STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

KENOSHA COUNTY, WISCONSIN,

Plaintiff,

DECISION & ORDER

v.

Case No. 11 CV 1813

CITY OF KENOSHA, WISCONSIN,

Defendant.

The County of Kenosha has sued the City of Kenosha, alleging that after the 2010 Census, the City did not act in good faith in the creation of city voting wards in response to the tentative plan for the creation of supervisory districts which the County had provided to the City. Where a municipality has failed to create a ward plan compliant with § 5.15, Wis. Stats., within the time limited by law, § 5.18, Wis. Stats., allows the County to apply to the court for the promulgation of a different plan, to remain in effect until a plan conforming to § 5.15, Wis. Stats., has been enacted or adopted by the municipality's governing body.

The County claims that the City "failed to make a good faith effort to accommodate" its tentative plan, which is a requirement that § 5.15(2)(d), Wis. Stats., imposes upon the City. It alleges that the City's failure to comply with the requirements of § 5.15, Wis. Stats:

> "created an unworkable situation for the County, as adjusting the County's lines to fit the City's ward plan would have resulted in a population deviation of 18.64% -- a deviation that is presumptively discriminatory under the Equal Protection Clause of U.S. and State Constitutions."

The City responds that it acted in good faith, and has claimed that there is no presumption that a supervisory redistricting with a population deviation greater than 10% is discriminatory, relying on ***Frank v. Forest County***, 336 F.3d 570 (7th Cir. 2003) and ***Cox v. Larios***, 542 U.S. 947 (2004). I certainly disagree with the City's view of the law. The 10% presumption was explicitly pronounced by the Supreme Court in ***Brown v. Thomson***, 462 U.S. 835, 842-43 (1983), and restated in ***Voinovich v. Quilter***, 507 U.S. 146 (1993). ***Cox v. Larios,*** upon which the City has relied, did nothing to alter the rule. To the contrary, in that case the Court affirmed, without opinion, a district court ruling which held that deviations of less than 10% did not necessarily constitute a "safe harbor" for governmental bodies. It would be my impression that the case only emboldened the rule. The ***Frank*** case is noteworthy for the extent to which the court discussed the specific facts of that case (nothing like those in this case) which demonstrated why application of the acknowledged 10% rule would be absurd. The case before this court bears no similarity to ***Frank,*** and the 10% presumption is alive and well.

Thus, the outcome of this case is determined by an analysis of whether the City has presented sufficient evidence to overcome the presumption of discrimination which is created by the 18.64% deviation:

> It is well-established that a plaintiff may establish a prima facie case of dilution by demonstrating a population deviation in excess of 10%. *See Quilter,* 507 U.S. at 161, 113 S.Ct. 1149. Such a showing shifts to the state or municipality the burden of justifying the deviation, which requires it: (1) to articulate a "rational state policy" that may justify the deviation; (2) to explain how the apportionment plan "may reasonably be said to advance" the rational state policy; and (3) to demonstrate that the resulting deviation does not "exceed constitutional limits." *Mahan v. Howell,* 410 U.S. 315, 328, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); *accord Quilter,* 507 U.S. at 161-62, 113 S.Ct. 1149.

Regensburger v. City of Bowling Green, Ohio, 278 F.3d 588, 595 (6th Cir. 2002).

As I expressed at the summary judgment hearing, I have been troubled from the beginning by the meaning of the term "good faith" in § 5.15(2)(d), Wis. Stats. "Good faith" is not defined in this statute, although there are other definitions of the term elsewhere in the statutes. All of them appear to reflect the definition provided by § 401.201(19), Wis. Stats: "Honesty in fact in the conduct or transaction concerned." One who merely makes an honest mistake is typically not guilty of a lack of good faith.

It seems clear to me that the City was, at a minimum at least, mistaken about the weight to be given to various factors in the process for the creation of wards, and viewed necessity for population equivalency between districts as but one of a series of factors to consider; first among equals, perhaps, but far short of the true stature which population equality enjoys: "One person – one vote," which ordinarily requires equal voting strength for every voter, is the controlling law of the United States.

The City was challenged by the need to accommodate, for the first time, the existence of unequal numbers of supervisory and aldermanic districts. Obviously, to the extent that the City Council constituted a community of "neighborhoods," some severance would necessarily occur when reducing the number of supervisory districts. That did not, however, by itself authorize the City to prefer certain neighborhoods for "preservation" over others. More to the point, though, the City has proved neither the rational governmental policy underlying the need for the protection of its preferred neighborhoods, nor that the ward plan which it has embraced furthers the policy to the extent which would be necessary to warrant devaluing the votes of citizens living in any neighborhood.

The law requires more that a fondness for an idyllic past to justify departure from the "one person, one vote" requirement of the Fourteenth Amendment, which guarantees the equal protection of the laws to every voter. The districts which result from the City Council's action are not close to substantial equality in population. In support of the City's position that "fracturing neighborhoods" would result from accommodating the County Plan, Dr. Kenneth Mayer wrote that "maintaining communities of interest is among the more difficult [criteria] to objectively measure, because of the subjective nature of the concept." Expert Report of Kenneth R. Mayer, p. 11. Indeed, one of the members of the Leadership Committee testified that "how you define a neighborhood is kind of a personal decision." I cannot accept the proposition that such an amorphously-defined neighborhood can be propped up to justify denial of equal voting rights to every citizen.

