

IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY		
CITY OF BETTENDORF, IOWA,	)	
	)	Case No. 115801
Petitioner,	)	
	)	
vs.	)	BRIEF IN SUPPORT OF
	)	RESPONDENTS' MOTION
FOR		
SCOTT COUNTY AUDITOR	)	SUMMARY JUDGMENT and
ROXANNA MORITZ and SCOTT	)	REPLY BRIEF TO
PETITIONER'S		
COUNTY, IOWA,	)	MOTION FOR SUMMARY
	)	JUDGMENT
Respondents.	)	

COMES now Respondents Scott County Auditor Roxanna Moritz and Scott County, Iowa, by and through their attorney, Robert L. Cusack, Assistant Scott County Attorney, and in support of their motion and in reply to Petitioner's motion, state as follows:

**FACTUAL BACKGROUND**

Respondents Scott County Auditor Roxanna Moritz and Scott County, Iowa, (hereinafter "the County" or "Moritz") and Petitioner City of Bettendorf, Iowa, (hereinafter "Bettendorf") agree that there are no substantial facts at issue in this case. As set forth in the Petition, Bettendorf has an elected Park Board, whose members are elected for a term of four years. In January, 2010, a vacancy occurred in the Park Board when Park Board Commissioner Greg Adamson took a seat on the Bettendorf City Council, having been elected in November, 2009. The term of office for this Park Board position would have ended December 31, 2011, with an election held in November, 2011. The Bettendorf City Council filled the vacant Park Board position by appointing Mr. Frank Baden to that position in early 2010.

In a letter dated March 5, 2010, Scott County Auditor and Commissioner of Elections Roxanna Moritz set forth her opinion, along with that of the Iowa Secretary of State, that city appointees filling a vacancy in an elected city office should stand for election in the 2010 general election rather than waiting for the city election in 2011. See letter attached as Exhibit "A". This opinion is based upon an interpretation of Iowa Code §69.12. Under this interpretation, Mr. Baden would be required to stand for election in 2010.<sup>[1]</sup> Bettendorf disagrees with this interpretation of §69.12 and has filed a Petition requesting a declaratory judgment to settle the issue. The County is also requesting that this Court interpret Iowa Code §69.12.<sup>[2]</sup>

**LEGAL ISSUE PRESENTED**

**Whether Park Board Commissioner Frank Baden is required to stand for election at the next general election (to be held in November, 2010) or at the next city election (to be held in November, 2011)?**

**ARGUMENT**

This is a case of first impression in the State of Iowa. The County agrees that Bettendorf properly appointed Mr. Baden pursuant to Iowa Code §372.13. The question becomes how long that appointment lasts. Iowa Code §372.13(2)(a) provides that the "appointment shall be for the period until the next pending election as defined in section 69.12 . . . ." Iowa Code §69.12 reads:

“When a vacancy occurs in any non partisan elective office of a political subdivision of this state, and the statutes governing the office in which the vacancy occurs require that it be filled by election or are silent as to the method of filling the vacancy, it shall be filled pursuant to this section. As used in this section, “pending election” means any election at which there will be on the ballot either the office in which the vacancy exists, or any other office to be filled or any public question to be decided by the voters of the same political subdivision in which the vacancy exists.”

Iowa Code §69.12.

Therefore, Mr. Baden’s appointment to the Bettendorf Park Board lasts until the following occurs:

(there is) any election at which there will be on the ballot either;

1. the office in which the vacancy exists,
2. or any other office to be filled
3. or any public question to be decided

by the voters of the same political subdivision in which the vacancy exists.

**In the instant case, the 2010 general election is the next “pending election.”**

The undersigned actually follows with most of counsel for Bettendorf’s parsing of §69.12. For instance, it is agreed that the phrase “any other office” is modified by the phrase “by the voters of the same political subdivision in which the vacancy exists”. Bettendorf’s example that a LeClaire mayoral election should not trigger a Bettendorf Park Board election certainly makes sense and the County is not advocating otherwise. Further, it is agreed that “next pending election” does not encompass *all* elections. For instance, Iowa Attorney General Opinion 75-2-2, cited by Bettendorf, does present the possibility that a city vacancy should not be filled at a school board election – the cited opinion does not provide enough information to determine whether or not the school district encompassed all of the voters for the city vacancy.

