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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

LIBERTARIAN PARTY OF SOUTH DAKOTA; BRIAN LEROHL; and BOB NEWLAND, Plaintiffs, vs. JOYCE HAZELTINE, Secretary of State of the State of South Dakota. Defendant.	)	CIV. 00-3021 MEMORANDUM OPINION AND ORDER 2000 DSD 33

PROCEDURAL HISTORY

[¶1] On May 4, 2000, the Libertarian Party of South Dakota, Brian Lerohl and Bob Newland ("Libertarian Party") filed a complaint pursuant to 42 U.S.C. § 1983. The Libertarian Party alleges that the South Dakota Secretary of State ("the Secretary") misinterpreted South Dakota election law when she denied Brian Lerohl access to the primary election ballot pursuant to SDCL 12-5-1.4. In the alternative, plaintiffs argue that SDCL 12-4-1.4 is unconstitutional.

[¶2] On June 14, 2000, the Libertarian Party filed a motion for summary judgment requesting both declaratory and injunctive relief. On June 16, 2000, the Secretary moved this Court to certify to the South Dakota Supreme Court the question of whether the Secretary improperly construed SDCL 12-5-1.4. The Secretary has also filed a motion for summary judgment. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

FACTS

[¶3] The following facts are undisputed. The Libertarian Party became a registered political party in South Dakota in 1991. It ran candidates under the Libertarian Party name in the 1992, 1994, 1996, and 1998 general elections. In the 1994 gubernatorial election its party candidate

garnered 4.12 percent of the total vote for governor. By 1998, however, the Libertarian Party candidate for governor received only 1.69 percent of the total vote for governor and thereby ceased to meet the definition of "political party" as outlined in SDCL 12-1-3.[1] Though no longer a "political party" be definition, the Libertarian Party was still deemed to be a "political action committee" in accordance with SDCL 12-25-1.[2]

[¶4] Wishing to run candidates in the 2000 election, the Libertarian Party timely filed with the Secretary a declaration of new party in accordance with SDCL 12-5-1,[3] signed by at least 2.5 percent of the voters of the state as shown by the total vote cast for Governor at the last preceding gubernatorial election. The Secretary accepted the petition and recognized the Libertarian Party as a properly registered "new party."

[¶5] Despite being called a "new party" pursuant to statute, it is undisputed that the Libertarian party that ran candidates throughout the 1990s, is the same Libertarian Party that fell to the status of a political action committee after the 1998 election, and then re-registered for

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[1]SDCL 12-1-3(10) defines "political party" as " a party whose candidate for Governor at the last preceding general election at which the Governor was elected received at least two and one-half percent of the total votes cast for Governor."

[2]SDCL 12-25-1(8) defines a "political action committee" as "any two or more people who cooperate for the purpose of raising, collecting or disbursing money to influence the outcome of an election and who are not candidates for nomination, candidates for election, a political party or a candidate's committee."

[3]SDCL 12-5-1 provides:

> **Organization of new party — Filing and contents of declaration — Number of signatures required.** A new political party may be organized and participate in the primary election by filing with the secretary of state not later than the first Tuesday of April at five o'clock p.m. prior to the date of the primary election, a written declaration signed by at least two and one-half percent of the voters of the state as shown by the total vote cast for Governor at the last preceding gubernatorial election, which declaration shall contain:
>
> (1) The name of the proposed party; and
>
> (2) A brief statement of the principles thereof;
>
> whereupon the party shall, under the party name chosen, have all the rights of a political party whose ticket was on the ballot at the preceding general election.

purposes of the 2000 election. The current South Dakota Libertarian Party remains affiliated with the Libertarian National Committee, it maintains the same bylaws and party platform as adopted in 1995, and with the exception of one individual, its party central committee is still comprised of the same people who where on the committee prior in 1998. In addition, the Libertarian Party's post office address has remained the same since 1998, and no individual identified as a registered Libertarian voter has been required to re-register party affiliation. There are currently 968 registered members of the Libertarian Party in South Dakota.

