UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISON

WILL BRADSHAW,

Plaintiff.

v.

JOSEPH SALVAGGIO;
KELLY KUENSTLER;
CATHERINE RODRIGUEZ;
DONNA CHARLES;
MONICA ALCOCER.

Defendants.

Case No. SA-20-CA-1168-FB

Hon. Fred Biery
Mag. Elizabeth S. Chestney

PLAINTIFF'S REPLY TO DEFENDANTS' "RESPONSE"
***IE* "DEFENDANT CITY OF LEON VALLEY OFFICIALS' MOTION TO DISSOLVE TRO AND/OR IN THE ALTERNATIVE, EXPEDITED HEARING ON PRELIMINARY INJUNCTON" ECF #12**

NOW COMES Plaintiff, Councilor Will Bradshaw, by and through counsel, Solomon M. Radner, and files this Reply to Defendants' Motion to Dissolve, since that motion was intended to be Defendants' Response that this Court ordered them to file by October 13, 2020, and respectfully files the attached Reply.

Respectfully Submitted,

EXCOLO LAW, PLLC

Dated: October 20, 2020

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1. <u>There are myriad Constitutional issues with the "*process*" being afforded Plaintiff.</u>

In their Motion to Dissolve, Defendants do not address the merits of Plaintiff's due process or first amendment claims. Defendants merely claim Plaintiff "has always been given due process." (ECF # 12, p. 2). This unfounded assertion is an insufficient basis to dissolve the Court's TRO. Plaintiff has credibly alleged multiple constitutional violations in his well-pled complaint outlining Defendants' current attempt to unconstitutionally throw Mr. Bradshaw out of office; the harm is without question "irreparable." (ECF # 1; ECF # 4). Defendants pointing to their hiring of a so-called *<u>independent</u>* counsel to investigate does not change this fact. (ECF # 12, p. 2).

2. <u>Strangely, Defendants do not address a single Constitutional issue raised by Plaintiff.</u>

Nothing in Defendants' instant motion addresses the myriad constitutional issues raised. The fact remains that the due process concerns continue to be present despite Defendants' so-called "independent" investigator, including:

a. Plaintiff's only alleged misconduct in this matter is so clearly constitutionally protected speech, that any claim that such speech forms the basis for removal from office is without merit and an affront to the Constitution. (ECF # 1, ¶ 20, 52-55, 63-64, 72-76).

b. Plaintiff is not permitted to have Counsel speak on his behalf at the hearing. (*Id*. at ¶ 102).

c. Plaintiff himself is also not permitted to ask any questions of any witnesses, **<u>including his own witnesses</u>**. (*Id*.). Simply put, Plaintiff is not permitted to ask ***<u>any</u>*** questions of ***<u>any</u>*** witnesses.

d. Some Defendant councilors, who would serve as judge and jury, have made public statements, that the sole goal of the 3.12 hearing is to remove Mr. Bradshaw from office. These statements were made ***<u>before</u>*** the so-called "independent investigation" was complete. (*Id*. at ¶ 97).

e. The number of votes with which these same Defendant councilors removed former Councilman Benny Martinez, was insufficient even according to the city's own charter, but it

is too late for Mr. Martinez to get his seat back because of how quickly the Defendants immediately swore in a replacement, leaving the only option to regain his seat, a *Quo Warranto* action which Plaintiff is not permitted to bring. (*Id*. at ¶ 31, 39-40). "Irreparable harm" indeed!

Defendants' conclusory statements, such as "Defendant City of Leon Valley officials have afforded Councilman Bradshaw due process….." and "Defendant City of Leon Valley Officials assert that there is not substantial likelihood of success on the merits, that the threat and injury to the Movant does not outweigh the injury to the on-Movant and that granting the injunction will disserve the public interest" (ECF #12, p. 4), are completely without support. Meanwhile, Plaintiff, clearly articulated numerous due process violations in his Emergency Motion for TRO.

