

Election Day on the Last Day of Passover

Herzfeld v. District of Columbia Board of Elections and Ethics (Emmet G. Sullivan, D.D.C. 1:11-cv-721)

A rabbi filed a federal complaint when he realized that a special election to fill municipal vacancies was going to be held on the last day of Passover, a day when he could not vote until after the polls would be closed. The district judge scolded the board of elections for not seeking a court order allowing them to adjust the statutorily mandated special-election date, but the judge denied the plaintiff immediate injunctive relief, because the rabbi had early and absentee voting alternatives. The statute was subsequently amended by an act of Congress.

Subject: Election dates. *Topics:* Polling hours; intervention; absentee ballots.

On April 3, 2011, Rabbi Shmuel Herzfeld was taking a walk with his children and he noticed a sign for an April 26 special election to fill vacancies in the city council and board of education for the District of Columbia.¹ This was an issue, because April 26 was the last day of Passover, so Rabbi Herzfeld would not be able to vote on election day unless voting hours were extended.² On April 13, he filed a federal complaint in the District of Columbia seeking such a remedy.³ With his complaint, he filed a motion for a temporary restraining order and a preliminary injunction.⁴

The court assigned the case to Judge Emmet G. Sullivan, who held a telephonic status conference on the day that the complaint was filed.⁵ Judge Sullivan set a hearing for April 15 and granted the district's oral motion to intervene.⁶

When Judge Sullivan was presented with a motion for a temporary restraining order, it was his practice to look for two types of opportunity: (1) to consolidate the motion for a temporary restraining order with consideration of a more durable injunction or an otherwise more conclusive determination of the case's merits and (2) settlement possibilities, perhaps with the assistance of a magistrate judge.⁷ In this case, he also employed a common prac-

1. See Transcript at 6–7, *Herzfeld v. D.C. Bd. of Elections & Ethics*, No. 1:11-cv-721 (D.D.C. Apr. 15, 2011, filed Jan. 9, 2012), D.E. 42; Shmuel Herzfeld, Op-Ed, *Voting Rights Denied on a Religious Holiday*, Wash. Post, Apr. 24, 2011, at C5.

2. See Herzfeld, *supra* note 1.

3. Complaint, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Apr. 13, 2011), D.E. 1; see Second Amended Complaint, *id.* (May 27, 2011), D.E. 17; Amended Complaint, *id.* (Apr. 22, 2011), D.E. 12; see also Mike DeBonis, *Rabbi Sues Over Timing of Special Vote: During Passover*, Wash. Post, Apr. 14, 2011, at B6.

4. Motion, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Apr. 13, 2011), D.E. 3.

5. Docket Sheet, *id.* (Apr. 13, 2011); see Transcript, *supra* note 1, at 18.

Tim Reagan interviewed Judge Sullivan for this report by telephone on August 1, 2012.

6. Docket Sheet, *supra* note 5.

7. Interview with Hon. Emmet G. Sullivan, Aug. 1, 2012.

tice of his in emergency cases between parties with sufficient resources: he required the parties to present to the court binders of authorities on which the parties would be relying in advance of the scheduled hearing, so that resolution of the matter would not be delayed by court staff hunting down authorities and making photocopies.⁸

On April 15, Judge Sullivan denied the rabbi immediate injunctive relief.⁹

Before I issue my ruling, I want to put on the record my extreme, I emphasize that, disappointment that this issue could not have been resolved by the parties. While I agree with the D.C. Board of Elections that it does not have the authority to extend the polling hours as requested by plaintiff, this court does. . . .

What I wish had happened in this case is that the District, with the Board of elections or both, upon learning that the April 26th election was scheduled for the last day of Passover, would have come to this court with a consent motion requesting that, given the unique and indeed unprecedented facts presented in this case, the Court ordered that the polls be held open for two additional hours in order to afford observant Jewish voters the opportunity to go to the poll and vote on Election Day. This court would have happily granted such a motion, but that unfortunately is not what happened in this case.¹⁰

Despite Judge Sullivan's sympathy for the rabbi's position, the judge noted that early and absentee voting options were available.¹¹ "While the Court is profoundly sympathetic to Plaintiff's desire to be able to vote in the Special Election by going to his local polling station, the Court cannot conclude, as a matter of law, that plaintiff's right to vote has been severely restricted based on his inability to do so."¹² The elections board agreed to offer additional early voting on Easter Sunday, April 24.¹³

On September 14, the case was reassigned to Judge James S. Gwin of the Northern District of Ohio, who frequently assisted the District of Columbia court as a visiting judge.¹⁴ On January 10, 2012, Judge Gwin approved a stipulated dismissal of the action without prejudice.¹⁵ The mayor had agreed to propose legislation that would give the board of elections greater flexibility to avoid religious holidays when setting election dates.¹⁶ On February 10, the parties filed a stipulated dismissal with prejudice.¹⁷

8. *Id.*

9. Transcript, *supra* note 1, at 93, 107–08; Docket Sheet, *supra* note 5; see Mike DeBonis, *Judge Denies Rabbi's Bid to Extend D.C. Election*, Wash. Post, Apr. 16, 2011, at B6.

10. Transcript, *supra* note 1, at 90–91.

11. *Id.* at 102–06; see DeBonis, *supra* note 9.

12. Transcript, *supra* note 1, at 102.

13. See DeBonis, *supra* note 9.

14. Order, *Herzfeld v. D.C. Bd. of Elections & Ethics*, No. 1:11-cv-721 (D.D.C. Sept. 15, 2011), D.E. 32 (chief circuit judge's order); Order, *id.* (Sept. 15, 2011), D.E. 33 (district court's reassignment order); Interview with Hon. Emmet G. Sullivan, Aug. 1, 2012.

15. Order, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Jan. 10, 2012), D.E. 43.

16. See *City Settles Rabbi's Suit Over Special Election Scheduled During Passover*, Wash. Post, Jan. 10, 2012, at B2.

17. Stipulation, *Herzfeld*, No. 1:11-cv-721 (D.D.C. Feb. 10, 2012), D.E. 44.

On July 18, the President signed the District of Columbia Special Election Reform Act, which gives the board of elections flexibility to schedule special elections more quickly and to avoid religious holidays.¹⁸

18. Pub. L. No. 112-145, 126 Stat. 1133 (2012).