

STATE OF WYOMING

IN THE DISTRICT COURT

COUNTY OF SUBLETTE

NINTH JUDICIAL DISTRICT

LORETTA M. DEATS and)
ROBERT JOHN BRITO, JR.)

Plaintiffs,)

vs.)

DAVE M. SMITH, CHRIS HOUSE,)
PATTY RACICH, and ERIK)
ASHLEY,)

Defendants.)

Civil Action No. 2006-6855

FILED

MAR 21 2007

MARILYN M. JENSEN
CLERK OF DISTRICT COURT
PINEDALE WYOMING

BY _____
Original

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND

JUDGMENT

This matter came before the Court on Plaintiff Robert John Brito Jr.'s ("Brito") Motion for Partial Summary Judgment (the "Motion") contesting the election of Dave Smith to the Town Council of Pinedale under Wyo. Stat. § 22-17-101(a)(ii). A hearing on the Motion was held on March 8, 2007. Plaintiff Brito was represented by Clark Stith, 505 Broadway, Rock Springs, Wyoming 82901. Defendants Dave Smith, Patty Racich and Erik Ashley were represented by Ralph E. Wood, 9 West Magnolia Street, Pinedale, Wyoming 82941-0130.

Pursuant to W.R.C.P. 56 and 58, the Court, having considered the Motion, the

affidavits and exhibits on file, the pleadings, the arguments of counsel, and being advised in the premises, hereby FINDS, ORDERS and renders JUDGMENT as follows:

FINDINGS OF FACT

1. Plaintiff Robert John Brito, Jr. is a resident and registered elector in the Town of Pinedale, Sublette County, Wyoming.

2. Defendant Patty Racich is the Town Clerk of Pinedale, Sublette County, Wyoming. Pursuant to Town of Pinedale Charter Ordinance No. 2, municipal elections are to be held on the Tuesday next following the first Monday on the month of May in even numbered years. Accordingly, on March 13, 2006, Patty Racich issued a notice (the "Proclamation") proclaiming that a regular municipal election would be held on Tuesday, May 2, 2006. According to the Proclamation, the election was to elect a mayor and two council members. The Proclamation further provided that completed nomination applications from prospective candidates would be received in the office of the Town Clerk until 5:00 p.m. on April 10, 2006.

3. On April 7, 2006, Defendant David M. Smith, also known as Dave Smith, signed and submitted a request (the "Petition/Application") that his name be placed on the official election ballot as a candidate for the office of Town Council at the May 2, 2006 election. The Petition/Application stated that he was a "qualified elector" of the Town of Pinedale. However, defendant David Smith was not a registered voter on April 7, 2006.

4. The Petition/Application that Defendant David Smith signed stated:

I, David M. Smith, being 37 years of age, a qualified elector of the Town of Pinedale,

do hereby request that my name be printed upon the official Election Ballot for the election to be held on 5-2,2006, as a candidate for the Office of Town Council. I hereby declare that if elected I will qualify for office.

Dated the 7th day of April, 2006.

/s/ Dave Smith

5. Defendant David Smith was apparently unaware that, on April 7, 2006, he was not a registered voter. Town Clerk Patty Racich did not make any efforts to verify whether Smith or any other candidate was a registered voter when they submitted their candidate Petitions/Applications beyond verifying that they had signed the Petition/Application. Indeed, one other candidate for Town Council, Defendant Erik Ashley, submitted a Petition/Application and was placed on the ballot, although he too was not a registered voter on the day of submission of his Petition/Application.

6. Although David Smith was not a registered voter on the day he submitted his candidate Petition/Application, his name was placed on the ballot for Town Council for the May 2, 2006 general municipal election, as was the name of Erik Ashley. David Smith discovered that he was not a registered voter on the morning of May 2, 2006 when he attempted to cast his vote. The Sublette County Clerk registered David Smith to vote on May 2, 2006.

7. On May 3, 2006, the canvassing board met to certify the election results. Defendant Patty Racich did not attend the meeting of the canvassing board. The other two members of the canvassing board certified the numbers of votes and election results as

follows:

Dave Smith	183
Chris House	125
Dave Hohl	108
Barbara Boyce	96
Robert Brito	83
Anthony Fagnant	56
Erik Ashley	53

The Canvassing Board declared Defendants Dave Smith and Chris House the winners of the election for the two open seats on the Pinedale Town Council.

