supporting the action that the Shelby County Commission is attempting to undertake. Dillon’s Rule, which was adopted by the Tennessee Supreme Court in *Southern Constructors, Inc. v. Loudon County Board of Education*, 58 S.W.3d 706 (Tenn. 2001), provides that local governmental entities such as the Shelby County Commission are creatures of limited authority. “[T]his Court has recognized that municipal

governments in Tennessee derive the whole of their authority solely from the General Assembly and that courts may reasonably presume that the General Assembly ‘has granted in clear and unmistakable terms all [power] that it has designed to grant.’ *Id.* at 710 (citing *Mayor & City Council v. Linck*, 80 Tenn. (12 Lea) 499 (1883)). Because only the State of Tennessee is sovereign, “any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied.” *Id.* at 711 (citing 1 John F. Dillon, *Commentaries on the Law of Municipal Corporations*, 173 (1st ed. 1872)).

If the Tennessee General Assembly had intended for local county commissions to have the authority to remove members of the local boards of education or to reconstitute these boards altogether, then the General Assembly would certainly have granted this power expressly. In fact, there is no provision of Tennessee law that gives local commissions this authority, nor is there any other provision of Tennessee law from which one can infer that the General Assembly intended to grant such authority.

Quite simply, in the absence of any such express or implied statutory authority, this Court must conclude that the General Assembly did not intend for the Shelby County Commission to be able to take its intended actions against the Shelby County Board of Education and its individual members. In contrast to the Commission’s illegal and unauthorized actions, the Movants have Constitutionally protected property interests in their positions as members of the School Board. This Court must intervene to protect these interests.

b. The Movants have shown irreparable injury

The Movants have property interests that by operation of law, to last for four years so long as the Movants do not partake in any activities outlined in *Tenn. Code Ann.* § 8-47-101. Should the Shelby County Commission be permitted to take the actions it has proposed in the

manner specified above, these actions will deprive the Movants of their property without the due process guaranteed to them by the Fourteenth Amendment of the Constitution of the United States of America.

To unilaterally deprive the Movants of their property interests without this Constitutional guarantee as soon as March 28, 2011 will surely result in irreparable injury to the Movants. Specifically, if the Commission takes its intended action, the Movants will be deprived of the opportunities to serve their constituents in the capacities for which they were elected. If the Commission expands the board of education without any legal authority, then these Movants would suffer a diminution of their authority by a reduction of their voice and inclusion on a sham board of education. If the Commission removes the Movants, then the Movants would suffer the loss of their right to perform their statutory duties without due process of law.

c. Issuance of an Injunction will not substantially harm others

Issuance of a Preliminary Injunction will not cause harm to any individual, organization, or governmental entity. Rather, the issuance of the Injunction will merely ensure that the Shelby County Commission is prohibited from wrongly depriving the Movants of their property. Since the Movants are elected officials, the general public will be best served by the issuance of an Injunction as it will prevent the public from being deprived of its rightfully elected representatives before the natural expiration of their terms.

With regard to the other parties involved in this matter, both the residents of the City of Memphis and Shelby County have an interest in determining that their Board of Education is lawfully established and properly constituted. This Court's injunction and subsequent declaratory relief will benefit, rather than harm, the parties involved and the community at large.

d. The public interest will be served

Because the parties at issue are public entities, preventing the Shelby County Commission from unilaterally depriving the Movants of their property will be in the best interest of the public. A community has a significant investment in its public education system and, as such, issuing a Preliminary Injunction to ensure that the members of the Shelby County School Board are not wrongly deprived of their property interests will serve the greater good and ensure that the public is not improperly deprived of the public servants it elected.

In contrast, a disruption of the School Board membership through diminution of the roles of the Movants or their removal entirely, or the creating of a sham board with doubtful legal status will likely cause conflict and turmoil, complicating the makeup of the School Board and slowing the process by which the School Board operates, if only temporarily. A school board with doubtful legal status is no good to anyone considering the significant issues with which they are currently dealing. Halting the proposed wrongful actions of the Shelby County Commission now will ensure that the most efficient and proper resolution is reached.

CONCLUSION

The Movants would suffer immediate and irreparable harm without the issuance of a Temporary Restraining Order and Preliminary Injunction. Further, their claims will likely succeed on the merits, no one else will be harmed, and the public interest will be served.

WHEREFORE, premises considered, based upon the facts and case law outlined above, the Movants respectfully request that this Court grant their Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC

BY: /s/ D. Scott Bennett

D. SCOTT BENNETT – TNBPR: 015988

MARY C. DECAMP – TNBPR: 027182

801 Broad Street, Third Floor

Chattanooga, TN 37402

Telephone: (423) 265-0214

Telecopier: (423) 266-0594

Scott.bennett@leitnerfirm.com

Mary.decamp@leitnerfirm.com

BY: /s/ J. Gregory Grisham

J. GREGORY GRISHAM – TNBPR: 013810

The Brinkley Plaza, Suite 800

80 Monroe Avenue

Memphis, Tennessee 38103

Telephone: (901) 527-0214

Telecopier: (901) 527-8224

Greg.grisham@leitnerfirm.com

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, a copy of the foregoing Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

/s/ D. Scott Bennett

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