[¶6] On April 4, 2000, registered Libertarian Brian Lerohl ("Lerohl") submitted his nominating petition for the office of United States Congressmen in the Office of the Secretary of State as provided by 12-6-4.[4] The nominating petition bore what purported to be the signatures of 109 registered Libertarian voters.[5] In a letter dated April 5, 2000, the Secretary rejected Lerohl's petition on the grounds that SDCL 12-5-1.4 mandates that candidates of a "new party" file a petition containing the signatures of 250 registered party members in order to have that candidate's name placed on the ballot. This suit followed.

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[4]SDCL 12-6-4 provides:

> **Petition required to place candidate's name on primary ballot — Place of filing.** Except as provided by § 12-5-4 and as may be otherwise provided in chapter 12-9, no candidate for any office to be filled, or nomination to be made, at the primary election, other than a presidential election, may have that person's name printed upon the official primary election ballot of that person's party, unless a petition has been filed on that person's behalf not prior to January twentieth, at eight a.m., and not later than the first Tuesday of April at five p.m. prior to the date of the primary election. If the petition is mailed by registered mail by the first Tuesday of April at five p.m. prior to the primary election, it shall be considered filed. A nominating petition for national convention delegates and alternates as provided in § 12-5-3.11 shall be filed in the office of the county auditor of the county in which the person is a candidate. Nominating petitions for legislative and judicial office whether elected in one or more counties, and all other party and public offices to be voted on in more than one county shall be filed in the Office of the Secretary of State.

[5]While 109 signatures were on the nominating petition, the Libertarian Party admits that 30 of the signatures were persons not actually registered with the Libertarian Party. See Plaintiffs' Brief in Support of Summary Judgment ("Plaintiffs' Brief") at 3-4.

SUMMARY JUDGMENT STANDARD

[¶7] Under Rule 56(c) of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the movant can "show that there is no genuine issue as to any material fact and that [the movant] is entitled to judgment as a matter of law." In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.

[¶8] In determining whether a genuine issue of material fact exists, the Court views the evidence presented based upon which party has the burden of proof under the underlying substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). The Supreme Court has instructed that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," and "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 106 S. Ct. at 1356.

[¶9] The teaching of Matsushita was further articulated by the Supreme Court in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 2083 (1992)

where the Court said, "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." The Court expounded on this notion by reiterating its conclusion in Anderson that, "[s]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Eastman Kodak, 504 U.S. at 468 n.14, 112 S. Ct. at 2083 n.14 (quoting Anderson, 477 U.S. at 248, 106 S. Ct. at 2510). To survive summary judgment there must be evidence that "reasonably tends to prove" the plaintiff's theory; defendant meets the burden under Fed. R. Civ. P. 56(c) when it is conclusively shown that the facts upon which the nonmoving party relied to support the allegations were not susceptible of the interpretation which was sought to give them; only reasonable inferences can be drawn from the evidence in favor of the nonmoving party. Id. (citations omitted).

DISCUSSION

[¶10] **Motion to Certify**

[¶11] Before the Court can proceed to the merits of this action, it must first address the Secretary's motion to certify. The Secretary argues that because the question of whether the Secretary improperly construed SDCL 12-5-1.4 is "quintessentially one of state law," this Court must certify the question to the South Dakota Supreme Court.

[¶12] The question of certification is committed to the sound discretion of district courts. See Allstate Ins. Co. v. Steele, 74 F.3d 878, 881-82 (8th Cir. 1996) (citing Lehman Bros. v. Schein, 416 U.S. 386, 94 S. Ct. 1741, 1744, 40 L. Ed. 2d 215 (1974)). While the Court agrees that the construction and interpretation of SDCL 12-5-1.4 is one of state law, the action of the Secretary implicates a federal fundamental constitutional right. The Fourteenth Amendment to the United States Constitution provides in part that "no state shall deny to any person within its jurisdiction the equal protection of the laws." So also the right to vote is a First Amendment right. This Court is therefore unpersuaded that certification is the proper course of action.