8. Pursuant to Wyo. Stat. 22-17-101 and 27-17-102, within fourteen days of the certification of the results by the canvassing board, Plaintiff Robert Brito filed a verified complaint and petition (the "Complaint") to have the election of Dave Smith set aside. In paragraph 22(a) of the Complaint, Plaintiff Brito requested that the election of Dave Smith be set aside under Section 22-17-101(a)(ii) because "the person whose election is contested is not eligible to hold the office."

9. Charter Ordinance No. 2 was adopted on April 6, 1998. It sets forth the procedures for the conduct of general elections, but it does not set forth, or purport to set forth, qualifications for candidates. It provides that the "Town Clerk is the chief election officer for Town elections and is responsible for determining if a person seeking nomination is a qualified candidate." The Charter Ordinance also states that certain statutes shall not be

applicable to the Town of Pinedale. Specifically, Section 18 of the Charter Ordinance provides as follows:

SECTION 18. STATUTES NOT APPLICABLE. That part of the Wyoming Election Code applying to nominations and primary elections (currently Wyoming Statutes §§ 22-23-301 through 22-23-308) shall not apply to the Town of Pinedale.

Charter Ordinance No. 2, § 18.

CONCLUSIONS OF LAW

A. THE LEGAL STANDARD

W.R.C.P. 56 provides that “a party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party’s favor on all or any part thereof.” “Summary judgment is appropriate when no genuine issue as to any material fact exists and the prevailing party is entitled to judgment as a matter of law.” *Cordero Mining Company v. United States Fidelity and Guarantee Insurance Company*, 67 P.3d 616, 620 (Wyo. 2003). “A genuine issue of material fact exists when a disputed fact, if it were proven, would have the effect of establishing or refuting an essential element of the cause of action or defense which the parties have asserted.” *Cordero Mining Company v. United States Fidelity and Guarantee Insurance Company*, 67 P.3d 616, 620 (Wyo. 2003). The Court is to “examine the record from the vantage point most favorable to the party who opposed the motion, and . . . give that party the benefit of all favorable inferences which may fairly be drawn from the record.” *Id.*, at 620-21.

B. DISCUSSION.

**1. Whether Defendant David Smith Is Eligible To Hold Office Under
Wyo. Stat. § 22-17-101(a)(ii).**

Wyo. Stat. § 22-17-101 provides, in pertinent part:

(a) A qualified elector may contest the right of a person declared elected to an office in the elector's county, municipality, district or precinct, other than the office of state legislator, United States president and vice-president and presidential elector, on the following grounds:

- (i) Misconduct or material negligence of an election official which affected the result of the election;
- (ii) The person whose election is contested is not eligible to hold the office;
- (iii) The person whose election is contested offered to give a bribe to a voter or election official to procure his election;
- (iv) Illegal votes were counted or legal votes were not counted;
- (v) The person whose election is contested violated the provisions of W.S. 22-26-101 through 22-26-121.

Wyo. Stat. § 22-17-101.

Wyo. Stat § 22-23-301 provides, in pertinent part:

Municipal Officers. All candidates for municipal office shall be nominated at the municipal primary election. In order to be eligible, **a candidate must be a registered voter** and a resident of the municipality and ward which he seeks to represent **on the**

day the Petition is filed, and shall not be an employee of the municipality. As used in this section, the term "employee" under this section based solely upon coverage under the Wyoming Worker's Compensation Act or other pension, death or disability program.

Wyo. Stat § 22-23-301 (emphasis added).

In *Hayes v. City of Sheridan*, 2005 WY 10, 3 (Wyo. 2005), the Wyoming Supreme Court addressed the 1997 amendments to Wyo. Stat. § 22-23-301. In *Hayes*, the Supreme Court affirmed that state law now requires that a person be a registered voter on the day that he or she files a Petition to be placed on the ballot. Specifically, in *Hayes*, the Supreme Court stated:

There are two separate clauses containing eligibility qualifications in the statute [Wyo. Stat. § 22-23-301]. The first requires a candidate to be "a registered voter and a resident of the municipality and ward which he seeks to represent on the day the Petition/Application is filed." The second clause states that a candidate "shall not be an employee of the municipality." The second clause is very clearly separated from the first clause. **The critical distinction between the clauses for the present purposes is that the first clause specifically refers to a time by which the clause's qualifications must be met, while the second clause does not.**

Hayes v. City of Sheridan, 105 P.3d 459, 2005 WY 10, ¶3 (Wyo. 2005)(emphasis added).

