THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Mark Warden

v.

Matthew Normand, in his official capacity as City of Manchester Clerk, and
The City of Manchester

Docket No. 216-2019-CV-00935

ORDER

Plaintiff Mark Warden seeks declaratory and injunctive relief voiding the names of ballot candidates for the Manchester School District Charter Commission and striking those same names on absentee ballots pursuant to the election on November 5, 2019. Defendants move to dismiss the complaint, arguing that Plaintiff does not have standing and that the relief sought is moot because ballots have already been printed and mailed to absentee voters. A hearing was held on November 1, 2019. For the reasons stated below, the injunction is GRANTED IN PART.

Factual Background

The following facts are taken from the hearing and the pleadings. Effective July 10, 2019, the State Legislature passed a law establishing a Manchester School District Charter Commission. RSA 49-B:15. The purpose of the Commission is to recommend revisions, amendments, or replacements to the Manchester school district charter in the form of a ballot question in the November 2020 election. The Commission will be made

up of nine members who will be elected "in conjunction with the regular November elections in 2019 in accordance with RSA 49-B:4." *Id*.

RSA 49-B:4 deals with charter commissions, including their makeup, procedure, and reporting duties. It also describes how commission members are elected:

> Members shall be elected in the same manner as the municipal officers except that they shall be elected at large and without party designation. The names of the candidate shall be arranged on the ballot in an order determined by lot, publicly selected by the city or town clerk. Declarations of candidacy for the commission shall be filed as provided in RSA 669:19, except that that filing period shall begin on the fourth Wednesday before the election and end on the Friday of the following week.

RSA 49-B:4, I(b). RSA 669:19, in turn, applies to candidates filing a declaration of candidacy in towns. Under RSA 669:19, candidates must file according to the format described in the statute and within the filing period that "shall begin on the seventh Wednesday and end on the Friday of the following week before the town election."

On October 7, 2019, Plaintiff went to the Manchester city clerk's office to inquire about filing as a candidate for the Commission. (Compl. ¶ 22.) He believed that the relevant filing period for candidacy for the Manchester School District Charter Commission is the period described under RSA 49-B:4, which runs from October 9, 2019 until October 18, 2019. He was told by the clerk's office that the filing period had passed, as it occurred in July with other city officer election positions. (*Id*.) Plaintiff filed a complaint with the Secretary of State, which was forwarded to the attorney general's office. (*Id*. ¶ 24.) On October 18, 2019, Plaintiff was contacted by the attorney general's office to tell him that the Manchester city clerk's office and the city solicitor were not going to open a new filing period and stop the election. (*Id*.) Plaintiff argues that any candidates that signed up during this period in July are ineligible to be on the

ballot and that Defendants deprived him of an opportunity to be lawfully placed on the ballot when they closed the filing period before the time prescribed by the statute. (*Id*. ¶¶ 21-22.)

Discussion

I. Standing

Defendants argue that Plaintiff does not have standing because RSA 49-B:10 applies to this case and requires the petition of ten Manchester voters to enforce this chapter. Defendants also argue that, even if the filing period ran from October 9 until October 18, he attempted to file on October 7, 2019, and not during the filing period. Defendants also argue that Plaintiff made no attempt to seek immediate relief during that period. Defendants' arguments are not persuasive.

First, RSA 49-B:10, I states that: "The superior court may, upon petition of 10 voters of the municipality or on petition of the attorney general, enforce this chapter." RSA 49-B:10, II states that: "A petition for declaratory relief may be brought on behalf of the public by the attorney general or, by leave of the court, by 10 voters of the municipality." It further states: "Judicial review to determine the validity of the procedures whereby any charter is adopted, revised or amended may be had by petition of 10 voters of the municipality brought within 30 days after the election at which such charter, revision or amendment is approved." RSA 49- B:10, III. Defendant argues that, because Plaintiff has not come to the Court with the support of nine other voters, this Court does not have jurisdiction.

RSA 49-B:10 does not apply to this case. *See In re Campaign for Ratepayer's Rights*, 162 N.H. 245, 250 (2011). Plaintiff does not seek a declaratory judgment on

behalf of the public or a determination as to the validity of the procedures involved in adopting, revising, or amending a charter. He instead seeks redress for Defendant's violation of his specific, fundamental right to be elected. *See* N.H. CONST. pt. I, art. 11; *Akins v. Sec. of State*, 154 N.H. 67, 71 (2006). A requirement that any prospective candidate who is turned away by a city clerk's office, intentionally or not, come to the Court with nine other supporters would diminish that fundamental right. It could empower a city clerk's office to turn away unpopular candidates, disenfranchising prospective candidates who want to be involved in the political process. The ability of an eligible individual to declare his candidacy, and judicial review of a city clerk's denial of that individual's candidacy, is not within the scope of RSA 49-B:10. Moreover, Plaintiff is claiming that the city clerk's office miscommunicated information about the filing period, undermining the process by which candidates are elected and amounting to a violation of Plaintiff's due process rights. *See Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d. Cir. 2005) (due process violations found when government intentionally infringes upon right to vote).[1]

