

STATE OF INDIANA) IN THE MONROE CIRCUIT COURT
)SS:
COUNTY OF MONROE) Case Number: 53C04-2006-MI-000958

ANDREW GUENTHER, individually)
and in his capacity as appointed member of the)
Bloomington Plan Commission,)

And)

WILLIAM ELLIS, in his capacity as Chairman)
of the Monroe County Indiana Republican Party)

Petitioners,)

v.)

CITY OF BLOOMINGTON, INDIANA)

JOHN HAMILTON, in his official capacity)
as Mayor for the City of Bloomington, Indiana,)

And)

CHRISTOPHER COCKERHAM, in his)
capacity of contested member of the Bloomington)
Plan Commission,)

Respondents.)

DEFENDANTS' MEMORANDUM IN SUPPORT OF
FIRST MOTION TO DISMISS

Respondents City of Bloomington, Indiana, John Hamilton, and Christopher Cockerham, by counsel, file their memorandum in support of their first motion to dismiss Petitioner's June 9, 2020 *Verified Complaint for Writ of Quo Warranto*.

Petitioners do not have legal standing to file their petition seeking to strike down City of Bloomington Mayor John Hamilton's appointment of Respondent Christopher Cockerham to the City of Bloomington Plan Commission seat formerly occupied by Nick Kappas. This Court must therefore dismiss Petitioners' Complaint pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure.

I. Governing Law

A motion under Trial Rule 12(B)(6) tests the legal sufficiency of a claim rather than the facts supporting that claim. *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306 (Ind. 2012); *Meyers v. Meyers*, 861 N.E.2d 704, 705 (Ind. 2007). A trial court must grant a motion to dismiss under Trial Rule 12(B)(6) if the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. *McPeck v. McCardle*, 888 N.E.2d 171 (Ind. 2008). In determining whether the facts alleged in the complaint are incapable of supporting relief, “the court must look only to the complaint and may not resort to any other evidence in the record.” *Dawson v. Newman*, 845 N.E.2d 1076, 1080 (Ind. Ct. App. 2006), *trans. denied*. When ruling on a motion to dismiss under Trial Rule 12(B)(6), the court should consider all of the allegations in the complaint to be true and resolve all inferences in favor of the non-moving party. *Allen*, 980 N.E.2d at 308; *State v. American Family Voices, Inc.*, 898 N.E.2d 293, 295–96 (Ind. 2008).

Where a party lacks standing to pursue a claim, dismissal under Trial Rule 12(B)(6) is appropriate. *In re Paternity of G.W.*, 983 N.E.2d 1193, 1196 (Ind. Ct. App. 2013); *Long v. Biomet, Inc.*, 901 N.E.2d 37, 40 (Ind. Ct. App. 2009); *R.J.S. v. Stockton*, 886 N.E.2d 611, 614 (Ind. Ct. App. 2008). Standing is defined in Indiana as having a “sufficient stake in an otherwise justiciable controversy.” *Ind. Civil Rights Comm’n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 945 (Ind. 1999). The purpose of the standing requirement is to ensure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. *Pence v. State*, 652 N.E.2d 486, 487 (Ind. 1995). Standing is “a significant restraint on the ability of Indiana courts to act, as it denies the courts any jurisdiction absent an actual injured party participating in the case.” *Id.* at 488; *see also Garau Germano, P.C.*

v. Robertson, 133 N.E.3d 161, 170 (Ind. Ct. App. 2019), *reh'g denied* (Oct. 17, 2019), *trans. denied* (Ind. Feb. 13, 2020).

Indiana law expressly limits the parties with standing to bring an information of *quo warranto*. Indiana Code, Section 34-17-2-1, the statute under which Petitioners bring their Complaint, states:

An information described in IC 34-17-1-1 may be filed:

(1) by the prosecuting attorney in the circuit court, superior court, or probate court of the proper county, upon the prosecuting attorney's own relation, whenever the prosecuting attorney:

(A) determines it to be the prosecuting attorney's duty to do so; or

(B) is directed by the court or other competent authority; or

(2) by any other person on the person's own relation, whenever the person claims an interest in the office, franchise, or corporation that is the subject of the information.

Indiana law is well settled that “a private person may bring a *quo warranto* only if he claims an interest on his own relation or a special interest beyond that of a taxpayer.” *City of Gary v. Johnson*, 621 N.E.2d 650, 652 (Ind. Ct. App. 1993); *See also Hovanec v. Diaz*, 272 Ind. 342, 343, 397 N.E.2d 1249, 1250 (1979) (“Although a private person may pursue a *quo warranto* action, he must demonstrate a personal interest distinct from that of the general public.)

II. Argument

Considering all of the allegations in the Complaint to be true and resolving all inferences in favor of the non-moving party, the facts alleged in the Complaint are incapable of supporting relief for Petitioners. Neither Guenther nor Ellis has any right or title to the office at issue in their Complaint and they therefore lack standing to bring an action in *quo warranto*.

Petitioners claim that Ellis, as the Republican Party Chair, was entitled to appoint Guenther to replace Nick Kappas on the City of Bloomington Plan Commission under Indiana Code, Section 36-1-8-10(d) which states:

(d) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, both of the following apply:

(1) The member may continue to serve on the board for only ninety (90) days after the expiration date of the member's term.

(2) The county chair of the political party of the member whose term has expired shall make the appointment.