In *Hayes*, the Supreme Court emphasized that Section 301 now imposes a clear

time requirement for voter registration that must be met in order for a person to be a qualified candidate. In *Hayes*, the Supreme Court held that this timing requirement does not apply to the second clause dealing with the ineligibility of municipal employees to hold municipal office. *See Hayes*, 105 P.3d at 460 (“A person need not resign from municipal employment to run for municipal office, but only must be willing to resign from municipal employment if elected to municipal office.”) By contrast, the statute does impose a time by which the qualification of being a registered voter must be met, namely, the candidate must be registered to vote “on the day the petition is filed.” *See Hayes v. City of Sheridan*, 105 P.3d 459, 2005 WY 10, ¶13 (Wyo. 2005).

The Petition/Application was not in the form prescribed by Wyo. Stat. §22-23-302, which requires that candidates certify that they are registered voters “as of the closing of the municipal clerk’s office on the day this petition is filed.”

Defendant David M. Smith was not a registered voter on the day that he signed his Petition/Application. As a result, under Wyo. Stat. § 22-23-301, he was not an eligible candidate for Town Council. Because he was not an eligible candidate, he is not eligible to hold office under Wyo. Stat. § 22-17-101(a)(ii).

2. Whether Charter Ordinance No. 2 Exempts The Town Of Pinedale From The Application Of Wyo. Stat. § 22-23-301.

Defendant Smith has argued that Charter Ordinance No. 2, which purports to exempt Pinedale from Wyo. Stat. § 22-23-301, made it unnecessary for Dave Smith to be a registered voter on April 7, 2006, the day he submitted his Petition/Application.

This argument fails, for two reasons. First, the Charter Ordinance does not purport to establish any qualifications for candidates. Thus, it does not attempt to abrogate the qualifications set forth in 22-23-301 requiring the candidate to be a registered voter on the day the Petition/Application is submitted. Pinedale's charter ordinance was adopted pursuant to Wyo. Stat. § 22-23-202. Subsection (b) of Wyo. Stat. § 22-23-202 provides: "those matters not otherwise provided for in a charter ordinance shall be governed by chapters 1 through 21, 23, 25 and 26 of this Election Code." Therefore, because the Charter Ordinance upon which Defendants rely does not purport to set different qualifications for office, under Section 22-23-202, the qualifications for municipal candidates "shall be governed by chapter . . . 23 of this Election Code," which includes Section 22-23-301. Therefore, Wyo. Stat. § 22-23-301 does apply to Dave Smith and the Town of Pinedale. Because it applies, Dave Smith, in order to be eligible, had to have been registered on April 7, 2006. Because he was not, he is ineligible to hold office.

Second, if the Charter Ordinance purported to establish different qualifications for office than are mandated by state statute, it would run afoul of the Wyoming Constitution. A municipality may not exempt itself from state "statutes uniformly applicable to all cities and towns." *See* Wyo. CONST., Art. 13, § 1(c).

The home rule amendment, Wyo. Const. art. 13, § 1(b), specifies:
All cities and towns are hereby empowered to determine their local affairs and government as established by ordinance passed by the governing body, subject . . . to statutes uniformly applicable to all cities and towns

Cook v. Zoning Bd. of Adjustment, 776 P.2d 181, 186 (Wyo. 1989).

Subsection (c) of the home rule amendment allows a town to exempt itself from certain statutes, but not those that are “uniformly applicable to all cities and towns.” *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo. 1985). Thus, the Home Rule Act makes constitutional statutes that allow for an optional mode of election, such as Wyo. Stat. 22-23-202, but it does not allow towns to repeal state statutes that have uniform application.

State statutes regarding the qualifications of candidates for municipal office are clearly statutes that apply uniformly to all cities and towns. Because Wyo. Stat. § 22-23-301’s requirement that a candidate be a registered voter on the day of filing his petition to be placed on the ballot is a uniform rule applicable to all municipalities, the Town of Pinedale does not have the authority to exempt itself from this requirement. Therefore, even if the Charter Ordinance purported to establish alternative qualifications for office, it would not be enforceable to that extent. The provisions of the Charter Ordinance do not, therefore, exempt Defendant Dave Smith from the obligation to have been a registered voter on April 7, 2006 in order to be eligible to hold office.

