

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

PHIL BREDESEN, Governor of the)
State of Tennessee,)
)
Plaintiff,)
)
VS.)
)
TENNESSEE JUDICIAL SELECTION)
COMMISSION,)
)
Defendant.)

NO. 06-2275-I(III)

CLERK OF MASTER
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MEMORANDUM AND ORDER

This lawsuit was filed by Governor Bredesen to obtain a legal declaration of the statutory procedure for filling vacancies on the Tennessee Supreme Court. The Tennessee Judicial Selection Commission, who is charged by statute to consider applicants and certify to the Governor three nominees, and the Governor, who chooses from those nominees to fill the vacancy, disagree on the procedure the statute requires when, as in this case, one of the certified nominees withdraws.

On November 6 2006, this Court entered the agreed order of the attorneys representing the Governor and the Commission for an expedited hearing on motions to summarily decide the issue. A speedy resolution was requested because the vacancy on the Tennessee Supreme Court is now in its third month. The Court granted the request for an expedited summary judgment hearing and set it for next week, on December 13, 2006.

Last week, motions to intervene were filed on behalf of two individuals, Houston Gordon and George T. Lewis, who were both nominees on panels selected by the Commission out of which this controversy arises. Both claim they have a stake in the outcome of this case and seek in their motions to participate and be heard as parties by the Court.

The Court determined that it could do justice to the motions to intervene but continue to expedite the proceedings in this matter by not conducting oral argument on the motions and, instead, deciding them on the papers. The deadline for briefing on the motions to intervene was yesterday afternoon.

As to the motion to intervene filed by George T. Lewis, the parties have notified the Court that they shall submit an agreed order.

With respect to the motion to intervene of Houston Gordon, the parties were unable to reach an agreement and seek a ruling from this Court.

After reviewing the papers in support and in opposition of the motion of Houston Gordon to intervene, as well as the complaint filed by the Governor, the answer of the Commission, and the summary judgment papers filed by the Governor, the Court concludes that Mr. Gordon has satisfied the requirements of the Rule 24.01 of the Tennessee Rules of Civil Procedure to intervene and be added as a necessary party.

Further, the Court concludes that by setting a briefing schedule and requiring the parties to address at the December 13, 2006 hearing priority legal issues on the scope of the statute and its construction and interpretation, which are potentially dispositive of the case, the Court can maintain the December 13, 2006 hearing but still provide a fair opportunity for all counsel to be heard. Counsel are accomplished, and the papers filed with the Court to date, including a 56 page memorandum filed by Intervenor Gordon in opposition to the motion for summary judgment, establish that counsel have substantially researched and developed the record and their legal argument.

The Court's reasoning and orders are as follows.

The facts which give rise to this controversy are that a panel consisting of Chancellor Richard Dinkins, Houston Gordon and George T. Lewis was certified by the Commission pursuant to Tennessee Code Annotated section 17-4-109 and submitted to the Governor to fill the existing vacancy on the Tennessee Supreme Court. While Governor Bredesen was considering the nominees, Chancellor Dinkins withdrew. The Governor then sent two letters to the Commission which the Governor characterizes as a "rejection" of the panel, pursuant to Tennessee Code Annotated section 17-4-112(a). The Commission returned to the Governor a list of three names which included Houston Gordon, who had been listed on the panel from which Chancellor Dinkins withdrew, and two other names not listed on the panel from which Chancellor Dinkins withdrew.

Governor Bredesen in his complaint in this case seeks clarification of one issue: does the statute require, after the Governor has exercised his rejection of the first panel, that the subsequent panel not include one or more of the nominees on the first panel. Governor Bredesen's position is that the subsequent panel must include three new nominees. The Commission disagrees with the Governor's interpretation of the wording of the statute and asserts that the statute allows the Commission to include persons from the first panel.

But equally as significant to the Commission's opposition to the Governor's interpretation of section 17-4-112 is the Commission's additional defense that the Court never gets to the issue of statutory interpretation of section 17-4-112. The Commission defends against the Governor's lawsuit by asserting that the statutory interpretation issue on which the Governor seeks clarification has been preempted in this case. In its pleadings the Commission contends as a matter of law that the Governor's actions did not constitute a rejection of the first panel and that as a matter of law any attempted rejection was illegal and, therefore void, because it was based on considerations of race and gender. The Commission argues that if the Governor's actions as to the first panel did not constitute a rejection or were invalid, Governor Bredesen's statutory interpretation issue with respect to the second panel is null.

Supportive of the motion to intervene and illustrating that Houston Gordon has an interest in this case separate and distinct from the Commission and not adequately represented by the Commission is that Mr. Gordon's legal theories on these same facts

include those asserted by the Commission but add more. Mr. Gordon in his proposed pleadings expands what the Court shall term the "preemptive defenses" to include the argument of statutory construction that the statutory precondition of three nominees to trigger the Governor's statutory right of selection or rejection failed in this case when one of the nominees withdrew, thereby rendering the process a nullity. Another example of a difference in legal theories is that Mr. Gordon in his proposed pleadings take a somewhat different tack from the Commission in arguing that the statutory mandate that the Governor state his reason for rejection in writing indicates that the Commission is vested with the obligation to protect the integrity of the process and assure that the reasons for rejection are lawful, valid and sufficient.

