

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DOCKETED

JUN 24 2014

MATHEW GRUBEL,	:	
ERIC TOMLINSON,	:	F. CLARK
FRANCES BYERS, and	:	DAY FORWARD
CAROL M. COCCAGNA	:	
Plaintiffs	:	
vs.	:	November Term, 2008
	:	
COUNTY BOARD OF ELECTIONS,	:	No. 1125
City and County of Philadelphia, and	:	
CITY OF PHILADELPHIA	:	
Defendants	:	

ORDER

And Now, this *24th* day of June, 2014, after considering the Motion for Summary Judgment filed by Defendants, and the Responses thereto, and, for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that the Motion filed by the City of Philadelphia is **GRANTED** and the Plaintiffs' Complaint is **DISMISSED With Prejudice**.

BY THE COURT:

Frederica A. Massiah Jackson

 FREDERICA A. MASSIAH JACKSON, J.

Grubel Etal Vs City Of -ORDER



IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DOCKETED

JUN 24 2014

F. CLARK
DAY FORWARD

MATHEW GRUBEL,	:	
ERIC TOMLINSON,	:	
FRANCES BYERS, and	:	
CAROL M. COCCAGNA	:	
Plaintiffs	:	
vs.	:	November Term, 2008
	:	
COUNTY BOARD OF ELECTIONS,	:	No. 1125
City and County of Philadelphia, and	:	
CITY OF PHILADELPHIA	:	
Defendants	:	

ORDER

And Now, this 24th day of June, 2014, after considering the Motion for Summary Judgment filed by the Plaintiffs, and the Responses thereto, and, for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that the Motion filed by the Plaintiff Class is **DENIED** and the Plaintiffs' Complaint is **DISMISSED With Prejudice**.

BY THE COURT:

Frederica A. Massiah-Jackson

 FREDERICA A. MASSIAH-JACKSON, J.

Grubel Etal Vs City Of -ORDMM



08110112500244

Control No. 14030918
Control No. 13115081

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

MATHEW GRUBEL,	:	DOCKETED
ERIC TOMLINSON,	:	
FRANCES BYERS, and	:	JUN 24 2014
CAROL M. COCCAGNA	:	F. CLARK
	:	DAY FORWARD
Plaintiffs	:	
vs.	:	November Term, 2008
	:	
COUNTY BOARD OF ELECTIONS,	:	No. 1125
City and County of Philadelphia, and	:	
CITY OF PHILADELPHIA	:	
Defendants	:	

MEMORANDUM in SUPPORT OF ORDERS
GRANTING THE DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT and DENYING THE
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MASSIAH-JACKSON, J.

June 24th, 2014

I. FACTUAL BACKGROUND and PROCEDURAL HISTORY

On May 26, 2005, the City Council of the City of Philadelphia enacted and approved an Ordinance at Chapter 17-1300 of the Philadelphia Code, entitled “Philadelphia 21st Century Minimum Wage Standard.” The Wage Ordinance provides that covered employers shall pay each “employee” an “hourly wage” of at least 150% of the federal minimum wage. Phila Code §17-1305. The City is expressly named as an employer covered by the Wage Ordinance. Phila Code. §17-1303(1). In November, 2010, the Philadelphia Home Rule Charter was amended to confirm City Council’s power to enact the Wage Ordinance.

In November, 2008, the Plaintiffs initiated this class action litigation naming the Philadelphia County Board of Elections and the City of Philadelphia as Defendants. The Plaintiffs represent a class of persons who are the Election Day workers. On July 9, 2012, the Court approved a Stipulation prepared by the parties that the Plaintiff Class shall be defined as follows:

“ . . . [T]his case may proceed as a class action on behalf of all persons who, at any time from and including November 8, 2005 to the present, has served in an election in Philadelphia in any of the following capacities: Judge of Election, Majority Inspector, Minority Inspector, Clerk, Machine Operator, Overseer, and Bilingual Interpreter; and all persons who will serve in any such capacities in an election in Philadelphia in the future, so long as the ‘Philadelphia 21st Century Minimum Wage Standards,’ Chapter 17-1300 of the Philadelphia Code, remains in effect and has not been substantially modified or amended.

Provided, however, that nothing in this stipulation shall constitute a waiver by any party of any claim or defense or argument that has been asserted, or that they may be asserted, including, but not limited to, any defense of any defendant against the claims of any individual class member.”

See generally, Pennsylvania Election Code, 25 P.S. §§2602, 2642, 2671, 2674, 2675.

