

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

KENNETH HALL

Plaintiff,

and

BYRON SHARPER

Plaintiff-Intervenor,

**CIVIL ACTION NO.: 3:12-cv-657
BAJ/DLD**

v.

STATE OF LOUISIANA, et al

Defendants.

**MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AS
TO INTERVENOR BYRON SHARPER BY SECRETARY OF STATE TOM SCHEDLER**

MAY IT PLEASE THE COURT:

Every Louisiana elected official is required to take the following oath of office:

“I, ..., do solemnly swear (or affirm) that I will support the constitution and laws of the United States and the constitution and laws of this state and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ..., according to the best of my ability and understanding, so help me God.”

La. Const. art. X § 30.

The Secretary of State moves for summary judgment contending that in spite of his oath of office, he has no duty to enforce federal law. This motion is due to be denied.

As Intervenor Sharper explained in his discovery responses, in promulgating the results of elections for the Baton Rouge City Court, the Secretary of State certifies that the election has been conducted in accordance with all laws. If the election was conducted in violation of the Voting Rights Act of 1965, then the Secretary of State has a duty to so report and he perpetuates a violation of the Voting Rights Act when he fails to do so, as he has in fact done.

The constitutional office of Secretary of State is designated as the chief election official of the State of Louisiana.

The secretary of state shall head the department and shall be the chief election officer of the state. He shall prepare and certify the ballots for all elections, promulgate all election returns, and administer the election laws, except those relating to voter registration and custody of voting machines. La. Con. art. 4 § 7.

The Secretary of State also has statutory election duties including a duty to make reports and recommendations to the legislature on election issues and investigate election irregularities.

In addition to the functions, powers, and duties otherwise vested in the secretary of state by law, he shall:

. . .

(5) Make reports and recommendations on his own initiative or upon the request of the legislature, or any committee or member thereof.

. . .

(8) Investigate allegations of election irregularities.

(9) Do such other things, not inconsistent with law, as are necessary to perform properly the functions vested in him.

La. R.S. §36:742.

In the case at bar, there have been allegations of an election irregularity in the election of Baton Rouge City Court judges for years arising from the failure to reapportion the subdistricts. These allegations have obvious substantial substance and the Secretary of State has neither investigated the complaints nor has Secretary Schedler reported the irregularities to the Louisiana Legislature.

The Secretary of State was clearly on notice of the irregularity since the filing of the civil suit in the *Reverend Jerry Johnson v. State of Louisiana, et al*, No. 541,528, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, where the Secretary of State was named as party defendant. It has been argued that the Legislature alone is responsible for reapportionment of the Baton Rouge City Court; however, the Legislature has delegated this

authority. Louisiana Revised Statutes Title 33, Section 1371 requires reapportionment of *all* local districts from which public officials are elected by local government within one year of the release of the official census data. This section reads in part as follows:

Except as otherwise provided in a home rule charter, the governing authority of any municipality which contains two or more districts from which public officials are elected shall, within one year after the official release of every decennial census, examine the apportionment plan of the municipal districts composing the municipal governing authority to determine if there exists any substantial variation in the representation of the districts. After the examination, the governing authority of such municipality shall, by ordinance adopted by a majority of the members thereof, either declare the apportionment of the districts to be equitable and continue its existing apportionment plan or provide for a new apportionment plan.

There is no home rule charter provision in the City of Baton Rouge to the contrary. The use of the term “Public Officials” clearly shows intent to have broader coverage than just the local governing body members. This reading is supported by another provision for parish governing bodies, which is expressly limited to reapportionment of “its members.” La. R.S. §33:1411.

The mandate that local districts be reapportioned with each census is also found in the Louisiana Election Code at La. R.S. §18:1922 which reads as follows:

A. Unless a different period of time is specified by the constitution or by statute, the governing authority of each local governing body shall reapportion its voting districts by the end of the year following the year in which the population of this state is reported to the president of the United States for each decennial census.

The subdistricts at issue are clearly voting districts of the City of Baton Rouge (Election Sections 1 and 2). Together these provisions are a clear mandate from the Legislature that timely use of the delegation of authority from the Legislature to reapportion local government districts is expected. The provisions also establish reapportionment as a public policy of the State of Louisiana.

There has been no such reapportionment of the Baton Rouge City Court subdistricts since the subdistricts were created in 1993, two census cycles. The Secretary of State is clearly aware that the Baton Rouge City Court has not been reapportioned in accordance with Section 1371 and Section 1922 for two census cycles. Thus, the Secretary of State had knowledge of the complaints of the failure to reapportion was notice he needed to act and he failed to do so.

The Secretary of State's election duties are substantive, not ministerial or ceremonial. The Attorney General of Louisiana has advised the Secretary that he has authority to refuse to accept qualification papers for candidates where there is no valid apportionment plan as is the case of elections for the Baton Rouge City Court.

