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City of Huetter v. Keene Appellant's Reply Brief Dckt. 35470

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INTRODUCTION

The Idaho legislature enacted several statutes addressing the conduct of elections in Idaho; the challenge of elected officials after taking office for failure to qualify for office at the time of election; removal of officials after election when the office is held without authority of law; and the creation of vacancies in offices of public officials. With respect to municipal elections, Chapter 4, Title 50, addresses the conduct of elections. Chapter 20, Title 34 addresses a post-election challenge of an individual who was not qualified for office at the time of the election. Chapter 6, Title 6 addresses the removal of a public officer who holds office without authority of law. Chapter 9, Title 59 addresses the events deemed to create vacancies in public offices.

This case involved the removal of a mayor from his office by the district court after he took office due to a claim that the mayor became ineligible to remain in office as a result of a failure to remain a qualified elector during his term of office as required by I.C. § 50-601. In its reply brief, the City of Huetter ("City") takes exception to Keene characterizing this matter as a contest to Keene's right to hold office as mayor, firmly stating that this matter involves only a request by it for declaration of Keene's right to continue in the office of mayor following Keene's failure to respond to a challenge by another elector of his entry as an elector in the election record and poll book.

However, the essence of the arguments presented by the City on appeal are that Keene was ineligible prior to taking office to take office because his voter registration was challenged at the election and his registration was subsequently cancelled in January 2008, thus making him unqualified to hold the office at the time of his election in November 2007, thus causing the provisions of I.C. § 50-469 to be applicable. Alternatively, the City argues that Keene became

ineligible to continue in office pursuant to I.C. § 50-601 due to the cancellation of his voter registration for a short period of time after his election.

Although Chapter 20, Title 34 addresses the method provided by the legislature to contest an incumbent for failure to qualify for the office at the time of election and Chapter 6, Title 6 addresses the removal of an officer from his office when the officer continues to hold the office without authority of law (i.e. is ineligible to hold office), the City maintains that I.C. § 50-469 was intended to provide a mechanism for a City to oust an elected official from office when either (1) the elected official was not qualified at the time of election or (2) the elected official became ineligible to hold office after the election, even though qualified at the time of election.

Although not relevant to the issues on appeal, another matter which merits response in this reply brief is the City's allegations of inappropriate conduct by Keene after the cancellation of his voter registration, apparently presented to cause this court to form an unfavorable opinion of Keene. The City sprinkled throughout its brief claims that the record showed that Keene engaged in verbal altercations with the city attorney and some council members, disrupted the orderly business of the City, and willfully chose not to retrieve certified documents from the post office sent to him by the elections department. The majority of these allegations were supported by cites to the City's petition allegations, and not evidence in the record from trial.

The petition claimed that there was a verbal altercation lasting some thirty minutes at the February 13, 2008 meeting when the City refused to allow Keene or Brown to take their seats at the council meeting. This refusal was transmitted by the city attorney, who informed Keene and Brown they could not hold office and could not be appointed to their position (although they had already been sworn in), despite the fact that at that time there was no court decree declaring their seats vacant. R p. 4. Following this disagreement regarding Keene's status, the City sought the

opinion of the Idaho attorney general and was advised that the attorney general was of the opinion that a cancellation from the voter registration did not result in an automatic ouster of the mayor from office. R p. 15. Keene also provided a legal opinion expressing his position on the matter of automatic ouster pursuant to I.C. § 50-469. R p. 16.

More importantly, the actual evidence that was submitted to the trial court regarding this sequence of events was contained in Stipulated Fact #8. This stipulated fact recited that on February 13, 2008, the City refused to recognize or seat Keene or Brown based on the city attorney's assessment that they were ineligible to hold office and therefore their offices were vacant due to their removal from the voter registration rolls by Kootenai County. R p. 52. There was no evidence of any verbal altercation or disruption, only fundamental disagreement.

The record also reflects that the Court denied the City's request for a preliminary injunction preventing Keene from acting as mayor. Even though the City was unsuccessful in obtaining a preliminary injunction to prohibit Keene's participation in city government, Keene subsequently proposed a reciprocal stipulated Order of Preliminary Injunction limiting the actions which would be taken by himself and the City so as to protect the interests of the citizens of the City of Huetter. R p. 34.

The City's implication in its brief that Keene acted in a disruptive, abusive manner in this matter is simply not true. He merely acted as an individual who wished to protect his rights as an elected official. In fact, it was the action of the city attorney that caused much of the disturbance. Had the city attorney sought the opinion of the attorney general and filed an action at the outset rather than attempting to block elected officials from their office without guidance or court decree, much of the drama could have been avoided.