In February, 2014, the litigation was assigned to this Judge. As the result of a conference with all counsel on February 11, 2014, several procedural and substantive matters were cleared up, that is, miscellaneous motions were resolved, Defendants were permitted to re-file their Motion for Summary Judgment (Control No. 14030918) and Plaintiffs’ Motion for Summary Judgment was assigned to this Court (Control No. 13115081). By April, 2014, all briefing was complete. Miscellaneous issues were supplemented by the parties in May and June, 2014.

For purposes of this Motion, there are no disputes of fact on material issues. After considering all of the memoranda of the parties, including supplemental submissions and conferences with counsel, this Court concludes that the Motion for Summary Judgment filed by the Defendant-City is **GRANTED**. The related Motion for Summary Judgment filed by Plaintiff-Mathew Grubel on behalf of the Class is **DENIED**.¹

¹ This litigation has been advanced by the exemplary advocacy of attorneys for Plaintiffs: J. Matthew Wolfe, Esquire and Alice W. Ballard, Esquire, and for Defendants: Diane A. Loebell, Esquire and Joshua Brand, Esquire.

II. LEGAL DISCUSSION

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure states that any party may move for summary judgment **as a matter of law**, as follows:

“(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense”

The issues raised at this juncture are not precluded from consideration simply because Preliminary Objections were overruled in May of 2012. The failure to present a cause of action upon which relief can be granted may be raised at any time. Salerino v. Philadelphia Newspapers, Inc., 546 A.2d 1168, 1170 (Pa. Superior Ct. 1988). See, Preliminary Objections of Defendant to Plaintiffs’ Amended Complaint in Civil Action, dated June 19, 2009, attached hereto as Court Exhibit “A”. In this case, this Court concludes as a matter of law:

- a. The Pennsylvania Election Code preempts application of the City Wage Ordinance to the Plaintiff-Class of Election Day workers, and,
- b. The Plaintiff-Class of Election Day workers are not “covered employees” so that the City Wage Ordinance would entitle them to be paid an “hourly wage” of at least 150% of the federal minimum wage.

A. The Statute Indicates the Intent of the General Assembly That the Election Code Preempts Local Compensation Measures.

Our Appellate Courts have been reluctant to find that local legislation is preempted by state statutes. The Supreme Court held that “absent a clear statement of legislative intent,

state legislation will not generally preempt local legislation on the same issue.” Mars Emergency Medical Services, Inc. v. Township of Adams, 740 A.2d 193, 196 (Pa. 1999). See also, Devlin v. City of Philadelphia, 862 A.2d 1234 (Pa. 2004).

In the circumstances present here, the Pennsylvania Constitution provides direction for all elections held in the Commonwealth of Pennsylvania. Article VII, Section 6, specifies in part:

“All laws regulating the holding of elections by the citizens, . . . shall be uniform throughout the State . . .”

The Commonwealth Court in Nutter v. Dougherty, 921 A.2d 44 (Pa. Commonwealth Ct. 2007), held that although the Election Code delegates extensive powers and authority to county election boards, there is clear legislative intent to establish and maintain uniform procedures for the purpose of holding fair and honest elections. At 921 A.2d 60, the Commonwealth Court states:

“. . . a thorough review of the Election Code itself demonstrates a legislative intent to establish and maintain uniform procedures for the purpose of holding fair elections and obtaining honest election returns, *Oncken v. Ewing*, 336 Pa. 43, 8 A.2d 402 (1939), and it becomes evident that this legislative scheme intended inter-governmental coordination and cooperation with local governments in accomplishing its purposes so long as the local governments’ acts are not inconsistent with the statute. See *Hydropress*; *Mars Emergency Med. Servs., Inc. v. Township of Adams*, 559 Pa. 309, 740 A.2d 193 (1999) (stating that the act there was silent as to whether local governments may enact supplemental legislation and that court must then look to the act itself to determine legislative intent with regard to local legislation).” (footnote omitted)

In the case at bar, unlike Nutter v. Dougherty, *supra*, there is every indication from the language of the Election Code to demonstrate express and implied legislative intent to legislate the manner and amount of compensation for Election Day workers.

25 P.S. §2682.2 of the Election Code specifically provides the maximum and minimum compensation to be set by the county board of elections. The ranges of the dollar amounts for each “election officer” are fixed by the General Assembly for “all counties regardless of class.” The payments are made by per diem lump sum in accordance with 25 P.S. §2682.2(c) and payments are not taxable income.