B. REMEDIES.

The remedy for a finding that a putative municipal office holder is ineligible to hold the office is provided in Wyo. Stat. § 22-17-108. Section 108 provides, in pertinent part:

A judgment of the court in an election contest shall confirm or annul the election or declare elected a qualified candidate receiving the highest number of legal votes, or declare the result of the election on each contested ballot proposition. . . .

...

For offices to be filled by more than one (1) candidate, the election shall not be declared null and void but the qualified candidates receiving the highest number of legal votes shall be declared elected.

Wyo. Stat. § 22-17-108.

The May 2, 2006 Pinedale municipal election was for two open city council seats. The two qualified candidates receiving the highest number of legal votes were Chris House (125 votes) and Dave Hohl (108 votes).

Dave Smith was not a qualified candidate and he is hereby declared not to have been elected to the Town Council of Pinedale. The election of Dave Smith is hereby annulled and set aside. Chris House and Dave Hohl are hereby declared to be elected to the Town Council of Pinedale.

With respect to costs, Wyo. Stat. § 22-17-104 provides:

If the election is annulled and set aside for grounds stated in W.S. 22-17-101(a)(ii),(iii) or (iv), judgment for costs shall be rendered against the party whose election was contested and in favor of the party contesting the election.

In this case, the election of Dave Smith is being set aside and annulled under Section 101(a)(ii). Nonetheless, Section 22-17-104 requires that costs be assessed against Dave Smith. However, a determination of cost to be assessed will be deferred pending a final resolution of the entire case.

Finally, Defendant Dave Smith has requested that the Court stay this order pending

further proceedings and potential appeal. Stays pending appeal for civil cases are governed by W.R.A.P. 4.02. Rule 4.02 would require the posting of a bond to cover potential damages.

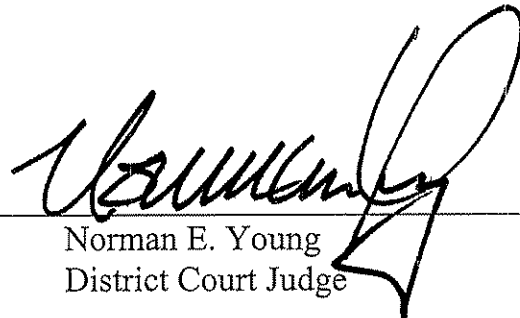
The problem for Defendant is that there is no amount of money that can remedy the effect of his wrongful holding of a seat on the Town Council. A stay may be granted where there is danger of irreparable harm from the enforcement of the judgment. *See Pagel v. Franscell, 2002 WY 169, P4 (Wyo. 2002)*(the trial court “offered to stay the enforcement pending appeal since the court recognized the potential for irreparable harm.”) Stays have been routinely denied, even where the trial court’s order has immediate negative economic effects on the appellant. *See Wyo. Downs Rodeo Events, LLC v. State, 2006 WY 55, P10 (Wyo. 2006)*(Supreme Court denied gambling business’ motion to stay the district court's order pending appeal.”)

In this case, however, the more likely cause of irreparable damage would result from granting a stay. The Court finds that, given the legislature’s evident intent in amending Wyo. Stat. 22-23-301 specifically to require all candidates to be registered on the day their Petitions/Applications are submitted, and given the Wyoming Supreme Court’s acknowledgement of that intent in *Hayes v. City of Sheridan*, the likelihood of success of such an appeal would be low. Given that Dave Smith does not lawfully hold the office of Town Council, there is danger of irreparable damage from his continued purported service on that council. In order to mitigate such potential irreparable damage, the Court orders that this order and judgment become effective immediately.

Therefore, Plaintiff Robert John Brito Jr.'s Motion for Partial Summary Judgment is GRANTED. The election of Dave Smith is hereby annulled and set aside. Chris House and Dave Hohl are hereby declared to be elected to the Town Council of Pinedale. This judgment is effective immediately. Costs are awarded to Plaintiff.

IT IS SO ORDERED.

Dated this 20TH day of March, 2007.



Norman E. Young
District Court Judge