The difference in the parties’ interpretation of §69.12 is simply this: does “any other office to be filled by the voters of Bettendorf” mean an office that *only* citizens of Bettendorf vote for or does it mean an office that the citizens of Bettendorf *also* vote for.<sup>[3]</sup> If the answer is *only* citizens of Bettendorf, then Bettendorf’s interpretation is correct and Mr. Baden should not stand for election until 2011. If the answer is *also* by the citizens of Bettendorf, then Moritz’s interpretation is correct and Mr. Baden should stand for election in 2010.

The first, unnumbered paragraph of §69.12 may not clearly answer the above question. However, the paragraph does not distinguish between general and city elections. Clearly the legislature could have done so had it wanted. It is also clear that the legislature could have referred to odd numbered years for nonpartisan elections for vacancies – again, it chose not to.

In fact, a further reading of §69.12 shows that the legislature contemplated a “pending election” to encompass a variety of elections. Iowa Code §69.12(1) is replete with references to various types of elections – general elections (see Iowa Code §69.12(1)(a)(1)), regularly scheduled and special city elections, (see Iowa Code § 69.12(1)(a)(2)), regularly scheduled school elections (see Iowa Code § 69.12(1)(a)(3)), and special elections (see Iowa Code § 69.12(1)(a)(4)). It would be absurd for the legislature to include all of these references to various elections, including general elections, if the legislature did not intend those elections

to be “pending elections.” In other words, if the legislature did not intend these other elections to be “pending elections” why would the legislature include them in the statute?

**Public policy is furthered by requiring appointed officials to stand for election at the earliest opportunity.**

Bettendorf has set forth a number of public policy considerations in support of its argument. Public policy considerations cannot be used to override the expressed intent of the legislature. However, such considerations can be used to help discern the legislative intent. One stated consideration is keeping partisan elections separate from nonpartisan elections. The general election ballot already includes several nonpartisan offices such as township trustees and judicial retention. Another concern was keeping general election ballots more manageable. Certainly the addition of a park board election will not push the general election over the edge of manageability. And finally, keeping the voting public focused on city matters for city elections was mentioned.

While some of the above claimed public policy considerations may be more valid than others, what cannot be argued is the right of the voting public to choose their officers at the polls. Inherent in that right is the opportunity to exercise it at the earliest opportunity. Under Bettendorf’s interpretation, an appointee would have to wait until the next city election to receive voter validation. Under Moritz’s interpretation, appointees to city offices would be able to stand for election in any year they happened to be appointed. Likewise, voters in city elections would be able to make that decision at the very next November election – no matter in what year the appointment occurred. This is the overriding factor Moritz used in deciding that the legislature mandates appointees stand for election at the very next election at which voters of that political subdivision will vote – be it a general or city election. The position of Scott County and its auditor is very simple in this regard. Let the voters decide and let the voters decide at the very earliest opportunity.

**Past interpretation by the parties is not binding on this Court.**

Bettendorf has offered the affidavit of Bettendorf City Administrator Decker P. Ploehn in support of its Motion for Summary Judgment. This affidavit is offered to show that Bettendorf has, in the past, appointed officers who have not stood for election at the general election. A careful review shows that these examples do not support Bettendorf’s position.

Example #1:

“In October 1998, Park Board Commissioner Howard Peterson’s passing resulted in the Council appointment of Larry Makoben to the vacant seat. Makoben was approved October 12, 1998 for a term ending December 31, 2001. He ran for office in November, 2001. There was no concern raised over the need to fill the office at any general election.”

This example really does not support either side – it appears Mr. Makoben did not stand for election at the next pending election under Bettendorf’s theory, which would have been November, 1999 (the vacancy did not occur seventy-four or more days before the November, 1998 general election as required by § 69.12(1)(a)(1), thus the November, 1998 general election was not the next pending election). Nor did Mr. Makoben stand for election at the general election of November, 2000. It appears that he simply continued on in the appointment for the duration of the unexpired term. This outcome is not supported by statute, nor is it being advanced by either party in this action.

Example #2:

“In November 2002, Park Board Commissioners Gregory Adamson and Joseph Hutter were elected to other offices. The Council chose to fill the vacancies by appointment (George Worley and Steve Beckman) in February, 2003. The term of office for both seats ended in December of 2003, and both stood for election at a City election in November, 2003.”

This example also does not provide support for either side. The appointees simply stood for election at the next pending election which, coincidentally, was a city election that occurred at the end of the unexpired terms of the vacant offices.

Example #3:

“In 2008, First Ward Council member Keith Kauten resigned his office. The Council chose to fill via appointment, and in July, Norm Voelliger was appointed for a term ending in December, 2009. No objection to the length of the appointment was raised by the County Auditor. However, a timely petition calling for a special election was filed, and a special election was held for the office, ultimately electing Dean Mayne to the office.”