It seems to me that the sort of a "neighborhood" which the Supreme Court has endowed with some modest weight in redistricting is very different from what is to be encountered in Kenosha. Of course, there are certainly some identifiable, longstanding neighborhoods, but they are very different, and serve very different purposes, than the neighborhoods which the Supreme Court envisioned in permitting this exception to the ordinary equality of population demanded in districts.

In the years following the massive European immigration into this country, newcomers frequently settled in neighborhoods populated by those from their native land. They shared a common language, culture, background, and frequently, religion. In cities like Chicago, these could become quite large in both size and population. Comfortable with their surroundings, some residents would spend nearly the entirety of their lives, from birth to death, in their neighborhoods: attending school, working, worshiping, and relaxing. With time, assimilation

and the automobile, these ethnic enclaves have changed, and few of their original settling groups remain; often replaced by other groups who have settled there by choice, or lack of an affordable alternative. While these enclaves existed, and the extent that they exist today with different cohering residents, they have often needed special protection for their identifiable and uniform community interests, and the Supreme Court was sensitive to that. That is, of course, still true in respect of those in the most impoverished neighborhoods, and special consideration has been found to be an appropriate weight against strict population equality in those cases, but the City appears mistakenly to have believed that special consideration is appropriate for *any* neighborhood. That is not the law. The cohesiveness which bound the people of many older neighborhoods is gone, and in newer areas, often populated by upwardly-mobile, ethnically diverse transients headed for different types of housing in other ethnically diverse neighborhoods, it has never existed.

Moreover, as mentioned before, the composition of many neighborhoods, which lack the distinct "community of interest" that the immigrants or long time victims of discrimination would share, appear now to have become, for the City, mere geographical areas that it would be nice to keep together in a single voting unit. Even if that is deemed desirable, it cannot constitutionally be accomplished by debasing the equal weight to be given to every voter's choice. "Legislators represent people, not trees or acres." ***Reynolds v. Sims***, 377 U.S. 533, 562 (1964).

Additionally, the City's identification of neighborhoods seems haphazard, arbitrary and incoherent. The City itself maintains multiple maps which depict city neighborhoods with different borderlines and even different names. Oftentimes, what is identified as a "neighborhood" is merely the physical area surrounding a subdivision, a park or a school. In its

post trial brief, the City has asserted that "[r]esidents of the City's neighborhoods share unique characteristics and division of these neighborhoods will adversely impact their effective representation." p. 15. The City has failed to establish anything sufficiently unique about any neighborhood to justify blessing some residents with greater voting power at the expense of others; and in some cases, the "neighborhood" itself seems to have been created for no purpose other than giving a name to a geographic area on a map.

Testimony was offered by the City, both by aldermen and by Dr. Mayer, that alderman have many duties as liaisons between their constituents and city administrative agencies. While that is certainly true, it has not been persuasively established that the level of services citizens will receive would suffer due to the change in the borderline of an aldermanic or supervisory district.

Ultimately, I reject as unsustained the City's claim that other factors provide sufficient reasons to justify the large population deviation which has been created.

It does not follow, however, that the City has acted in "bad faith," or that it did not act in "good faith." Public officials make mistakes all the time. That does not mean that they have acted "in the absence of good faith," as that term has been defined in our law. But I do not address this issue which the County has presented, because I conclude that in the final analysis, it is irrelevant.

From the beginning, the focus of this case has been on whether the City's action has resulted in discriminatory population deviation. That has been the central issue of the litigation. I have concluded that it has, and the question of whether the City acted in good faith is therefore irrelevant. Even if I were to find that the City acted in the best of faith, I would be obliged to

grant the relief which the County seeks. The Supremacy Clause of the United States Constitution provides:

> This Constitution…shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

U.S. Const. Art. 6, Sec. 2. Since I have concluded that the population deviation is discriminatory, I am bound by the Federal Constitution to grant the relief which the County seeks, regardless of the good or bad faith of the City. Were I to allow the next election to be conducted with the current plan, I would be acquiescing in the violation of the rights of the voters. This matter has been fully litigated on this issue, and I find that the actions of the City, however intended, constitute an unconstitutional debasement of the entitlement of every citizen to have an equal weight placed on every vote. If I were to read the statutory reference to "the community of interest of existing neighborhoods" as expansively as the City urges, then the statute itself would be rendered affrontive to the Equal Protection Clause.

Even if the City were to prevail on the issue of good faith, the County would be left in the constitutionally indefensible position of having election districts which, after judicial examination of the issue, had been found to be discriminatory, and the relief now sought would simply be ordered by another court, with the county being obliged to pay, not only for its own defense, but for the attorneys' fees of the challenger. There is absolutely no point in the expenditure of additional funds on this issue.

The City has argued, supported by Dr. Mayer and abundant case law, that courts typically hesitate to involve themselves in redistricting questions, leaving the issues to the legislative bodies charged with this function. But that hesitance comes in part from the nonjusticiability of

the issues prior to ***Baker v. Carr***, 369 U.S. 186 (1962), and the lack of any specific statutory authority for judicial intervention. In Wisconsin, however, § 5.18, Wis. Stats., specifically *requires* judicial action where a conflict like this one exists.

I find that the plan submitted by the County at the hearing of October 17, 2011 is the most practical and appropriate which has been submitted to the court, and I order its promulgation as provided in § 5.18, Wis. Stats., to remain in effect until such time as the City Council adopts a superseding, and constitutional, ward plan.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Kenosha, Wisconsin, Monday, November 14, 2011.

BY THE COURT:

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Bruce E. Schroeder
Circuit Judge