Election officers, as defined by the statute, and all members of the Plaintiff-Class are performing their duties consistent with the State Constitution. Election Day workers perform their duties to further the legislature’s express intention to maintain uniformity of all elections throughout the Commonwealth. Uniformity includes the manner of calculating compensation.

Defendants seek summary judgment contending that there is an irreconcilable conflict between the Election Code and the local Wage Ordinance. The Plaintiff-Class argues that there is “no irreconcilable conflict between the Election Code and the Wage Ordinance.” The Supreme Court has consistently held that the focus of a conflict preemption analysis is that if a local ordinance contravenes or is inconsistent with a state statute then the ordinance is invalid. The statute must be irreconcilable, that is, it must not be possible to comply with both. See, Holt’s Cigar Co., Inc. v. City of Philadelphia, 10 A.3d 902 (Pa. 2011); Kuznik v.

Westmoreland County Board of Commissioners, 902 A.2d 476 (Pa. 2006). This Court concludes that in the interests of uniformity, the per diem, lump sum payments of the Election Code must prevail.

By way of example, if the City Wage Ordinance were applicable to Philadelphia's Election Day workers, not only would Philadelphia workers be paid differently than those in 66 other counties, but, within the City there would be distinct differences. In certain Wards and Divisions with high voter turnout, the evening tally may take longer to complete. Those workers would receive greater pay for longer work hours. The Wards and Division with low turnout will find fewer individuals willing to be elected or to work on Election Day because those workers will receive less pay. Or, the Election Day workers may not work as expeditiously as possible in order to ensure greater compensation. Moreover, the Wage Ordinance formula provides fluctuation from election to election based on prevailing federal minimum wage rates.

The Plaintiff-Class has declined to directly address certain issues raised by this Court:

“a. If an Election Day worker is paid an hourly rate consistent with the Wage Ordinance and the total amount due is greater than the Election Code's statutory cap, what is the Plaintiffs' suggested remedy?”

b. Under the Wage Ordinance formula, do the Plaintiffs foresee that there may be Wards/Divisions where certain Election Day workers are paid more than others due to higher voter turnout, slower tallies when polls close, etc.?”

See Court's letter to Plaintiffs, dated May 15, 2014; Plaintiffs' Response, dated June 9, 2014; Defendants' Response, dated June 20, 2014.

In Duff v. Township of Northampton, 532 A.2d 500, 505 (Pa. Commonwealth Ct. 1987), the Commonwealth Court sets forth a five-part test to follow when assessing whether local legislation is preempted. The test involves the following factors:

- (1) Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the legislature has permitted?
- (2) Was the state law intended expressly or impliedly to be exclusive in the field?
- (3) Does the subject matter reflect a need for uniformity?
- (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
- (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?

The Appellate Court held that if the answer to any one of these questions is affirmative, then the local ordinance must be found to be preempted by the state statute.

The fact that the General Assembly has enacted a statewide comprehensive Election Code to implement the uniformity provisions of our Pennsylvania Constitution does not, in itself, preclude a municipality from enacting a legislative ordinance relating to elections. County Boards of Elections and the County Commissioners have been authorized to provide a broad range of duties and responsibilities in order to effectuate the goal of fair and honest elections. The subject matter here, however, does reflect a mandate for uniformity throughout the 67 counties of the Commonwealth. First, the operational effect of having different Election Day workers receiving different amounts of compensation does conflict

with the state statute. Second, the language of the Election Code expressly conveys the intention to be “exclusive” with respect to compensation. 25 P.S. §2682.2 states specifically that the compensation rates which are applicable “in all counties regardless of class” “shall be fixed . . . in accordance with [the per diem schedule]” (emphasis added). Third, the plain language of the Pennsylvania Constitution and statute reflect a need for uniformity. Fourth, the state scheme does not anticipate Election Day workers in a City of the First Class being paid hourly or with taxes deducted. Fifth, implementation of this Wage Ordinance to Election Day workers would be an impediment to the objectives of the General Assembly. The plain language of the statute is clear and free from all ambiguity.

Relying on Duff, supra, it is apparent that the First, Second, Third, Fourth and Fifth factors support state preemption. The Philadelphia Wage Ordinance is preempted by the Pennsylvania Election Code for the Plaintiff-Class under the conflict preemption analysis.

Query whether the course of regulation and control in 25 P.S. §2682.2, is so specific that it “brooks no municipal intervention” and, thus the Wage Ordinance is in fact subject to field preemption. In Dept. of Licenses and Inspections v. Weber, 147 A.2d 326, 327 (Pa. 1959), Justice Michael Musmanno wrote.