As to the issue of the certified mail receipt, the City challenged Keene's statement on appeal that Keene was unable to obtain the certified mailing due to his work schedule. The City claims Keene was not correct in representing on appeal that the record reflected he was working a 60 hour work week. The testimony given during examination of Mr. Keene was:

- Q. I just put forth the question and restate: Mr. Keene, why didn't you pick up the envelope that was addressed to you?
- A. At the time I was working about 60 hours a week. And I really didn't have time to go into Coeur d'Alene as I was working in Post Falls. So any time that I would have had to pick that letter up the post office wouldn't have been opened.
- Q: And so you were working at all times when the post office was open during that time period.
- A. I was working form 8:00 in the morning until 7:00 or 8:00 at night, Monday through Saturday. Sunday, 10:00 to 4:00.

Tr p. 25, L. 24-25; p. 26, L. 1-3

Finally, the City claims, without any cite to the record that the Coeur d'Alene, Idaho post office was open during the hours Keene had off. The only evidence in the record on this matter is Keene's testimony that the post office was not open during the hours he had off. Keene did not avoid receipt of the certified mailing from the county clerk. Had the letter been sent regular mail as anticipated by the statute, Keene would have received it in a *timely manner*.

ARGUMENT

A. The Trial Court did not Properly Construe I.C. §50-469

The trial court held that I.C. § 50-469 provided a third statutory mechanism for addressing the ineligibility of a person to hold office, but that the statute was ambiguous as to operation of this third mechanism because the trial court was not left with a clear and simple understanding of how I.C. § 50-469 should be applied within the body of Idaho election law. R p. 70. On appeal, Keene challenges the trial court's construction of I.C. § 50-469, claiming that it

was not intended by the legislature to provide a third mechanism for challenging the right of a person to hold office or to effect an ouster of an elected municipal official.

In its reply, the City notes that this Court on appeal may not find I.C. § 50-469 ambiguous as did the district court below. Apparently recognizing Keene's argument that the Statement of Purpose respecting Chapter 4, Title 50 demonstrates this chapter was enacted to address the conduct of elections and place the processes in sequential order, the City notes that this Court might find on appeal that I.C. § 50-469 was intended to only address electoral challenges arising at the time of election. The City concludes, "Since challenges made pursuant to Idaho Code § 50-427 could not be resolved until after the election, a person could be elected and still fail to qualify for the office in the future due to such a challenge." (Respondent's brief, page 8.) The city concludes it was therefore proper for the district court to declare a vacancy in such circumstances pursuant to I.C. § 50-469. Although not expressly argued, the City apparently presumes that the cancellation of registration is retroactive and therefore constitutes a failure to qualify at the time of election because the candidate would not be a registered voter if there is retroactive application to the date of the election.

Nothing in the statutes or the legislative history supports this argument. Idaho Code § 50-427 allows any registered elector at the time of the election to challenge the entry of another elector's name as it appears in the election record and poll book. It does not address the contest of a candidate's qualifications at the time of election or a challenge to an incumbent's eligibility to remain in office. Once challenged pursuant to I.C. § 50-427, the county clerk has the obligation to inform the challenged elector by mail of the nature of the challenge and how to respond to the challenge. I.C. § 34-432. If there is no response, or an unsatisfactory response, the challenged voter's registration may be cancelled. However, nothing in I.C. § 34-432 allows

the clerk to declare an incumbent ineligible for office or remove him from office as a result of a voter challenge. In fact, the removal from the voter registration does not even invalidate the vote cast by the challenged voter.

Further, the City's analysis of its argument is incomplete. While acknowledging that a person would be ineligible at the time of election under this argument, the City does not complete its analysis of how such a fact intertwines within the applicable election statutes or the legislature's intent in enacting Chapter 4, Title 50.

The City acknowledges that, "Idaho Code § 50-469 does not specify who or what entity must declare a vacancy exists if a person elected fails to qualify for an office, but does state the mayor and the council shall fill the vacancy." (Respondent's brief, page 5.) It is accurate that I.C. § 50-469 does not provide a mechanism for a challenge based upon ineligibility to hold office at the time of election. Rather, Title 34, Chapter 20 addresses the mechanism for determining a vacancy based on a challenge for failure to qualify for office at the time of election and the mechanism for removal in such event. Specifically, I.C. § 34-2001(2) provides in relevant part that the election of any person to any public office may be contested when the incumbent was not eligible to the office at the time of the election. Such challenge must come from another elector of the City. I.C. § 34-2007. Should such a challenge be successful, the district court then declares the office vacant pursuant to Chapter 9, Title 59. I.C. § 34-2021. Nothing in the statutory scheme adopted by the legislature allows a city to request the district court to declare a vacancy for a failure to qualify for office at the time of election.