The Secretary of State, as chief election officer of the state, may accept a parish governing authority's certification stating that no valid apportionment plan exists and therefore the Secretary of State and clerks of court would have no duty to accept qualifying papers from persons seeking to qualify for positions on the governing body or members of political party parish executive committees. Op. Atty. Gen., No. 91-442(A) (Aug. 22, 1991).

In fact, in another opinion arising from the same request, the Attorney General told the Secretary of State that it would be illegal to take any action to hold an election in the absence of a valid reapportionment.

Because the Secretary of State has such knowledge on hand, it is the opinion of this office that it would be unlawful for the secretary of state to enforce any Parish governing authority's reapportionment plan for the 1991 Gubernatorial Election unless such Plan has been precleared prior to qualifying on September 3rd, 1991. Op. Atty. Gen., No. 91-442.¹

The Secretary of State in the instance of the 1991 opinion had knowledge that there was a new reapportionment plan that had been adopted but the plan had not been precleared under

¹ These opinions were taken from the Louisiana Attorney General's web site. Copies of the opinions as published on the web site are attached. It is obvious that the opinions were digitized by running at Optical Character Recognition program that in a few cases introduced errors which were obvious and not substantive. This quotation is corrected.

Section 5 of the Voting Rights Act.² Unambiguously, the Louisiana Attorney General has told the Secretary of State what his duties are when a reapportionment plan is in violation of the Voting Rights Act and that duty is quite different from what Secretary Schedler argues in his Motion for Summary Judgment.

The Secretary of State is also an ex officio member of the State Board of Election Supervisors, a statutory legal entity, housed in the Secretary of State's office that is created by La. R.S. §18:23. The Board of Election Supervisors has the statutory duty to address the exact issue pending before this Court.

A. To accomplish the purposes of this Part and Subpart G of Part V of Chapter 5 of this Title, the board shall have the following powers, duties, and functions:

. . .

(3) To review election laws and procedures and to report to the legislature as required by this Part.

La. R.S. § 18:23.

To fulfill its mission, the Board of Election Supervisors has authority to hold hearings, issue subpoenas and employ legal counsel.³ In spite of this duty, the Board of Election Supervisors has not investigated the Baton Rouge City Court districts and has not reported to the Legislature that a violation of the Voting Rights Act exists with regard to the apportionment of the election districts for the Baton Rouge City Court.

In addition to the clearly defined statutory and constitutional duties to investigate election violations such as the ones at issue, discover the clear violations, and report the violations to the Legislature, the Secretary of State is the final state authority in the election process from whom

² At the time of the 2012 primary election on November 6, 2012 *Shelby County, Ala. v. Holder*, 133 S. Ct. 594, 184 L. Ed. 2d 389 (2012) had not been decided and several aspects of the Baton Rouge City Court subdistricts also had a preclearance issue.

³ La. R.S. 18:24 A (2), (4).

comes the official notification that a candidate has been validly elected to office.⁴ The Secretary of State is the final authority officially declaring that there was no irregularity to the election process.

CONCLUSION

State executive branch officials, including the Secretary of State in the present instance, have, en masse, decided to hide behind the skirts of the legislature's failure to adopt a reapportionment plan of the Baton Rouge City Court election districts. While the Legislature is given authority to change the election districts, the people of Louisiana in the 1974 Constitutional Convention and subsequent amendments to the Louisiana Constitution wisely vested election oversight responsibility in the executive branch, particularly the Secretary of State, when they gave the power to apportion the electorate to the Legislature. The Legislature has clearly established a policy of review of the apportionment of all local districts with each census and a timetable for that to happen. As stated by the Attorney General in 1991, the Secretary of State cannot legally allow candidates to qualify for election in a district that has no valid apportionment plan. The Secretary of State was required in the instance of the 2006 and 2012 Baton Rouge City Court election to withhold opening of qualifying of candidates for the Baton Rouge City Court Judge until there was a legal apportionment of the voters in the subdistricts. Had the Secretary of State used the power of his office to investigate claims that the Baton Rouge City Court districts were illegally apportioned prior to the 2006 and 2012 election the present state of affairs forming the basis for this suit would not exist. Had the Secretary of State convened the State Board of Election Supervisors, which is housed in his office, and used that agency's subpoena power to investigate the allegations, the present state of affairs would not exist. The legislature's lack of response stems in large part from the fact that state executive

⁴ La R.S. 18:513.

branch officials like the Secretary of State have continued business as usual when they had a duty to do otherwise.

RESPECTFULLY SUBMITTED:

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s/ Ronald R. Johnson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2014, a true and correct copy of the foregoing Memorandum in Opposition to Defendant Secretary of State's Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

Baton Rouge, Louisiana, this 20th day of June, 2014.

/s/ Ronald R. Johnson

RONALD R. JOHNSON