“It is also apparent that, even if the statute is silent on supersession, but proclaims a course of regulation and control which brooks no municipal intervention, all ordinances touching the topic of exclusive control fade away into the limbo of ‘innocuous desuetude.’ However, where the Act is silent as to monopolistic domination and a municipal ordinance provides for a localized procedure which furthers the salutary scope of the Act, the ordinance is welcomed as an ally, bringing reinforcements into the field of attainment of the statute’s objectives.”

None of the parties have suggested that the City Wage Ordinance furthers the salutary scope of the Election Code or furthers the statute's objectives.

B. Election Day Workers Are Not Employees Covered By The Wage Ordinance.

It is undisputed that the City of Philadelphia is an "Employer Subject To The Chapter [the Wage Ordinance]". The Plaintiff-Class suggests that anyone (including Election Day workers) who works for the City or provides service to the City is entitled to the benefits of the minimum wage mandates, §17-1303. The Defendant-City responds that the Wage Ordinance defines the group of employees who are beneficiaries of the minimum wage requirements, §17-1302. It is apparent that the Ordinance identifies that the employees who are subject to receive the benefits of the Ordinance are those persons whose work arises directly from service contracts, financial aid, a City lease, concession, franchise or public agency. §17-1302(4) provides the definition of a covered employee:

"(4) 'Employee.' Any person who performs work for a covered Employer arising directly out of a Service Contract, City financial aid, the grant of a City lease, concession or franchise, or a funding agreement with a public agency, on a full-time, part-time, temporary, or seasonal basis,"

In Allstate Life Insurance Co. v. Commonwealth, 52 A.3d 1077 (Pa. 2012), the Supreme Court reiterated the classic analysis when the objective is to interpret a statute, by noting at 52 A.3d 1080:

“Generally the best indication of the General Assembly’s intent is the plain language of the statute. ‘When the words of a statute are clear and free from all ambiguity, they are presumed to be to the best indication of legislative intent’”. (citation omitted).

See also, Mishoe v. Erie Insurance Co., 824 A.2d 1153 (Pa. 2003), holding that courts must read the words in the context in which they appear.

This Court concludes that the clear meaning of the definitions and words of the City Wage Ordinance, is that the persons who are covered by the local legislation are those who perform work for the City arising directly out of a service contract, City financial aid, or grant of a City lease, concession, franchise or a public agency. No members of the Plaintiff-Class are entitled to benefit from the Philadelphia 21st Century Minimum Wage Standard Ordinance. The Philadelphia City Council did not include the Election Day workers within the definition of covered employees.

**C. Plaintiffs’ Motion for Summary Judgment
Based on Regulatory Estoppel is Denied.**

The Plaintiff-Class has filed a Motion for Summary Judgment asserting that the principles of regulatory estoppel, a form of judicial estoppel, requires a finding that the Wage Ordinance is applicable to them as a matter of law. The equitable doctrine has been invoked

because in May, 2013, the Defendant-City Commissioners filed a Request to Waive Living Wage Requirements of Chapter 17-300. The Waiver was granted by the City's Office of Labor Standards.

It is the position of these Plaintiffs that the City-Defendant is precluded from asserting in this litigation that the Wage Ordinance does not apply, because the City presented a different and contrary position with the Office of Labor Standards by seeking the waiver. e.g. Sunbeam Corporation v. Liberty Mutual Ins. Co., 781 A.2d 1189 (Pa. 2001) (plurality decision). This Court does not agree.

These Plaintiffs cannot confer jurisdiction where none exists. **The City Wage Ordinance is preempted by the Pennsylvania Election Code.** No actions taken by the City of Philadelphia through the City Commissioners Office can render the local ordinance "unpreempted". No actions taken by the City's Office of Labor Standards supersedes the compensation format of the State Election Code. The City cannot request a "waiver" of hourly wages for compensation fees that are not "waivable". Again, the Pennsylvania Election Code is binding on all counties regardless of class, as stated by the General Assembly. The Election Day workers identified in the Stipulated Class (Judge of Election, Majority Inspector, Minority Inspector, Clerk, Machine Operator, Overseer and Bilingual Interpreter) are not "covered employees" under the Wage Ordinance and are not subject to hourly wages. Thus, any actions taken by the City through any Department (such as the

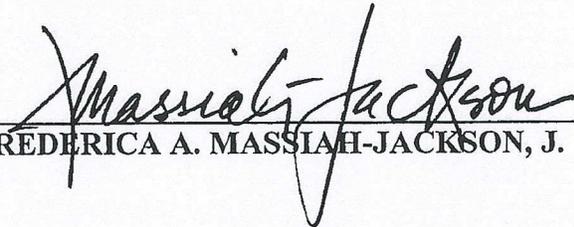
Law Department, Labor Standards or County Board of Elections) and which are purportedly based on the local Wage Ordinance are a legal fiction. The creative arguments proffered by the Plaintiff-Class to support their Motion are meritless.