The City maintains that it did not request the district court to declare a vacancy based upon ineligibility at the time of the election, thus avoiding the above analysis. Rather, the City contends its request was to declare a vacancy (ouster) due to Keene's failure to remain a qualified

elector during his term of office. The City correctly notes that Idaho Code § 50-601 specifies that, "[a]ny person shall be eligible to hold the office of mayor who is a qualified elector of the city at the time his declaration of candidacy or declaration of intent is submitted to the city clerk and remains a qualified elector during his term of office."

It is undisputed in this matter that Keene was a qualified elector at the time his declaration of candidacy was submitted to the city clerk as required by I.C. § 50-601. However, the city maintains that because Keene's voter registration was cancelled after he took office, he became ineligible to hold office and it was proper for the trial court to find I.C. § 50-469 provided statutory authority for the trial court to oust Keene from office and declare the mayor's office vacant under such circumstances.

Idaho Code section 59-901 addresses events occurring during the term of office that create a vacancy in a public official's office. Ineligibility to hold the office is not one of the events that the legislature has designated as creating a vacancy. Thus, the statutory authority to declare a vacancy must arise from another statutory provision. The City claims that provision is I.C. § 50-469.

Assuming *arguendo* that Keene did become ineligible to hold office due to the cancellation of his voter registration, nothing contained within I.C. § 50-469 indicates that it was intended to provide a mechanism to address such post-election ineligibility and oust a mayor from office. The City contends that the legislature intended a forward-looking interpretation of Idaho Code § 50-469 as demonstrated from language found in I.C. § 50-427 and I.C. § 50-601. The City does not expound on this argument.

By its express terms, I.C. § 50-469 applies to the circumstance where the person has been elected but fails to qualify at the time of election. It does not address ineligibility arising after

the election. No language in either I.C. § 50-427 (challenge of a voter's name in the election record and poll book) or I.C. § 50-469 (failure to qualify for office at time of election) expresses any intent that I.C. § 50-469 is intended to provide a post-election mechanism to remove an incumbent from his office.

With respect to I.C. § 50-601, the City's argument is that Keene could not hold the office of mayor because he became ineligible after election pursuant to the statute. Thus, the City is arguing Keene is holding office without authority of law. While I. C. § 50-601 addresses the eligibility requirements to hold the position of a mayor, nothing in this statute contains any reference to I.C. § 50-469 as a mechanism for the ouster of a mayor should ineligibility occur after taking office, nor does this statute address removal of the mayor from office.

Ineligibility arising after the election is irrelevant to the conduct of the election. Thus, I.C. § 50-469 sheds no light on how ineligibility to hold office arising after the election should be addressed. The only statute that addresses removal of an officer from office when the office is held without authority of law is I.C. § 6-602, which allows for ouster when the office is held without authority of law. Thus, I.C. § 50-469 does not provide a mechanism to oust an incumbent from office. Rather, the statutory mechanism provided by the legislature is the mechanism contained in Chapter 6, Title 6.

In conclusion, the legislative history, Statement of Purpose, and the order of the statutes contained in Chapter 4, Title 50 establish they were intended to address the conduct of an election and limited to that purpose. The specific language of the I.C. § 50-469 addresses an elected persons failure to qualify for the office at the time of the election. It does not address the circumstance when an incumbent later becomes ineligible after taking office to hold the office and certainly provides no mechanism for ouster of an officer when ineligibility occurs after the

conduct of the election. Thus, the trial court erred in holding that I.C. § 50-469 was intended to provide a mechanism for ouster from office of an incumbent who becomes ineligible post-election to hold office pursuant to I.C. § 50-601.

B. The Present Case as Postured by the City on Appeal Involves a Contest to Keene's Eligibility to Hold Office at the Time of Election

The trial court acknowledged that *Toncray v. Budge*, 14 Idaho 621, 95 P.2d (1908) held that Idaho statute provided two remedies for reaching the ineligibility of a person to hold office, one being contesting the election of the person to hold office under Sec. 119 of the Act of February 2, 1899 and the other being by way of a *quo warranto* proceeding under Secs. 4612 to 4169, Rev. Statutes. (These two methods have been recodified at Chapter 20, Title 34 and Chapter 6, Title 6, respectively.) The trial court held that even though that proposition may have been true in 1908 when *Toncray* was decided, since the enactment of I.C. § 50-469 in 1978, at least a third method for reaching the ineligibility of a person to hold office. R. p. 70. The trial court also held that the present action was not a contest to the actual election of Keene because the claim of the City was that Keene became an "unqualified elector" after Keene began his term of office, and therefore I.C. § 34-2007 was not applicable to the instant case. R. p. 70.