Second, Plaintiff has standing under the State Constitution. "The standing required by our constitution is not satisfied by the abstract interest in ensuring that the State Constitution is observed" or by claiming an "indistinguishable, generalized wrong allegedly suffered by the public at large." *Duncan v. State*, 166 N.H. 630, 643, 646 (2014). "In evaluating whether a party has standing to sue, we focus on whether the

[1] There is no evidence that the city clerk's office intentionally miscommunicated this information in a specific attempt to dissuade Plaintiff from running for office. However, the communication to Plaintiff that the filing period was in July, not October, as the statute provides, was intentional. Additionally, the fact that the City opened its candidacy period for a commission on July 8, before the law establishing the commission was passed on July 10, is puzzling. In any event, although the City did advertise that the filing period would be in July, not October, any eligible citizen who did not receive such communication but read the plain language of the statute and attempted to file for candidacy in October would be effectively disenfranchised and denied their right to seek election without due process.

party suffered a legal injury against which the law was designed to protect." *Libertarian Party of N.H. v. Sec'y of State,* 158 N.H. 194, 195 (2008). Moreover, the parties must "have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute which is capable of judicial redress." *Duncan*, 166 N.H. at 642-43 (citation omitted).

Plaintiff is not asserting a generalized grievance here: he is alleging that Defendants have denied him his right to participate in an election by miscommunicating to him the filing period and then refusing to reopen the candidacy period to allow him on the ballot. Plaintiff has a cognizable injury for which he is seeking redress. Since the Court finds that Plaintiff has standing under this test, an analysis into whether he has standing as a taxpayer is unnecessary.

Finally, Plaintiff did attempt to seek relief during the election period by filing a complaint with the Secretary of State on October 7, which was forwarded to the attorney general's office on October 8. Since the attorney general's office did not answer Plaintiff's complaint until October 18, Plaintiff could not have pursued the issue further during the candidacy period.

Defendants further argue that the requested relief is moot because the ballots have already been printed and mailed to absentee voters. "Generally a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." *Londonderry Sch. Dist. SAU #12 v. State*, 157 N.H. 734, 736 (2008). This is not the case here. The election has not yet happened and there is time to adequately address Plaintiff's claims.

II. Injunctive Relief

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *Murphy v. McQuade*, 122 N.H. 314, 316 (1982). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015) (citation omitted). An injunction should not be issued unless the petitioner demonstrates: (1) a likelihood of success on the merits; (2) that "there is an immediate danger of irreparable harm to the party seeking injunctive relief"; and (3) that "there is no adequate remedy at law." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). "[T]he granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *Dupont*, 167 N.H. at 434.

Defendants argue that Plaintiff will not be able to show a success on the merits because the requisite filing period is not October 9 through October 18, but is instead in July with the other municipal officer elections. Defendants argue that only the last sentence of RSA 49-B:4, I(b) ("the filing period shall begin on the fourth Wednesday before the election and end on the Friday of the following week") does not apply here because it modifies the filing period proscribed in RSA 669:13 for declaring candidacy in a town election.

Resolution of this issue requires the Court to engage in statutory interpretation, the principles of which are well-settled. The Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." *In re Carrier*, 165 N.H. 719, 721 (2013). The Court "must give effect

to all words in a statute, and presume[s] that the legislature did not enact superfluous or redundant words." *State v. Thiel*, 160 N.H. 462, 465 (2010). The Court also "do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Carrier*, 165 N.H. at 721. Moreover, the Court must "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id*. While the Court "interpret[s] legislative intent from the statute as written," it also "interpret[s] statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id*. If the statutory language is ambiguous, the Court can consider legislative history in conducting its analysis. *See Laramie v. Stone*, 160 N.H. 419, 436 (2010). "A statute is ambiguous if its language is subject to more than one reasonable interpretation." *Attorney General v. Loreto Publ'ns, Inc.*, 168 N.H. 68, 74 (2016).

The Court first looks to the statutory provision that established the Manchester School District Charter Commission, RSA 49-B:15. According to RSA 49-B:15, II(b), "the election of charter commission members shall be held in conjunction with the regular November elections in 2019 in accordance with RSA 49-B:4." The statute makes no reference to RSA 669:19, but clearly states that the procedures of RSA 49-B:4 will apply to the election. Turning to the relevant provision of RSA 49-B:4, the statute becomes clearer. RSA 49-B:4, I(b) details how members are to be elected: in the same manner as municipal officers except without party designation, arranged on the ballot in a particular order, and filed in accordance with RSA 669:19 *except* for the filing period of RSA 669:19. RSA 49-B:4 then continues on to detail its *own* filing period for charter commissions.