From the foregoing facts and analysis of the pleadings the Court concludes that Houston Gordon's inclusion on the first panel gives him a substantial interest in the Court's ruling on the "preemptive" defenses that the Governor's actions to reject the first panel was a nullity and invalid. Mr. Gordon's inclusion on the second panel gives him a stake in the statutory interpretation issue being pursued by the Governor. Additionally, Mr. Gordon's interest can not be adequately represented by existing parties because he has raised in his proposed counter complaint and cross complaint different legal theories arising out of these same facts. For all these reasons, Mr. Gordon has established the requirements for intervention under Tennessee Rule of Civil Procedure 24.01.

As to the effect Mr. Gordon's intervention shall have on expediting the disposition of this case, the Court states that a speedy resolution of this case is required. A vacancy on the Tennessee Supreme is not good for the public and the State. Mindful of the need to expedite this case, the Court concludes that it can do so but still be fair to all parties by prioritizing the issues in this case. In the orders below the Court has identified for counsel and requires them to address at the December 13, 2006 hearing priority issues of law of the scope of the statute in issue and its interpretation and construction which are potentially dispositive of the case. The Court also sets a briefing schedule to assist in the orderly expedition of the case. With these regulations, the Court concludes it can proceed in fairness to all parties with the December 13, 2006 hearing.

It is therefore ORDERED that the motion of Houston Gordon to intervene is granted.

It is further ORDERED that the Court on Wednesday, December 13, 2006, at 9:00 a.m. shall conduct a hearing on summary judgment. As well as any other issues raised in the papers, the Court requires counsel to address the following issues as a matter of law of the construction and interpretation of the statute and its scope:

"Preemptive" Defenses

1. **Statutory Construction and Interpretation**—Is it a statutory precondition to the Governor's right of selection or rejection of the first panel that he must have three nominees, certified by the Commission, who are willing to serve? That is, where three persons are certified by the Commission as nominees to the Governor and one withdraws, does the wording of Tennessee Code Annotated section 17-4-112(a), "shall fill

the vacancy by appointing one of the three (3) persons nominated by the judicial selection commission [emphasis added],” require, so as to maintain the number of nominees at three as stated in the statute, that the Commission send another nominee to the Governor before the Governor is permitted by the statute to exercise his selection or rejection of the first panel? And, if so, what are the implications and remedies for the facts of this case?

2. Statutory Construction and Interpretation—By requiring the Governor to state in writing his reasons for rejection, does the statute limit and subject that rejection to review by the Commission for its lawfulness and validity?
3. Scope of the Statute—Does the Tennessee Human Rights Act or Title VII apply where the Governor is exercising his statutory authority to fill a vacancy under the Tennessee Plan?

Governor’s Issue of Statutory Construction

4. Whether, upon rejection of the first panel of three nominees by the Governor in this case, Tennessee Code Annotated section 17-4-112(a) requires the Commission to submit a second panel that does not include on or more of the rejected nominees of the first panel, but, instead, includes three new nominees?

With respect to a briefing schedule, the plaintiff has already filed its summary judgment papers and Intervenor Gordon has filed his opposition. In light of the papers already filed the Court ORDERS that the Commission and Intervenor Lewis shall file on Friday, December 8, 2006, by 4:00 p.m. their summary judgment papers. Plaintiff shall file its reply on Tuesday, December 12, 2006, by noon.

It is further ORDERED that the Court shall consider Intervenor Gordon's motion for additional time for discovery as a defense, along with his other defenses, to Governor's Bredeesen's motion for summary judgment and as one of Intervenor Gordon's reasons the Court should deny Governor Bredeesen summary judgment. The Court shall not take up the request for additional time for discovery as a separate motion but shall consider it as part of Intervenor Gordon's opposition, as contemplated by the provision of Rule 56.07 of the Tennessee Rules of Civil Procedure that the court may refuse an application for summary judgment when discovery is needed on facts essential to justify the opposition.

The Court shall consider at the December 13, 2006 hearing issues of law on the scope and construction and interpretation of the statute to dispose of the case entirely or narrow the issues. If the Court does not dispose of the case on the foregoing issues and/or concludes that there are genuine issues of material fact or mixed questions of law and fact which preclude summary judgment, the Court shall convene a subsequent hearing to consult counsel on expedited discovery and an evidentiary hearing.

It is finally ORDERED that the Court strikes defendant Gordon's requests for admission on the grounds that they do not constitute discovery. They are, for the most part, statements of conclusions of law or facts that are not disputed. Rule 36.01 of the Tennessee Rules of Civil Procedure limits requests for admission to statements or opinions "of fact or of the application of law to fact." The requests, as presently worded as conclusions of law, have little utility to the lawsuit and create delay. The Court's order to strike is without

prejudice to Intervenor Gordon to resubmit the requests, as reworded, to comply with Rule 36.01, if the case is not disposed of in phase one of these proceedings.



ELLEN HOBBS LYLE
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