In its response on appeal, the City claims that in Idaho, a person may be elected to public officer prior to his qualification for that office being verified. (Respondent's brief, page 5.) The City also argues that to become eligible to hold office, an officer must meet dual requirements of being elected and qualified before they become an incumbent. (Respondent's brief, page 13.) The City also claims that, "[i]n the instant case, although Keene was elected, he never qualified to hold his office..." (Respondent's brief, page 14.) Thus, the City's position in its brief on

appeal is that although Keene was elected, he was not qualified to hold his office, and was therefore ineligible to hold the office at the time of his election.

Idaho Code § 34-2001 addresses an election contest for a failure to qualify at the time of the election. The City's argument that a person's failure to qualify for office creates an automatic vacancy vitiates Title 34, Chapter 20, as well as I.C. § 59-901.

C. The Trial Court Erred in Determining the Cancellation of Keene's Voter Registration Rendered him Ineligible to Continue in Office

In its brief on appeal, the City claims that the trial court did not err in determining that Keene was ineligible to hold office because he was an "unqualified elector". The City's position is that Keene was required to be a registered voter to be a qualified elector, and cancellation of his registration for the period of January 18, 2008 through February 25, 2008 "unqualified him to hold office." In making this argument, the City never addresses Keene's argument that Keene was registered to vote in the November 6, 2007 election, and was thus a qualified elector for that election as the cancellation was not retroactive. Similarly, the City simply ignores Keene's argument on appeal that the trial court erred in determining that a mayor must be continuously registered during his term to be a qualified elector because a lapse in registration is only relevant if it prevents the mayor from registering for an actual pending election.

Between the time Keene's registration was cancelled and he re-registered, there was no pending election. Idaho Code section 34-404 requires a person to register to be able to vote. Registration is allowed up to twenty-four (24) days preceding any pending election. I.C. § 34-408.

To be a qualified city elector, a person must be: 1) at least 18 years of age; 2) a U.S. citizen and 3) a resident of the city for at least 30 days before the election, or a resident of an area

that the city has annexed within 30 days of the election and 4) **registered within the time period as allowed by law.** I.C. § 50-402(c). It is undisputed that Keene was registered for the November 6, 2007 election, thus he was a qualified elector at that time. It is further undisputed that during the interim between the cancellation of his registration and his re-registration that there were no pending elections from which he was precluded from voting due to the cancellation of his registration. Keene's re-registration qualified him to vote in all upcoming city elections. Thus, the cancellation of Keene's registration did not result in Keene's inability to qualify as an elector. Therefore, he did not fail to remain a qualified elector as defined by the relevant statutes and constitutional provisions.

D. The City is not Entitled to Attorney Fees on Appeal

The City seeks attorney fees on appeal pursuant to I.C. § 12-117. Idaho Code section 12-117 provides:

in any administrative or civil judicial proceeding involving as adverse parties a . . . city . . . and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

I.C. § 12-117(1).

The City argues that on appeal Keene has acted without a reasonable basis in fact or law. The issue of whether I.C. § 50-469 provides a third mechanism for the removal of an elected official from his public office is an issue of first impression in Idaho. This factor has been weighed by this Court on appeals in determining whether an appeal is pursued without reasonable basis in fact or law. *See Smith v. Idaho Department of Labor*, ____ Idaho ____, ____ P.3d ____ (2009 Opinion No. 117, Docket No. 35651).

Further, I.C. § 50-469 is contained in that portion of Title 50 which addresses the conduct of elections. It provides no express provisions that it was intended to be used to contest an election of a public official or oust him from office. The Statement of Purpose and legislative history for this statute provides no support for the proposition that this statute was intended by the legislature to be used as a mechanism to remove elected officials from their public office and declare vacancies in their office. Thus, it can not be said that Keene has acted without a reasonable basis in law or fact in pursuing this appeal.

The City also claims this appeal was brought frivolously pursuant to I.C. § 12-121. Under that statute, attorney fees will be awarded to a prevailing respondent when this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably or without foundation. *Nelson/Pehrson v. Big Lost River Irrigation District*, ___ Idaho ___, ___ P.3d ___ (2009 Opinion No. 116, Docket No. 35543-2008), citing to *Downey v. Vavold*, 144 Idaho 592, 596, 166 P.3d 382, 386 (2007). This Court has weighed whether a matter is a case of first impression in determining whether an appeal was pursued frivolously. *Nelson/Pehrson, supra*. For the same reasons advanced in the previous argument on why this case was pursued without basis in fact or law, it can not be said that this case was pursued frivolously.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

RESPECTFULLY SUBMITTED this 13TH day of October, 2009.

JAMES, VERNON & WEEKS, P.A.


SUSAN P. WEEKS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of October, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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