[¶13] The concerns raised by the Libertarian Party primarily center around their ability to obtain access to the ballot. It is well settled that limitations on ballot access often burden two fundamental rights, that is, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. 5, 10, 21 L. Ed. 2d 24 (1968); see also McLain v. Meier, 637 F.2d 1159, 1163 (8th Cir. 1980). Furthermore, these fundamental rights are implicated most clearly where minor-party access to the ballot is restricted. See Munro v. Socialist Workers Party, 479 U.S. 189, 107 S. Ct. 533, 540, 93 L. Ed. 2d 499 (1986) (Marshall, J., dissenting) (citing Illinois Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230 (1979)).

[¶14] Because ballots for the 2000 general election will be printed sometime in late August, the delay occasioned by certifying this issue to the South Dakota Supreme Court is likely to foreclose Lerohl's access to the ballot for this election, regardless of whether the Supreme Court later returns an answer in his favor. In view of the fundamental rights presented, and the limited time frame afforded for resolution, this Court concludes that certification is inappropriate in this case. The Secretary's motion to certify will be denied.

[¶15] **Signature Requirement**

[¶16] Turning to the merits, this Court must examine whether or not the Secretary correctly applied SDCL 12-5-1.4 when she rejected Lerohl's nominating petition. SDCL 12-5-1.4 provides:

> **Nominating petitions of new party primary candidates.** If a political party qualifies for the primary ballot under § 12-5-1, candidates intending to participate in the primary election the first year of qualification shall file nominating petitions pursuant to § 12-6-4. ***However, if no voting history exists to determine the number of signatures required, state or federal candidates shall file petitions bearing signatures of at least two hundred fifty registered voters in the new party***, legislative candidates shall file petitions bearing signatures of at least five registered voters in the new party. (Emphasis added).

[¶17] In rejecting Lerohl's petition to run as the Libertarian Party's candidate for Congress, the Secretary argues that SDCL 12-5-1.4 requires all "new party" candidates for federal office to supply nominating petitions bearing the signatures of no less than 250 registered voters of the new party. In contrast, the Libertarian Party suggest that because it has participated in past elections, specifically the 1998 election for governor, it has the "voting history" described in SDCL 12-5-1.4, and therefore the number of signatures required should be based upon this "voting history" as provided in SDCL 12-6-7, which states:

> **Petition composed of several sheets — number of signers required.** A nominating petition may be composed of several sheets, which shall have identical headings printed at the head thereof. The petition for party office or political public office ***shall be signed by not less than one percent of the voters who cast their vote for the party's gubernatorial candidate at the last gubernatorial election*** in the county, party of the county, district, or state electing a candidate to fill the office. (Emphasis added).

In 1998, the Libertarian Party's candidate for governor received 4,389 votes. Because "one percent" of 4,389 is 44, the Libertarian Party argues that Lerohl's petition need contain 44 signatures pursuant to SDCL 12-5-1.4 and 12-6-7. Lerohl's petition contained 109 signatures, and they contend that it therefore should have been accepted by the Secretary. Because this Court concludes that the Libertarian Party's interpretation reflects the plain meaning of the statute, its requested relief shall be granted.

[¶18] The South Dakota Supreme Court has stated, "when the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." Martinmaas v. Engelmann, Nos. 20953-20955-A-RAM, 2000 WL 854332, at *9 (S.D. June 28, 2000) (citing Moss v. Guttormson, 551 N.W.2d 14, 17 (S.D. 1996) (citations omitted)).

[¶19] The plain meaning of SDCL 12-5-1.4 provides that where a candidate represents a wholly new political party, that is one without a voting history, that candidate must present a nominating

petition containing the signatures of 250 registered new party members. However, if the new party has a "voting history" the signature requirement is determined on the basis of this history. In this instance, one looks to the party's participation at the last gubernatorial election as the basis for the number of signers required as outlined in SDCL 12-6-7.

