

Order

Michigan Supreme Court
Lansing, Michigan

May 31, 2024

Elizabeth T. Clement,
Chief Justice

166312

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

RAISE THE WAGE MI,
Plaintiff,

v

SC: 166312

BOARD OF STATE CANVASSERS,
Defendant,

and

MICHIGAN OPPORTUNITY,
Intervening Defendant.

By order of April 10, 2024, the defendant and intervening defendant were directed to answer the complaint for mandamus. On order of the Court, the answers having been received, the complaint for mandamus is again considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief.

ZAHRA, J. (*concurring*).

In this mandamus action, plaintiff claims that the Board of State Canvassers violated Michigan election law by refusing to certify an initiative petition, which would have substantially altered the law of minimum wages and tipping in the state.¹ Plaintiff claims

¹ Under the petition, at least initially, the minimum wage would have increased to \$12 per hour in 2024, and from there it would have risen annually to \$15 per hour in 2027. After 2027, the minimum wage would have continued to rise by the amount of inflation. The minimum wage could never be lowered by a decrease in prices or an economic downturn; no conditions were included to limit minimum-wage increases during times of significant unemployment. By contrast, under current law, minimum-wage increases are paused when the unemployment rate “is 8.5% or greater” MCL 408.934(2). The petition would have also eliminated special provisions that allowed employers to hire trainees, apprentices, and disabled individuals at lower minimum wages if those workers were “clearly unable to meet normal production standards.” MCL 408.934c; see also MCL

that the Board was legally *required* to certify the petition and could not, in a reasonable exercise of discretion, decline to approve the petition for a statewide vote. But a writ of mandamus is an “extraordinary remedy”² reserved for violations of a “clear legal duty,”³ or where an agency’s action was “so arbitrary and capricious as to evidence a total failure

408.934b (another provision the instant petition eliminates that allows employers to hire minors using a lower minimum wage).

Moreover, the initiative petition would have eliminated any recognized difference between tipped and non-tipped labor. Over the course of several years, employers would be required to directly pay workers’ minimum wages, as opposed to a combination of employer and tipped wages. Over the course of time, this would very likely serve to eliminate tipping as a primary source of income for many workers, specifically those who make entry level or near minimum wages. Polling by the Michigan Restaurant and Lodging Association indicates that 61% of restaurant operators in Michigan estimated that they would lay off more than 25% of their tipped employees if the minimum-wage offset is substantially reduced or eliminated. Michigan Restaurant and Lodging Association, *Polling Memo: the Impacts of Tip Credit Elimination*, p 4 (2022) <https://www.mrla.org/uploads/1/2/1/3/121332115/mlra_impactsoftippedwageelimination.pdf> (accessed May 23, 2024) [<https://perma.cc/K6BK-UB9M>]. Concurrently, a substantial majority (75%) of tipped employees are polled to believe that they will earn less if they make their wages through employer payments instead of customer tips. Ninety-four percent of those workers are polled to believe that customers will tip less if the workers are paid primarily through their employer. Corder, *Michigan Restaurant Tipped Worker Survey* (September 2022), pp 9-10; *id.* at 11 (finding that 83% of tipped workers would prefer a system with lower base-pay with tips).

Whether the petition was wise, or worthy of passage is entirely a question of policy, properly left in the hands of the Legislature and democratic processes. The legal question before the Court concerns only whether plaintiff has met the standard to obtain mandamus relief.

² *Sumeracki v Stack*, 269 Mich 169, 171 (1934).

³ *Teasel v Dep’t of Mental Health*, 419 Mich 390, 415 n 13 (1984); 52 Am Jur 2d, Mandamus, § 1 (“The purpose of mandamus, generally, is not to adjudicate or review, but to enforce an established right or to enforce the performance of a duty, and particularly in the absence of another adequate legal remedy. The writ is to enforce, rather than establish, a claim or right. Mandamus strives to promote justice and to prevent irreparable harm.”) (citations omitted).

to exercise discretion[.]”⁴ Similar to an abuse of discretion standard, a court in mandamus proceedings cannot “substitute its own discretion for the discretion of [public] officers.”⁵

Using a statutory preapproval process established under MCL 168.482b, the Board initially approved the summary of plaintiff’s petition required by state law.⁶ This preapproval process allows petitioners to obtain a manner of security in a proposed summary by receiving Board approval prior to circulation, and therefore prior to often significant expenditures of time, effort, and money. The statute confirms that the Board “may not consider a challenge to the sufficiency of a submitted petition on the basis of the summary being misleading or deceptive” if the Board preapproved the summary.⁷

When plaintiff submitted the summary initially, the petition had altered the definition of “employers,” to whom the minimum-wage law applies, to include those who “employs 21 or more employees”⁸ The initial proposal reduced the number of employees needed to trigger the minimum-wage laws from 2 employees to 1. At the time

⁴ *Bischoff v Wayne Co*, 320 Mich 376, 386 (1948) (quotation marks and citations omitted); 52 Am Jur 2d, Mandamus, § 39 (“A general standard for abuse of discretion in this context is that the one invested with discretion has acted arbitrarily, capriciously, fraudulently, or without due regard for the petitioner’s rights and that the action was prejudicial to the petitioner. In this sense, mandamus is appropriate to determine the outer bounds of official discretion.”) (citations omitted); 55 CJS, Mandamus, § 151 (“[I]t must clearly appear that such officer has so far departed from the line of duty under the law that it can be said the officer has in fact so far abused such discretion that the officer has neglected or refused to exercise any discretion.”); see, e.g., *Teasel*, 419 Mich at 414 (“It is contrary to the entire import of the Mental Health Code that defendants could make a decision to release based, as was hypothesized, on flipping a coin or by arbitrarily releasing, for example, every third patient.”); *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 494 (2004) (examining the substance of proposed ballot language, rejected at the discretion of the Board, and concluding that it was clearly and impartially written, therefore requiring mandamus relief).

⁵ *Nelson v Wayne Co*, 289 Mich 284, 296 (1939) (quotation marks omitted); cf. *People v Babcock*, 469 Mich 247, 269 (2003) (explaining that abuse of discretion review for lower court proceedings recognizes that there is “no single correct outcome” and reversal is not warranted if “the trial court selects one of these principled outcomes”).

⁶ MCL 168.482(3); see also MCL 168.482b (detailing further explanation of requirements in the context of preapproval process).

⁷ MCL 168.482b(1).

⁸ Cf. MCL 408.412(d) (defining “employer”).

of the initial approval, the summary stated accurately that it would “increase the minimum” wage applicable to “all employees.” Yet after obtaining preapproval, plaintiff circulated for signatures an initiative that applied the minimum wage to employers with “21 or more employees.” The altered petition *added* the “1” next to the “2” rather than *replacing* the “2.” Consequently, the petition could eliminate the minimum-wage rules for employees who work for employers with less than 21 workers, not increase the minimum wage for all employees.⁹ When plaintiff submitted this revised petition for final approval, the Board deadlocked 2-2, and the petition was rejected.

The Board of State Canvassers was established in the Michigan Constitution to have an even number of members from different, and often adversarial, political parties.¹⁰ The structure ensures that the affirmative resolution of election disputes, which often implicate the greatest ideological and partisan furries in our law, have broad and bipartisan support. The Michigan Constitution placed special emphasis on public confidence in election integrity and results. Therefore, differences of opinions and reasonable disputes in election administration are an expected and important *feature* of this constitutional structure, not a flaw. Furthermore, judicial oversight is available only through a writ of mandamus,¹¹ which is extraordinarily deferential to the Board’s decisions.

As repeatedly indicated in similar cases, it is not the role of this Court to second guess and question the administration of election disputes properly left to the bipartisan oversight of the Board of State Canvassers.¹² Plaintiff claimed that its summary had

⁹ MCL 408.413 (“*An employer shall not pay any employee at a rate that is less than prescribed in this act.*”) (emphasis added).

¹⁰ Const 1963, art 2, § 7.

¹¹ MCL 168.479(1) (“Notwithstanding any other law to the contrary and subject to subsection (2), any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court.”).

¹² *Promote the Vote 2022 v Bd of State Canvassers*, 510 Mich 884, 890-894 (2022) (ZAHRA, J., dissenting) (review of the Board’s decision to reject a petition seeking to amend the Constitution because it abrogated other provisions of the Michigan Constitution and the petition failed to include any notice to the public of such abrogation); *Reproductive Freedom for All v Bd of State Canvassers*, 510 Mich 894, 897-902 (2022) (ZAHRA, J., dissenting) (review of the Board’s decision to reject petition seeking to amend the Constitution because it failed to include legible spacing in a copy of the amendment circulated among the public); see also *Johnson v Bd of State Canvassers*, 509 Mich 1015 (2022) (review of challenge to the manner by which the Board reasonably determined the validity of signatures in a nomination petition).

received preapproval given, in plaintiff’s view, that the amended petition was not materially different than the version initially submitted. However, the preapproval process requires “a true and impartial statement” for “*the* proposed amendment or question proposed”¹³ It was abundantly reasonable for the Board to conclude that plaintiff failed to obtain preapproval of an *accurate* statement of *the* petition submitted for final approval, which, rather than increasing the minimum wage for all employees, may have served to eliminate it for thousands.¹⁴

I take no position on whether the Board’s decision was advisable or superior to potential alternatives. Nor do I comment on whether the Board ultimately came to a “correct” conclusion, as if this Court possessed the administrative authority over elections or the authority to weigh policy merits. Given that plaintiff’s submission to the Board did not include the same petition language used to obtain preapproval of its summary, plaintiff failed to convince a majority of the Board to approve its petition. On this record, plaintiff has not met the high burden of showing a violation of a clear legal right as is required to obtain mandamus relief.

For the foregoing reasons, I concur.

¹³ MCL 168.482b(1) and (2)(b) (emphasis added); see also MCL 168.482(3).

¹⁴ Compare *Nykoriak v Napoleon*, 334 Mich App 370, 380-382 (2020) (examining the substance and record of a nominating petition and affidavit and concluding that mandamus relief against a county board of election commissioners was not warranted), with *Berry v Garrett*, 316 Mich App 37, 43-44 (2016) (examining the substance of a nominating affidavit and granting mandamus relief due to a failure to include precinct numbers, despite the filing being approved by county election officials tasked with administering the law).



s0528

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 31, 2024

Clerk