

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

FEB 03 2010

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JAMES W. McCORMACK, CLERK
By: _____ DEP CLERK

WILLARD PROCTOR, JR.

Plaintiff

vs.

HONORABLE JAMES HANNAH, CHIEF JUSTICE; *
HONORABLE ROBERT BROWN, ASSOCIATE JUSTICE; *
HONORABLE DONALD CORBIN, ASSOCIATE JUSTICE; *
HONORABLE JIM GUNTER, ASSOCIATE JUSTICE; *
HONORABLE PAUL DANIELSON, ASSOCIATE JUSTICE; *
HONORABLE TONYA ALEXANDER, SPECIAL JUSTICE; *
HONORABLE PAUL KEITH, SPECIAL JUSTICE; *
HONORABLE ELANA WILLS, ASSOCIATE JUSTICE; *
HONORABLE RONALD SHEFFIELD, ASSOCIATE JUSTICE *
IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF *
THE ARKANSAS SUPREME COURT; *

HONORABLE F.G. "BUDDY" VILLINES, IN HIS
OFFICIAL CAPACITY AS CHIEF EXECUTIVE
OFFICER OF PULASKI COUNTY, ARKANSAS

HONORABLE VANN SMITH, IN HIS OFFICIAL
CAPACITY AS ADMINISTRATIVE JUDGE FOR THE
SIXTH JUDICIAL DISTRICT OF ARKANSAS

HONORABLE LEON JAMISON; CHAIRMAN; CHUCK
DEARMAN; JERRY LARKOWSKI; HONORABLE WILLIAM
STOREY; JOHN EVERETT; HONORABLE CHRIS
WILLIAMS; VICTORIA MORRIS; REG HAMMAN;
BILL FLY, IN THEIR INDIVIDUAL AND OFFICIAL
CAPACITIES AS MEMBERS OF THE ARKANSAS
JUDICIAL DISCIPLINE AND DISABILITY
COMMISSION; DAVID STEWART, IN HIS INDIVIDUAL
AND OFFICIAL CAPACITIY AS EXECUTIVE DIRECTOR
OF THE ARKANSAS JUDICIAL DISCIPLINE AND
DISABILITY COMMISSION

STATE OF ARKANSAS

Defendants

MOTION AND INTEGRATED BRIEF FOR IMMEDIATE
INJUNCTIVE RELIEF PER RULE 65 FRCVP

Comes now the plaintiff and moves this Court to issue an immediate injunction or order directing the defendants to restore plaintiff to the position of Circuit Judge for the Fifth Division, Sixth Judicial District of the State of Arkansas. Plaintiff has filed a complaint against the defendants in this matter. The complaint is adopted and asserted herein as if fully set-forth. The same, inter alia, states quite clear and the records thoroughly bear out that the plaintiff's removal does not afford one an appeal of any sort by the direct and express terms of the same from the decision. That rule was used against plaintiff and the same has no remedy other than the federal action filed in this matter. Rule 12E of the Rule of the Arkansas Judicial and Disciplinary Commission. Additionally, and very egregious is the fact that the current actions disenfranchise the black electorate and runs contrary to the Jeffers decision setting up the sub-district. *Jeffers v. Clinton*.

While there are a number of reasons listed in plaintiff's complaint that would merit injunctive relief, clearly the fact of action against plaintiff without notice

and opportunity for a meaningful hearing, the fact of no appeal and the fact of non-adherence to the its own rules by the defendants, entitle plaintiffs to swift and immediate relief from the order of removal. Furthermore, Amendment 66 of the Arkansas Constitution provides that while a judge may be removed from his judicial duties, he may not be removed from his executive or legislative responsibilities. Plaintiff was forced under threat of arrest to surrender his keys to the courthouse and his courthouse office. Defendant Pulaski County has changed he locks on the doors. Defendant Smith has met with plaintiff's staff and informed them that he would be seeking to transfer the probation department to the State. Plaintiff is suffering great and irreparable harm due to not being able to carry out the duties to which he was duly elected, and has lost and will continue to suffer great financial loss due to the impermissible action and conduct of the defendants as expressed herein and cited in plaintiff's complaint. Furthermore, there is a statute which unconstitutionally prohibits plaintiff from seeking re-election. This statute disenfranchises the voters of the district from which plaintiff was elected and it also violates plaintiff's constitutional rights. Cf. Griffen v. Ark. Jud. Disc. and Dis. Comm., 266 F. Supp. 2d 898 (ED

Ark. 2003) and *Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997).