III. CONCLUSION

For all the reasons set forth above, the Motion for Summary Judgment filed by the Defendant City of Philadelphia is **GRANTED**, and the Motion for Summary Judgment filed by the Plaintiffs' Class is **DENIED**.

BY THE COURT:

Date June 24, 2014


FREDERICA A. MASSIAH-JACKSON, J.

2. The Amended Complaint alleges in general that the Defendants are violating the Philadelphia 21st Century Minimum Wage Standard Ordinance ("the Ordinance") by not paying election day workers the minimum standard wages called for by City Council in that ordinance.

3. Defendants assert a demurrer to the Amended Complaint on five grounds. First, the provisions of the Ordinance upon which the Plaintiffs rely are preempted by the State Election Code, which states that the County Board of Elections, not City Council as Plaintiffs suggest, determines the pay to be made to election day workers. Second, the Ordinance applies to a certain class of defined employees, which does not include the election day workers who are defined by the Election Code and the Pennsylvania Constitution to be "constitutional officers" and not employees. Finally, even if you could somehow fit the definition of employee to cover the election day constitutional officers, City Council is without power or legal authority to regulate the wages of City employees. Fourth, the Pennsylvania Constitution requires uniformity in election administration, which will not occur if Plaintiff's claims were to succeed. Fifth, Plaintiffs have sued the County Board of Elections as a defendant when applicable law dictates that the City of Philadelphia is the appropriate defendant.

MOTIONS TO DISMISS THE AMENDED COMPLAINT FOR LEGAL INSUFFICIENCY (DEMURRER)

4. Pennsylvania Rule of Civil Procedure 1028 (4) provides that a preliminary objection may be filed on the basis of legal insufficiency of a pleading, i.e., a demurrer.

5. Demurrers are to be granted when the law is clear that a plaintiff is not entitled to recovery based on the facts alleged in the complaint. See The Insurance Adjustment Bureau, Inc. v. Allstate Insurance Company, 905 A.2d 462 (Pa. 2005).

PREEMPTION

6. Pursuant to 25 P.S. 2682.2 of the State Election Code , the compensation of judges of election, inspectors of election, clerks and machine operators "shall be fixed by the county board of elections." This section then goes on to provide a range of compensation for each of the election day workers. The County Board of Elections for Philadelphia County is the City Commissioners.

7. City Council, in the Ordinance, provided for certain minimum compensation to be paid to a variety of categories of employees.

8. Plaintiffs improperly seek to apply the Ordinance to the election day workers, thereby circumventing the authority of the County Board of Elections to set the compensation.

9. State law preempts the Ordinance for compensation of election officials.

10. The five part test for preemption has been set forth in many cases and includes the following: (1) whether the ordinance conflicts with state law because of conflicting policies or operational effect; (2) whether the state law was intended to expressly or impliedly be exclusive; (c) whether the subject matter requires uniformity; (d) whether the state scheme is so pervasive or comprehensive that it precludes coexistence of local regulation; and (e) whether the ordinance stands as an obstacle to accomplishing and executing full legislative purposes and objectives.

Nutter v. Dougherty, 921 A.2d 44 (Pa. Commw, 2007). If the answer to any of these questions is yes, preemption will be found to exist.

11. Here, the test for preemption is met and the Ordinance cannot be given effect to the election day workers. First, if the Ordinance proceeded unimpeded, there would be a conflict over who sets the compensation, the County Board of Elections or City Council. Clearly, the Election Code spells out the County Board of Elections as the entity with authority to set the rate

of compensation so to permit a City Council ordinance to govern would fly in the face of the state legislative intent.

12. Second, given that the Election Code covers all election matters as it relates to compensation of election day officials, it is clear that the state law provision was intended to be exclusive.

13. Third, this subject matter requires uniformity as the General Assembly in passing the Election Code did not intend to create varying interpretations of compensation made by different legal entities other than the specific County Board of Elections.