[¶20] In crafting SDCL 12-5-1.4, the South Dakota legislature seems to have anticipated that a political party once duly registered, could cease to garner the requisite votes required to continue to meet the statutory definition of "political party" under SDCL 12-1-3(10), and thereby fall to the status of a "political action committee" pursuant to SDCL 12-25-1(8). Because South Dakota election law does not contain a separate procedure through which a party in this position may ***re-register*** as a political party for purposes of future elections, such a party must instead register as a "new party" pursuant to SDCL 12-5-1 — in spite of the possibility that the party may have a long standing history of participation in previous elections. This is exactly the situation posited by this case.

[¶21] The Secretary argues that because the Libertarian Party registered as a "new party" on March 23, 2000, they cannot possibly have a "voting history" to determine the number of signatures required. The Court is unpersuaded.

[¶22] The Secretary's interpretation of SDCL 12-5-1.4 ignores the fact that it was the South Dakota legislature that placed within the nominating requirements for a new party candidate a clause acknowledging that a political party, though newly registered, could indeed have a voting history on which to base a signature requirement. The caption of SDCL 12-5-1.4 reads: "**Nominating petitions of new party primary candidates.**" The statue then goes on to provide the procedure through which a candidate of that new party can have his name placed on the ballot. This procedure distinguishes between those new parties that have a "voting history" and those new parties that do not have a "voting history." Hence, if the party has not participated in

the past gubernatorial election, and is thus without a "voting history," a candidate seeking to be placed upon the ballot on behalf of this party must present a petition bearing the signatures of 250 registered voters of the new party. Such a requirement is constitutionally permitted because states have an interest in assuring that candidates have shown a modicum of support amongst the electorate prior to being placed on the ballot. See Munro, 479 U.S. 189, 107 S. Ct. at 536.

[¶23] Where a party has participated in the last gubernatorial election, however, it is deemed to have a "voting history," and may present a petition bearing the signatures of not less than one percent of the voters who cast their vote for the party's gubernatorial candidate at the last gubernatorial election in conformance with SDCL 12-6-7. In this instance, the statute may require less than 250 signatures, but this serves to provide recognition to a political party and its candidates that have a history of participating in past gubernatorial elections, while still requiring candidates to present a threshold showing of support.

[¶24] In addition to contravening the plain meaning of the statute, the Secretary's interpretation of 12-5-1.4 would run afoul of several fundamental rules of statutory construction. Foremost of these is the rule that "the legislature does not intend to insert surplusage in its enactments." Steinberg v. South Dakota Dep't. of Miltary & Veterans Affairs, 607 N.W.2d 596, 601 (S.D. 2000) (citing National Farmers v. Universal, 534 N.W.2d 63, 65 (S.D.1995); Revier v. School Bd. of Sioux Falls, 300 N.W.2d 55, 57 (S.D. 1980)). In this case, the statute does not merely provide that "state or federal candidates shall file petitions bearing signatures of at least two hundred fifty registered voters in the new party . . . ." Rather, the requirement of 250 signatures is preceded by the phrase: "however, if no voting history exists to determine the number of signatures required . . . ." In order for this Court to endorse a blanket nominating requirement of 250 signatures, it would have to treat the above quoted phrase as surplusage. This is not permitted.

[¶25] Furthermore, the intent of a statute is determined from what the legislature said, rather than what this Court or the Secretary thinks it ***should have*** said, and the Court must confine itself to the language used. See South Dakota SIF v. CRE, 589 N.W.2d 206, 209 (quoting Delano v. Petteys, 520 N.W.2d 606, 608 (S.D. 1994)). In this case the statute is clear and requires no more than a review of its own terms to discern the intent of the legislature. As has often been stated by the South Dakota Supreme Court, "we assume statutes mean what they say and that the legislature meant what it said." Aman v. Edmunds Cent. Sch. Dist. No. 22-5, 494 N.W.2d 198, 199 (S.D. 1992) (citing In re Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D. 1984); Crescent Elec. Supply Co. v. Nerison, 89 S.D. 203, 210, 232 N.W.2d 76, 80 (1975)). This Court can conclude no less.