Defendants argue that the filing period of RSA 49-B:4 does not apply because it is a modifier for RSA 669:19, which applies only to towns. However, Defendants' argument is inconsistent with the plain language of the statute. The second sentence of RSA 49-B:4, I(b) specifically mentions a "city or town clerk." The statute's plain language contemplates application to a city such as Manchester. Moreover, the legislature's specific reference to RSA 49-B:4 in its establishment of the Manchester School District Charter Commission shows that, by its plain language, RSA 49-B:4 in its entirety would apply to, at the very least, the election of candidates to the Commission. The statute's language itself does not permit the conclusion Defendants desire. There is simply no language in the statute supporting the Defendant's view that the first two sentences of this section apply to cities but the third sentence does not. Moreover, the three sentences in this section work together by spelling out how members of the commission shall be elected. Carving out one sentence in the manner suggested by Defendant is inconsistent with the structure of the statute and that inconsistency further counsels against Defendant's strained interpretation.

Defendants argue that this creates a nonsensical result because, since the filing period of RSA 669:19 is what RSA 49-B:4 is modifying, and RSA 669:19 only applies to towns, application of the filing period applied only to towns would disrupt the primary election system of the City of Manchester. However, the election for seats on the Commission does not have (nor does the statute provide for) a primary election. The Court is not persuaded that applying the filing period of RSA 49-B:4 would create problems with the primary election simply because election to the Commission does not

involve a primary. Moreover, to the extent that it would disrupt the primary election system, it is a disruption caused by the legislature's plain language of the statute.

The Court further finds that Plaintiff has demonstrated all three factors necessary for injunctive relief. Plaintiff has alleged statutory and constitutional violations by Defendants that burdens his fundamental right to be elected—which, subsequently, affects the rights of voters. *See* N.H. CONST. pt. I, art. 11 ("Every inhabitant of the state, having the proper qualifications, has an equal right to be elected into office."); *Akins*, 154 N.H. at 71. Plaintiff's right to participate in the election was likely violated when the city clerk's office turned him away by communicating incorrect information on October 7, 2019, and when the attorney general's office also refused Plaintiff a spot on the ballot by not reopening the candidate filing period. As these actions directly contradict RSA 49-B:4, Plaintiff has demonstrated a likelihood of success on the merits.

He has also demonstrated an immediate danger of irreparable harm to himself because the failure of Defendants to include Plaintiff on the ballot violates Plaintiff's already-described rights to participate in an election. Once the election happens, Plaintiff's opportunity to be on the ballot is lost. Denying the injunction would only maintain the status quo and further deny Plaintiff his rights. Moreover, due to the election happening in a matter of days, there is no remedy at law that would adequately address the violation of Plaintiff's election rights and give him the chance to be on the ballot.

The Court recognizes the legislature's intent for the Commission to be elected in accordance with the November 2019 election. Defendants also argue that the filing period described in RSA 49-B:4 is impossible to comply with because there is a twenty-

one-day process that must be followed when printing official ballots. While this filing period does interfere with the twenty-one-day process, the statute is clear on its face that the filing period will occur in October. To the extent that the statute creates an incompatibility with the ballot approval process, it is a problem for the legislature to resolve.

III. Relief

In granting this injunction, the Court has considered the impact on the public interest and the possibility of substantial harm to others. *See UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 13-14 (1987). While granting the injunction (and any subsequent delay of the election that may follow) may cause last-minute confusion and lower turnout at the polls at any rescheduled election, "the public interest will be served by placing on the ballot the name of a candidate who meets the qualifications both for nomination and for holding office." *Payne v. Fawkes*, No. 2014-053, 2014-055, 2014 WL 4499559, at *9 (D.V.I. Sept. 12, 2014). The Court is mindful of the well-accepted "democracy canon," which states that "[a]ll election statutes should be liberally interpreted in favor of the right to vote according to one's belief or free choice." *Wilson v. Kennedy*, 86 N.E.2d 722, 726 (Ohio 1949); *see also Schneller v. Town of Bedford*, Hillsborough Cnty. Super. Ct. (Northern District), No. 216-2017-CV-00196 (March 14, 2017) (Order, Kissinger, J.) (citing democracy canon). Because Plaintiff's right to be a candidate in the election is so closely related to the right to vote, denying Plaintiff the opportunity to be on the ballot impacts the right to vote of the citizens of Manchester to their detriment.

In order to provide Plaintiff with his clear right to register for the election and finding that Plaintiff is entitled to injunctive relief, the Court finds that the best available remedy is to place Plaintiff's name on the ballot. *See Sickman v. Commc'ns Workers*, Local 13000, No. 99-5582, 1999 WL 1045145, at *7 (E.D. Pa. Nov. 16, 1999). If Defendants cannot accomplish this directive in time for Tuesday's election, they must postpone and reschedule the election.[2]

SO ORDERED.

November 4, 2019
Date

Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 11/04/2019

[2] Defendants argued at the hearing that this outcome would unfairly affect the candidates who filed in July (properly, Defendants claimed) and deny those candidates their due process rights and right to be elected because they were not present at the hearing. However, this order does not suggest those candidates need to refile for candidacy or that those candidates need to be removed from the ballot (even though those candidates filed under the incorrect period). This order only directs Defendants to add Plaintiff to the ballot already in existence.