14. Fourth, the state Election Code is so comprehensive in its treatment of how election day officials are to be compensated and by whom, it would be inappropriate to allow Plaintiffs to carve out an exception to the breadth of this part of the Election Code.

15. Finally, the Ordinance as Plaintiffs wish to apply it in this case does stand as an obstacle to the legitimate purposes the General Assembly envisioned in having the County Boards of Election be the sole entity in charge of setting compensation for election day workers.

16. For these reasons, the Court should dismiss the Amended Complaint on the grounds of preemption, as the Amended Complaint is legally insufficient.

THE ORDINANCE DOES NOT APPLY TO ELECTION DAY WORKERS

17. The Ordinance requires that its minimum wage provisions apply to all employees of the City government.

18. Mistakenly, Plaintiffs seek to characterize the election day workers as City employees.

19. However, pursuant to the Pennsylvania Constitution, the election day workers are characterized not as City employees, but as constitutional officers. See Pennsylvania Constitution, Article 7, Section 11.

20. Because the election day workers are not City employees, they cannot be covered by the terms of the Ordinance.

21. For these reasons, the Court should dismiss the Amended Complaint because the Ordinance does not cover the referenced employees and is therefore legally insufficient.

CITY COUNCIL DOES NOT HAVE THE POWER TO SET THE COMPENSATION OF CITY EMPLOYEES

22. Even if Plaintiffs were considered to be City employees, the Ordinance as applied to Plaintiffs is invalid on its face.

23. Pursuant to the City Charter a combination of executive branch officials can set compensation for City employees working in the operating departments. See Section 3-702 of the City Charter.

24. Therefore, to the extent the Ordinance purports to set minimum wage compensation for these City employees it violates the City's supreme law, i.e., the City Charter.

25. As such, Plaintiffs' claims are legally insufficient and should be dismissed.

PLAINTIFF'S APPLICATION OF THE ORDINANCE VIOLATES THE PENNSYLVANIA CONSTITUTION'S UNIFORMITY CLAUSE

26. Because of the widespread importance of having a uniform election law system, the drafters of the Pennsylvania Constitution required that all laws regulating the holding of elections be uniform throughout the state. See Pennsylvania Constitution, Article VII, Section 6.

27. The statutory provision referenced above, regarding the authority of the County Board of Elections to set compensation of election day workers is a law regulating the holding of elections, which is to be uniform throughout the Commonwealth of Pennsylvania.

28. Plaintiffs' application of the Ordinance to attempt to shift authority to City Council and away from the County Board of Elections would result in a lack of uniformity of the laws regulating the holding of elections.

29. Plaintiffs' application of the Ordinance would therefore violate the Pennsylvania Constitution's uniformity clause.

30. As such, Plaintiffs' claims are legally insufficient and should be dismissed.

PLAINTIFFS CANNOT SUE BOTH THE COUNTY BOARD OF ELECTIONS AND THE CITY OF PHILADELPHIA

31. In the Amended Complaint, Plaintiffs sue both the County Board of Elections and the City of Philadelphia.

32. Under applicable law, City of Philadelphia agencies may only be sued in the name of the City of Philadelphia. Philadelphia Entertainment and Development Partners v. City of Philadelphia, et al., 939 A. 2d 290 (Pa. 2007).

33. Courts have held that the County Board of Elections is a City agency and is therefore not a proper defendant in litigation. Kerrigan v. Board of Election, et al, 2008 U.S. Dist. Lexis 62263 (E.D. Pa 2008).

34. Accordingly, in the instant matter, the Court should dismiss the County Board of Elections from this case.

**MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO CONFORM TO
RULE OF COURT**

35. Pennsylvania Rule of Civil Procedure 1028 requires that a response to preliminary objections be made within twenty days of service of the objections.

36. As noted above, Defendants filed their Preliminary Objections on December 31, 2008, yet Plaintiffs waited until March 3, 2009 to file their Amended Complaint, well beyond the twenty (20) day deadline in Rule 1028.

37. Accordingly, Plaintiff's Amended Complaint should be dismissed for failure to conform to the rules of the court.

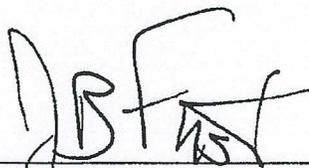
WHEREFORE, Defendants respectfully move this Honorable Court to sustain their Preliminary Objections and dismiss Plaintiffs' Amended Complaint in its entirety.

Respectfully submitted,

Date:

6/19/09

BY:



Jeffrey B. First
Senior Attorney