The Fourteenth Amendment to the United States Constitution, as well as Article 2, Section 8, of the Arkansas Constitution guarantee due process of law to all its citizens. A fair trial by a fair tribunal is a basic requirement of due process, a rule that applies to administrative agencies as well as to courts. Not only is a biased decision maker constitutionally unacceptable, but "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133 (1955).

This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process - the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *Id.* At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done" by

ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. See *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510 (1927). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Before any of the hearings prescribed by Commission rules were ever conducted, the Commission authorized the Executive Director and the Deputy Executive Director to serve as its attorneys and, in its name, pursue an action to have Judge Proctor temporarily suspended. After finding probable cause, the Commission allowed the Executive Director not only to prepare its findings but it also allowed him to sign them on behalf of the Commission

Chairman. The Executive Director attached a letter to this finding in which he set the public hearing in this matter outside the time frame required by the rules. When these errors were brought to the Commission's attention, without explanation, it refused to dismiss the case. (R. JDDC 383). The preparation and signing of the Commission's findings is not a ministerial act. It is constitutionally impermissible and foreshadowed that the Commission could not provide an impartial forum.

A.C.A. §16-10-404(b)(2) provides that "the commission may convene to executive session for the purpose of deliberating its final conclusions and recommendations, provided that, upon completion of the executive session, the final action of the commission shall be announced in an open and public session." Plaintiff specifically requested that he be "present in person or by telephone at ALL hearings, telephone conferences, or other meetings held in this matter." Plaintiff was not notified of any public session where this decision was announced.

There was an appearance of bias and impropriety, and, actual bias when Commission Members that voted to authorize prosecuting the Petition in this Court subsequently served as adjudicators. In *In re Wal-Mart Stores*, 145 N.H. 635, 637; 765 A.2d 168, 171 (N.H. 2000), the New Hampshire

Supreme Court held that "(l)t is axiomatic that a quasi-judicial official cannot both prosecute a case against an interested party and adjudicate that party's rights without casting doubt on his or her impartiality." This appearance of impropriety, actual bias, and deference continued throughout the proceedings as reflected by the fact the Executive Director was allowed to prepare and sign the Commission's probable cause findings. He was also allowed to proceed with allegations after failing to provide notice of a complaint which was used as a basis for the Commission's recommendation. The Panel made a specific finding that it found his statement more credible than the sworn testimony of a deputy prosecuting attorney and a transcript of the tape that contradicted his assertions. The Commission failed to notify plaintiff of the session where it made its final decision.

Amendment 66 to the Arkansas Constitution provides that "a judge who also has executive or legislative responsibilities shall be suspended or removed only from judicial duties." Plaintiff is the department head for the Fifth Division Circuit Court. The Arkansas Supreme Court has no authority to remove the plaintiff from his executive responsibilities, yet, defendant Villines through his agents have removed him from his offices. Furthermore, the

defendant Smith has met with plaintiff's staff and indicated that he would transfer the probation department from the Fifth Division to the State. The defendants have no authority to remove him from his executive responsibilities and such actions are being taken in clear contravention of the Constitution.

Plaintiff desires to run for re-election. However, he is precluded from seeking re-election. The filing deadline is in March of 2010. This prohibition violates his constitutional rights and disenfranchises the voters of this district of the right to elect a judge of its choosing.

Plaintiff requests an immediate hearing.

WHEREFORE, all premises considered, plaintiff prays relief be granted by preliminary and permanent injunction preventing the defendants, their agents, successors, employees and those acting in concert with defendants under or at their direction from engaging in such intentional, discriminatory and unconstitutional policies and practices as complained of herein and in plaintiffs' complaint filed contemporaneously herein, and costs of this action, including an award of reasonable attorney fees and all other costs and relief to which they is entitled.

Respectfully submitted,



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