[¶26] Finally, it is suggested by the Secretary that Lerohl may secure a name on the ballot by registering as an independent candidate. However, "a candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process." McLain v. Meier, 637 F.2d 1159, 1165 (8th Cir. 1980). "[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Storer v. Brown, 415 U.S. 724, 94 S. Ct. 1274, 1286, 39 L. Ed. 2d 714 (1974).

[¶27] **Injunctive Relief**

[¶28] Plaintiffs request this Court to provide injunctive relief. The requisite elements for an injunction are outlined in the case of Dataphase Systems, Inc. v. C.L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc). Although the Dataphase case actually dealt with the issuance of a preliminary injunction, the elements for granting a permanent injunction are essentially the same as for a preliminary injunction, except that to obtain a *permanent* injunction the movant must attain success on the merits. See Bank One v. Guttau, 190 F.3d 844, 847 (8th Cir. 1999); see also

Randolph v. Rodgers, 170 F.3d 850, 857 (8th Cir. 1999); Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998); Fogie v. THORN Americas, Inc., 95 F.3d 645, 654 (8th Cir. 1996). Accordingly, the factors are as follows:

(1) Whether the moving party will suffer irreparable injury absent the injunction;

(2) the harm to other interested parties if the relief is granted; and

(3) the effect on the public interest.

This Court concludes that these elements are met in this case. Plaintiffs are entitled to injunctive relief.

[¶29] First, without an injunction, Lerohl will be unable to participate in the 2000 election as a candidate for Congress. This despite the fact that he did provide 79 valid signatures in conformance with the requirement for a new party with a voting history as outlined in 12-6-7 (under 12-6-7, the one percent requirement would have been met with 44 signatures). As noted above, such a denial impinges upon several fundamental rights, including the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. There is no doubt that this injury, if permitted, would be irreparable.

[¶30] Second, the harm occasioned by granting an injunction in this case is minimal. In the short run, the Secretary need only place the name of Brian Lerohl on the ballot. In the long run, only those "new" political parties *that have a voting history* will by permitted to nominate candidates based upon the one percent voting figure pronounced in 12-6-7; all other new political parties will continue to be subject to the 250 signature requirement. It is telling that since the passage of 12-5-1.4, only the Libertarian Party has established itself as a "new political party" with the "voting history" described in 12-5-1.4. Hence, it cannot be said that this Court's pronouncement of the plain meaning of 12-5-1.4 will result in a host of frivolous candidates

being placed upon the ballot in the future. Furthermore, were this concern to materialize, the South Dakota legislature is free to amend the statute.

[¶31] Finally, the effect of granting this injunction only serves to *promote* the public's interest by encouraging individuals to associate for the advancement of their political beliefs. The United States Supreme Court has stated:

> The freedom to associate as a political party, a right we have recognized as fundamental, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because absent recourse to referendums, voters can assert their preferences only through candidates or parties or both. By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230 (1979) (citations omitted).

CONCLUSION

[¶32] Based upon the foregoing, it is hereby

[¶33] ORDERED that the Secretary's motion to certify (Docket #11) is denied.

[¶34] IT IS FURTHER ORDERED that the Secretary's motion for summary judgment (Docket #17) is denied.

[¶35] IT IS FURTHER ORDERED that the Libertarian Party, Brian Lerohl, and Bob Newland's motion for summary judgment (Docket #8) is granted. Judgment shall issue granting declaratory relief and requiring the defendant, Secretary of State Joyce Hazeltine, to place the name of Brian Lerohl on the ballot as a candidate for United States Congress.

[¶36] IT IS FURTHER ORDERED that the Secretary is hereby enjoined from enforcing the provisions of SDCL 12-5-1.4 in a manner not consistent with the plain meaning of this statute as previously outlined by this Court.

[¶37] IT IS FURTHER ORDERED that plaintiffs shall be awarded appropriate attorney's fees to be submitted on motion under oath. The Secretary shall be permitted to respond within twenty days. Thereafter, plaintiffs shall have ten days to reply.

Dated this 8th day of August, 2000.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE