

IN THE CIRCUIT COURT OF COLE COUNTY

JOHN T. SUMNERS,)	
)	
Plaintiff,)	
)	
v.)	Case No. 17AC-CC00592
)	
JENNIFER EDWARDS, et al.)	
)	
Defendants.)	

ORDER DENYING TEMPORARY RESTRAINING ORDER

Plaintiff John T. Sumners has filed suit seeking a declaration and injunction that Defendant Jennifer Edwards is participating illegally in the Missouri State Board of Education (“Board”) because Governor Greitens’ decision to remove him from a temporary appointment to the Board supposedly failed to comply with section 161.022.2, RSMo. For the reasons stated in this Order, Plaintiff’s request for a temporary restraining order (“TRO”) is DENIED.

STATEMENT OF UNDISPUTED FACTS

When vacancies in public offices arise while the Senate is out of session, the Governor has authority to appoint individuals to fill those vacancies. Mo. Const. Art. IV, § 4. The term for those positions runs until “successors are duly elected or appointed,” *id.*, or until “thirty days after the senate has convened,” *id.* § 51, whichever occurs first.

The Board consists of eight members appointed by the Governor. § 161.022.1, RSMo. No congressional district may be home to more than one member. § 161.032, RSMo. Because Missouri has eight congressional districts, each congressional district has

one – and only one – representative on the Board. This case concerns the seat on the Board for Missouri’s seventh congressional district.

On July 31, the Governor appointed Melissa Gelner to a temporary position on the Board. The appointment letter expressly designated that her term would last “until her successor is duly appointed.” Def. Ex. A. Fifteen days later, Ms. Gelner took the oath of office and began attending and voting at Board meetings. Def. Ex. B at 2. The Governor then removed Gelner from the position and temporarily appointed Sumners to the same position. Def. Ex. C. Sumners, too, took the oath of office. Like Gelner, the Governor then removed Sumners and appointed Jennifer Edwards to the same position. Def. Ex. D. She then took the oath of office. Def. Ex. E.

CONCLUSIONS OF LAW

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). The Missouri Supreme Court has adopted the four-factor test for determining whether to grant a motion for a preliminary injunction or TRO. *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996). This Court must consider “(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Id.* at 839-40 (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm.*, 812 F.2d 288, 290 (6th Cir. 1987)).

Plaintiff “must make some showing of probability of success on the merits before a preliminary injunction will be issued.” *Id.* at 839.

Plaintiff has failed to establish a likelihood of success on the merits.

The Court determines that Plaintiff has failed to establish a likelihood of success on the merits as Plaintiff’s lawsuit seeks ejection of a state official from office, which is a remedy that can only be granted in a quo warranto action initiated by the Attorney General or an elected prosecuting attorney.

Plaintiff cannot show a likelihood of success because the relief Plaintiff seeks—ejection of a state official, Ms. Edwards, from her office—can only be granted in an action in quo warranto. Plaintiff seeks only two forms of relief: (1) an order barring Ms. Edwards from participating on the Board, and (2) an order reinstating him to participate in the same office on the Board. The first form of relief, obviously, is a necessary precursor to the second.

But an action seeking this relief—the ejection of Ms. Edwards from her office—can only be brought in quo warranto, and can only be initiated by the Attorney General or an elected county prosecutor or circuit attorney. § 536.010, RSMo; *see also* Mo. Sup. Ct. R. 98.02(b); *State ex inf. Graham v. Hurley*, 540 S.W.2d 20 (Mo. banc 1976). The purpose of a quo warranto action is exactly what Plaintiff seeks here: “to prevent an officer . . . purporting to act as such from usurping a power they do not have.” *State ex inf. Nixon v. Kinder*, 89 S.W.3d 454, 458 (Mo. 2002).

Thus, in *Benne v. ABB Power T&D Co.*, 106 S.W.3d 595, 598-99 (Mo. App. W.D. 2003), the Court of Appeals considered an attempt by a private party to argue that a

temporary appointment to the Labor and Industrial Relations Commission was invalid. *Id.* at 598. The Court of Appeals held that such a claim could only be asserted in a *quo warranto* action. The Court stated that “this court is not in the position to rule via this case on the issue of whether [the official] was properly on the LIRC. Rather, the proper method for challenging the constitutional validity of an officer’s service is through a *quo warranto* action.” *Id.* Ordinarily, “the courts will not inquire into an officer’s qualifications, except in a collateral proceeding by *quo warranto*.” *Id.* at 600.

Because Plaintiff cannot himself bring an action in *quo warranto*, Plaintiff cannot show a likelihood of success on the merits. This is fatal to his claim for a temporary restraining order. The Court reaches no other issues raised by the parties and nothing in this order should not be construed or interpreted as validating the propriety of the actions of the Governor or reaching the merits of Plaintiff’s claims, pending a final judgment in this cause.

For these reasons, Plaintiff’s motion for a temporary restraining order is DENIED.

Cause is placed on the December 15, 2017 law day at 9:00 am for scheduling of further proceedings.

SO ORDERED this 30th day of November, 2017



Jon E. Beetem - Circuit Judge