3. <u>The harm is literally irreparable – once the harm happens, it CANNOT be undone.</u>

If this Court allows this 3.12 hearing to proceed, Mr. Bradshaw will be immediately removed from office, and his replacement immediately sworn in. He will then have no recourse to get his elected seat back, even if he proves it was unlawfully stolen from him, since he is not permitted to bring a *Quo Warranto* action. (*Id*. at ¶ 40; ECF # 4, p. 14-16). This is what happened to Former Councilor Benny Martinez, and Defendants are back at it against Mr. Bradshaw.

4. <u>What is Defendants' rush??</u>

Defendants request an expedited hearing but don't provide the court with ***<u>any</u>*** explanation as to why they are in such a rush. (<u>SPOILER</u>: They are desperate to throw out Mr. Bradshaw ***<u>before</u>*** the November 3, 2020 election because they are concerned they won't have the votes after the election – even the insufficient number of votes with which they threw out Mr. Martinez.) Defendant Alcocer even made a comment at the previous city council meeting that they were "running out of time" in reference to the 3.12 hearing to remove Plaintiff. (ECF # 1, ¶ 66). What else could she have been referring to, other than the election being so close?

5. Mr. Bradshaw's alleged misconduct is the law school definition of protected speech.

The underlying allegations against Mr. Bradshaw consist of nothing more than Mr. Bradshaw's constitutionally protected *offensive* free speech. Defendants can call it "spewing vitriolic comments toward the City of Leon Valley Officers and said comments were made at such time as the officers were performing their duties as police officers for the City of Leon Valley" - but Mr. Bradshaw's speech is protected and necessarily ***cannot*** be the basis to forfeit his office.

6. Defendants' "independent investigation" was not independent, and other issues.

Nothing about the investigation was independent. The so-called "independent investigator" did not even interview Mr. Bradshaw or any of his witnesses before reaching the preconceived decision that Plaintiff must be immediately thrown out of office, mere days before an election.

Further, and perhaps even more troublingly, this so-called "independent investigator" was never officially hired to investigate. In fact, they explicitly excluded the language of an investigation when making their motion and resolution[1]. This leaves open a gaping question: When was this so-called "independent ***investigator***" hired to ***investigate***? There are only two options:

a. In executive session (meaning they necessarily violated the Texas Open Meetings Act); or

b. NEVER (meaning they are having a hearing without having done an investigation.)

7. The caselaw cited by Defendants does nothing to help them.

Defendants' reliance on *Harris v. Monroe City Sch. Bd.*, 2012 U.S. Dist. LEXIS 115871 (W.D. La. Aug. 16, 2012), is telling because (1) the only case that even remotely supports their

[1] On Aug. 4, 2020, Defendant Charles: "I like to motion that the City Council conduct a 3.12 hearing against counselor Bradshaw with the **guidance** of an outside attorney, **not investigation**, but **guidance**."

Then on Aug. 18, 2020, Donna Charles: "I make a motion that we move forward by hiring Keith I don't know how to pronounce his last name? (Sieczkowski)… as the designated officer for the 3.12 hearing."

NO INVESTIGATION EVER DONE, YET NOW THERE IS A HEARING?!?!

claim is a district court in Louisiana; and (2) the case involved an employee with a contract – not an elected official. In our case, Plaintiff has a due process entitlement to the position. *Id*. at *1.

Ironically, *Harris* which is non-binding and barely even persuasive, cites to a case that is both on-point and binding precedent, *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047 (5th Cir. 1997). In *Valley*, both the trial court and Fifth Circuit agreed that when the adjudicators are obviously not impartial, that an injunction is appropriate. *Id*. at 1050, 1056.

Here, Defendant Councilors, are irreversibly biased having made comments about the need to remove Mr. Bradshaw from office, specifically ***before*** the election. This not only demonstrates irreversible bias, but also proves that the outcome is already predetermined.