Indiana Code, Section 36-7-4-207(a) and Bloomington Municipal Code (BMC), Section 2.13.010 govern the appointment of the members of the City of Bloomington Plan Commission. BMC Section 2.13.010 provides in relevant part:

The commission shall consist of twelve members who by statute shall be appointed in the following manner:

...

(5) Five citizens, no more than three of whom may be of the same political party, appointed by the mayor.

Assuming the factual allegations contained in the complaint to be true, the vacant seat on the City of Bloomington Plan Commission to which Ellis sought to appoint Guenther was held by Nick Kappas. Compl. ¶ 17. Kappas' seat was one of the five seats which are appointed by the Mayor. Compl. ¶ 17. Kappas's term expired on December 31, 2019. Compl. ¶ 19. Kappas was not a Republican, and did not have a party affiliation and/or designation. Compl. ¶ 20, 44. Mayor Hamilton failed to appoint a replacement member to fill Kappas's seat within 90 days of December 31, 2019. Compl. ¶ 24. On April 16, 2020, after the expiration of 90 days, Ellis, the Republican Party Chair in Monroe County, Indiana, announced his appointment of Guenther to fill Nick Kappas's seat on the City of Bloomington Plan Commission. Compl. ¶ 45, 46.

Petitioner Guenther claims standing to bring his claims in the Complaint in *quo warranto* under subpart (a)(2) of Indiana Code, Section 34-17-2-1, claiming an interest in the office in his own relation as being appointed by Petitioner Ellis, the Monroe County Republican Party Chair. Compl. ¶ 9. Petitioner Ellis does not plead or allege any personal

interest in the office in his own relation. Petitioners both assume that Indiana law allowed Ellis to appoint Guenther because, although the member whose four-year term had expired was not a Republican (Compl. ¶ 20, 44), his predecessor was a Republican. Compl. ¶ 47.

Contrary to their unsupported legal assumption, Petitioners' claim of Ellis's entitlement to appoint Guenther is contrary to Indiana law. Indiana Code, Section 36-1-8-10(d) provides only that "[t]he county chair of the political party of the member whose term has expired shall make the appointment." Whatever Nick Kappas's party affiliation was, it is factually undisputed that he was not a Republican. Petitioners, without any basis in law, argue that Kappas's seat must default back to a Republican appointment because his predecessor was a Republican. Indiana Code, Section 36-1-8-10 does not contain any provision granting appointment authority to the predecessor party of the departing member when the departing member claims no party affiliation.

Petitioners, through their Complaint, seek to add language to Indiana Code, Section 36-1-8-10 which the Indiana Legislature did not see fit to write. "It is not a proper function of this court to ignore the clear language of a statute and, in effect, rewrite the statute in order to render it consistent with a particular view of sound public policy." *T.B. v. Indiana Dep't of Child Servs.*, 971 N.E.2d 104, 110 (Ind. Ct. App. 2012); *See also Robinson v. Monroe Cnty.*, 663 N.E.2d 196 (Ind.Ct.App.1996) (concluding that court could not ignore unambiguous language of statute's exemption of particular class of individuals from abiding by certain safety requirement regardless of court's view as to the wisdom of the exemption).

Petitioners' interpretation of Indiana Law is contrary to Indiana Code, Section 36-7-4-207(a) and BMC Section 2.13.010, and it disregards the recognition of political affiliations in the State of Indiana other than Democrat or Republican. Indiana Code, Section 36-7-4-207(a) and BMC section 2.13.010 require that no more than three of the Mayor's five

appointments may be of the same political party. It does not require that the appointees only be Democrats or Republicans. Under the plain reading of the Indiana Code and BMC, the Mayor may appoint anyone he wants, so long as no more than three of the members are of the same political party.

Contrary to what Petitioners imply, there are more than two political parties in Indiana. Additionally, many individuals hold office without a political affiliation. The Indiana Code and BMC anticipate that appointees may be from parties other than Democrat and Republican. Neither Indiana Code, Section 36-7-4-207(a) nor BMC Section 2.13.010 require party affiliation, they only limit the maximum number of members of a single political party. Petitioners' interpretation of the law would ignore the plain language of the Indiana Code and BMC and render Indiana's recognition of numerous political affiliations meaningless.

Regardless, the question of whether Kappas may have been a member of any other political party is not relevant for this Court's purpose of determining whether these specific Petitioners in this case have legal standing. Because Kappas was unquestionably not a Republican, Ellis, the Chair of the Republican Party of Monroe County, did not have lawful authority to appoint Guenther to the City of Bloomington Plan Commission under Indiana Code, Section 36-1-8-10(d). Because Ellis did not have lawful authority to appoint Guenther to the City of Bloomington Plan Commission, Guenther was not entitled to appointment and his appointment is a legal nullity. Guenther has not suffered any actual injury, he does not have any substantive right to enforce the claim that is being made in the litigation, and he therefore lacks standing. *See Hovanec*, 397 N.E.2d at 1249; *Pence*, 652 N.E.2d at 488. Additionally, Ellis failed to allege any facts that he has any interest in the office in his personal relation as required by Indiana Code, Section 34-17-2-1, and he also lacks standing to bring the claims in the Complaint for this reason.

III. Conclusion

The facts alleged by Petitioners in their Complaint are incapable of supporting relief for Petitioners as neither Ellis nor Guenther have legal standing to bring the claims in the Complaint. This Court must therefore dismiss Petitioners' Complaint pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS) and the foregoing document was served upon the following parties or their attorneys of record via IEFS:

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