This example does support Bettendorf’s position. A review of the City Council Minutes

and Resolutions from June-July of 2008 shows that Bettendorf appointed Mr. Voelliger to Mr. Kauten’s council seat and the appointment was intended to last only until the next city election in November, 2009, even though the actual term of that office did not expire until December, 2011. However, as City Administrator Ploehn’s affidavit points out, a special election was called for pursuant to Iowa Code § 372.13(2)(b). The resolution was approved at a special session of the City Council on July 21, 2008, which was only seven days after Mr. Voelliger was appointed on July 15, 2008.<sup>[4]</sup> The special election was held on September 2, 2008, some two months prior to the general election.

Bettendorf may advance the argument that the Scott County Auditor did not inform the city when all this was going on that Mr. Voelliger would be required to stand for election at the general election in November, 2008, and that this somehow enhances Bettendorf’s position. However, at the time this occurred, the County Auditor’s Office was in, to put it mildly, a state of transition. The current Auditor, Roxanna Moritz, was not even in office yet, not having been elected until November, 2008. Longtime Auditor Karen Fitzsimmons had passed away the previous April. Temporarily appointed Auditor Wes Rostenbach no doubt had his hands full during this time preparing for the general election of 2008.

The County concedes that Bettendorf did act in conformance with its interpretation of §69.12 when the events described in Example #3 occurred. However, it is the position of the County that Bettendorf was not required to do so and Mr. Voelliger could have stood for election at the general election. It is impossible to know for sure, but this may have dissuaded those that petitioned for a special election from doing so. If that were the case, Bettendorf would have saved money by having the election at the same time as the general election of November, 2008. Therefore, the interpretation advanced by the County would actually save money over Bettendorf’s interpretation. See Good v. Crouch, 397 N.W.2d 757 (Iowa 1986). In fact, because the costs of general elections are carried by the County, any costs Bettendorf would realize because of an appointee standing for election at a general election would either be nominal or nonexistent.

Bettendorf asserts that its interpretation of §69.12 should be given more weight because it claims to have relied on that interpretation for the past twenty years. A review of the above examples, provided by Bettendorf, reveals that to simply not be the case.

**CONCLUSION**

The County agrees with Bettendorf that no issue of material fact has been presented. It is therefore appropriate for this Court to resolve this matter through summary judgment. The controlling statute, the first unnumbered paragraph of Iowa Code §69.12 can be interpreted both in favor of the interpretations of either Bettendorf or the County. However, a further reading of the statute, specifically Iowa Code §69.12(1)(a)(1-4) demonstrates that the legislature intended “pending elections” to include general elections. Further, the overriding policy consideration in this case, the right of the voter to determine their own representation as quickly as possible, should be given great weight in interpreting the statute. As such, Iowa Code §69.12 should be interpreted to require Mr. Baden to stand for election before the voters of Bettendorf at the general election to be held in November, 2010.

Respectfully submitted,

---

AT0001807

ROBERT L. CUSACK,

Assistant Scott County Attorney

400 W. 4<sup>th</sup> Street  
Davenport, IA 52801-1104

Phone 563-326-8600

Fax 563-326-8763

e-mail: rcusack@scottcountyiowa.com

ATTORNEY FOR

RESPONDENTS

Copy to:

Gregory S. Jager  
Bettendorf City Attorney  
1609 State Street  
Bettendorf, Iowa 52722

**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause:

By depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their

Respective addresses disclosed on the pleadings, or

By depositing a copy thereof in the office of the Scott County Court Administrator,

Hand delivered.

On the                      Day of

Signed:

---

[1] While the word “required” has been used, Scott County and Auditor Moritz affirmatively state that the interpretation of Iowa Code § 69.12 offered to the municipalities was intended solely as guidance and not as a directive. See Exhibit “A” (“Ultimately, your cities will need to follow the advice of your own lawyers on this question but guidance from the Secretary of State’s office, and my own, is as stated above.”).

[2] Although not technically “adverse”, the parties are in agreement with the procedural course being used to request the Court’s intervention in this case.

[3] The same question could be asked for alternative 3) is it “any public question to be decided” *only* by the citizens of Bettendorf or *also* by the citizens of Bettendorf?

[4] After reviewing the documentation of these events, there can be no doubt as to Bettendorf’s dedication to the voting rights of its citizens. Scott County and its officers do not intend to imply otherwise. This is simply a case wherein the parties have a reasonable disagreement over statutory interpretation.