8. Plaintiff has offered the perfect resolution to the pending TRO!

Plaintiffs have made an offer of resolution to Defendants, that Defendants would accept if their planned 3.12 hearing was not in fact a predetermined, forgone conclusion and that they are all just going through the motions. Plaintiff has offered to enter a Stipulation and Order allowing Defendants to proceed with their planned 3.12 hearing, so long as they agree that they may not throw Mr. Bradshaw out of office. If Defendants were truly impartial and not hell-bent on throwing him out before the election, it is inconceivable that they would actually remove someone from office for criticizing the police, even if they call it, "vitriolic comments toward the City of Leon Valley Officers" unless it is just a means to a predetermined end. In other words, they can have their hearing and dish out punishment – but they cannot remove Mr. Bradshaw from office. Their refusal to accept this resolution is telling of their goal. This TRO is thus VITAL.

9. DEFENDANTS ARE IN ACTIVE VIOLATION OF THE TRO. (Emphasis Added)

Defendants are actively ignoring the TRO that is in place and have an Ethics Hearing scheduled to take place just one day before the scheduled TRO hearing. The Leon Valley Ethics

Commission, **chaired by David Jordan, whom Mr. Bradshaw beat in the last election,** scheduled a hearing on Mr. Bradshaw, with the pre-determined result being a vote to recommend he be removed from office. Though obviously powerless to actually remove Mr. Bradshaw from office during this particular hearing, this commission planning this hearing is certainly "**any action** to remove plaintiff, Will Bradshaw, from office." The hearing is the first of several steps that end with Mr. Bradshaw's removal. It is certainly "any action" and is a clear violation of the TRO.

Prior to filing this Response, Plaintiff asked Defendants to cancel this ethics hearing, which is being **chaired by David Jordan, whom Mr. Bradshaw beat in the last election**, but Defendants advised, through counsel, that they are moving forward with it as planned because it is a new allegation. Defendants' position seems to be that they are only enjoined from removing Mr. Bradshaw from office for the allegations complained of in the operative complaint, but not on any new charges that they concoct. Mr. Frigerio responded to undersigned counsel as follows:

> "I do not concur in your conclusion. The Ethics Commission charge is separate from the issue of the Hearing under article 3.12. we should discuss next week."

Whether the Court examines this new ethics hearing or the Court reviews Defendants' 'response,' one thing becomes clear: Defendants must be reminded to take this TRO seriously and perhaps they need to be restrained with stronger language from the Court, that they may not take ***any action*** at all moving towards the removal of Mr. Bradshaw from office, until after this Court holds the scheduled TRO hearing. Defendants are thus far ignoring this Court's clear Order.

10. Defendants presentation of evidence should be limited to their "Response."

Defendants were court-ordered to respond to Plaintiffs' detailed Motion. Instead, they made boiler-plate conclusory statements, leaving Plaintiff to guess what they'll argue in court. They should either be restricted from doing so, or compelled to file a Sur-Response, with the TRO being extended until they have a chance to do so, and Plaintiffs having had a chance to file a Sur-Reply.

CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests this Court grant his requested relief. Alternatively, Plaintiff respectfully request that Court limit the defendants in their optional sanctions by not allowing them to forfeit Plaintiff Bradshaw's city council seat.

Further, that this Court Order that Defendants may not raise any arguments that were not made in their "Response."

Lastly, Plaintiff requests any other relief this Court deems fair and just including attorney fees and costs incurred by Plaintiff.

Respectfully Submitted,

EXCOLO LAW, PLLC

Dated: October 20, 2020

By: */s/ Solomon M. Radner*

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CERTIFICATE OF SERVICE

I hereby affirm that on this 20th day of October 2020, that the foregoing document was filed with the Court's CM/ECF electronic filing system, and that a copy of said document was served upon all parties of record, via electronic service.

/s/ Solomon M. Radner