

KENNETH D. SCHISLER,
INDIVIDUALLY, AS CHAIRMAN OF
THE PUBLIC SERVICE COMMISSION,
AND ON BEHALF OF THOSE MEMBERS
OF THE PUBLIC SERVICE
COMMISSION SIMILARLY SITUATED

and

PUBLIC SERVICE COMMISSION OF
MARYLAND

Plaintiffs

v.

STATE OF MARYLAND

Defendant

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IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY
Part 20
Case No.: 24-C-06-005386

ORDER

Upon consideration of the plaintiffs’ motion for a temporary restraining order, the submissions of the parties and oral arguments made during the hearing held on the matter on this date, it is this 28th day of June, 2006, by the Circuit Court for Baltimore City, Part 20,

ORDERED that the plaintiffs’ motion for a temporary restraining order is **DENIED**.

Plaintiffs’ seek a temporary restraining order pursuant to Md. Rule 15-501(c) to enjoin the implementation of Sections 12 and 22 of Senate Bill 1, effective as an emergency measure upon enactment on June 23, 2006. Section 12 ends the term of office of plaintiff Kenneth Schisler and the current commissioners on June 30, 2006 and provides a new method for their replacement from lists provided by the Senate President and House Speaker. Section 22 is a default provision intended to take effect in the event Section 12 is held invalid. Plaintiffs contend that these provisions of Senate Bill 1 violate Article II, § 15 of the Maryland

Constitution, Article 24 of the Maryland Declaration of Rights and Article I, § 10 of the U.S. Constitution, as well as § 3-307 of the State Government Article of the Annotated Code of Maryland.

It is not at all clear to the Court, even after hearing counsels' arguments, who are the real parties in interest in this case. The case is captioned: "Kenneth D. Schisler, Individually, as Chairman of the Public Service Commission, and On Behalf of Those Members of The Public Service Commission Similarly Situated and Public Service Commission of Maryland v. State of Maryland."

The case is not a purported class action. The other four commissioners have not joined as party plaintiffs. Mr. Schisler's individual capacity rests solely on the placement of a comma in the caption and the Public Service Commission's authorization to bring the action rests upon a polling of the commissioners, which resulted in the approval of a majority, according to the affidavit of Kenneth D. Schisler submitted at today's hearing, apparently as an afterthought.

Md. Rule 15-504(a) permits the Court to issue a temporary restraining order "only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction."

The original affidavit of Kenneth D. Schisler, filed with the motion, asserts that Sections 12 and 22 of Senate Bill 1 will cause the removal from office of the current commissioners as of June 30, 2006 and their replacement on July 1, 2006 without "due process

or other notice or opportunity to be heard.” That is the entirety of the record¹ before the Court on the critical issue of “immediate, substantial and irreparable harm.”

Because it is unclear whether even Mr. Schisler is a party plaintiff in his individual capacity alone, it is not apparent to the Court how the Public Service Commission or the chairmanship of that commission will suffer immediate, substantial or irreparable harm from the planned change in personnel. Both entities will continue to exist and perform their statutory functions after June 30, 2006.

If Mr. Schisler is properly before the Court as an individual plaintiff, he may meet this threshold test due to the loss of his appointed position, but then the Court must consider four further factors: 1) the likelihood of success on the merits; 2) the balance of convenience; 3) whether plaintiff will suffer irreparable injury; and 4) the public interest. *State Dept. v. Baltimore County*, 281 Md. 548, 554-57 (1977). The burden of proving the facts necessary to satisfy these factors rests on the party seeking the interlocutory injunction. *Dept. of Transp. v. Armacost*, 299 Md. 392, 405 (1984). In addition, the party seeking the injunction must prove the existence of all four of the factors set forth in *Armacost* in order to be entitled to preliminary relief. The failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief. *Fogle v. H & G Restaurant*, 337 Md. 441, 456 (1995).

The *Fogle* decision goes on to state that: “It is well-accepted that if a party cannot establish that it has a likelihood of success on the merits, then no interlocutory injunction should

¹ Plaintiffs’ counsel asked the Court to supplement the record with a series of media reports concerning the reasons for removing the current commissioners, citing Md. Rule 5-201. Defendant objected. The Court declines to take judicial notice of facts which are subject to reasonable dispute, as beyond the intent of Md. Rule 5-201(b).

be granted.” *Id.*, 337 Md. at 456.

At this juncture, the Court believes that plaintiffs have not demonstrated a likelihood of success on the merits. The General Assembly’s authority to alter the terms of office of the Public Service Commissioners and to reconstitute the Commission with new appointees,² chosen by the Governor from lists submitted by the legislative leaders, is not beyond its constitutional authority and does not run afoul of the federal constitution’s dictates on separation of powers or bills of attainder. Nor does it violate Maryland law. *See Baltimore v. State*, 15 Md. 376 (1860); *Anderson v. Baker*, 23 Md. 531, 627 (1865); *Davis v. State*, 7 Md. 151, 161 (1854); *Little v. Schul*, 118 Md. 454, 563-64 (1912); *Town of Glenarden v. Bromery*, 257 Md. 19, 27 (1970); and the statutory appointment process examples cited by defendant at pages 13-14 of its memorandum in opposition to the motion.

For these reasons, the Court must deny the motion for a temporary restraining order. Defendant shall file an Answer to the Verified Complaint in accordance with the time prescribed by the Maryland Rules.

/s/ Albert J. Matricciani, Jr.
ALBERT J. MATRICCIANI, JR.
Judge

cc: All Counsel (via e-mail)

² The record at this point is incomplete on the question of who will become Commissioners on or after July 1, 2006.