

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>TYFAHRA MILELE et al Plaintiff/Petitioner(s) VS. JAMES B. CHANIN et al Defendant/Respondent(s)</p>	<p>No. 23CV038479 Date: 08/15/2023 Time: 4:39 PM Dept: 14 Judge: Jenna Whitman ORDER re: Court Order Denying Request for Temporary Restraining Order</p>
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On August 15, 2023 at 10:00 a.m., the request of Tyfahra Milele et al. (petitioners) for temporary restraining order came on regularly for hearing. Petitioners were represented by Anne Kariuki and Lilia Bulgucheva. Respondents James B. Chanin et al. (respondents) appeared by H. Luke Edwards and John Burke. Having carefully considered the parties’ written submissions and oral argument, the court rules as follows:

APPLICABLE LEGAL STANDARD. The standard for issuance of a temporary restraining order ("TRO") is well-established. A TRO is appropriate to "restrain[] the...continuance of the act complained of" when "great or irreparable injury will result to the applicant before the matter can be heard on notice." (Code Civ. Proc. §§ 526(a), 527(c).) Two interrelated factors must be considered in determining whether to issue a TRO: (1) the likelihood that the applicant will prevail on the merits at trial; and (2) the relative interim harm the parties will sustain from the issuance or non-issuance of the TRO. (See, e.g., *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251-52.)

“The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support [a restraining order].... Of course, '[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits.' ... A trial court may not grant a [restraining order], regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.”

(Id., quoting *Butt v. State of California* (1992) 4 Cal.4th 668, 678, internal citations omitted.)

MOOTNESS OF REQUESTED RELIEF. As a threshold matter, the court declines to find that the requested relief is moot. In addition to requesting an order restraining the Selection Panel from voting in their July meeting, which occurred before this court to hear the matter, petitioners sought in the alternative an order staying respondent City of Oakland (including the City Council) from taking further action, including appointment to the Oakland Police Commission, on the Selection Panel’s recommendations. The City Council’s involvement in the matter is not a “completed act” incapable of restraint. Thus, petitioners’ request is not moot.

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IRREPARABLE HARM. As to irreparable harm petitioners may suffer if the court does not issue a TRO before a noticed hearing, petitioners have not made a strong showing. Petitioners Milele and Jordan were recently passed over for reappointment by the Selection Panel. The conduct which they allege wrongfully tainted the Selection Panel's process and unfairly and falsely maligned petitioners has already occurred; and the matter rests with the City Council to accept or reject the recommendations. Petitioners have not identified new or different harm they will suffer pending resolution of this case. Even assuming they could do so, however, the court must also consider their diligence, or lack thereof. The facts upon which petitioners' request for restraining order depends – their contention that James Chanin, the Chair of the Selection Panel, is biased and suffers from conflicts of interest – have been publicly known for years. Petitioners admit, "Since at least 2020, when Petitioner Ginale Harris was denied reappointment, citizens have been complaining about the non-transparent, arbitrary and capricious, and unconstitutional selection process the PC Selection Panel has been engaging in." Further, Chanin's conduct in connection with this year's selection process, in particular, has been known to petitioners for months. Despite this, petitioners waited until July 25, 2023, the same day that the Selection Panel was slated to meet and vote on the selections at issue, to file their request for restraining order. This unexplained lack of diligence further weakens petitioners' showing on the first prong.

LIKLIHOOD OF PREVAILING ON THE MERITS. In addition to having to show they will suffer irreparable harm absent the issuance of a restraining order, Petitioners bear the burden of demonstrating some possibility of prevailing on the merits of their claims.

CONFLICT OF INTEREST. Petitioners' claims are mainly premised upon the assertion that respondent Chanin has a conflict of interest which so infected the selection process that petitioners assert it should be set aside. That conflict allegedly flows from Chanin's receipt of court-approved attorneys' fees for his work in the related Allen case, in which the City of Oakland is a defendant, and in which the federal district court for the Northern District of California presides. Approximately two decades ago, that case was settled pursuant to a negotiated settlement agreement (NSA), providing for federal oversight of the City of Oakland's police department. Chanin, who represents plaintiffs in that action, continues to receive attorneys' fees for his services (subject to the court's approval. While respondents challenge the sufficiency of the evidence, there appears to be no genuine dispute that he receives such fees for his work in that case.

Petitioners assert that they need not prove an actual conflict of interest, and that an appearance of a conflict suffices; however, they do not specify what kind of conflict. In other words, they fail to tether their claim of an appearance of a conflict to any particular legal standard.

To the extent the existence of a conflict of interest may be found under the Political Reform Act (Gov't Code section 87100 et seq.), cited by petitioners, respondents contend such funds do not qualify as a "material financial interest" for purposes of the conflicts analysis. (See Gov't Code § 82030(b)(2).) Petitioners do not address this issue. Nor do they explain how it is "reasonably foreseeable" that Chanin's decision-making as part of the Selection Panel (which admittedly has no authority over the Police Commission, see Milele decl para. 23), will have a material impact on Commission decisions, which will in turn materially affect the course of the Allen proceedings and the City's ability to exit the NSA, which will then have a "material" impact on

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Chanin's financial interest (assuming there is a cognizable one). (See Gov't Code § 87103, Cal. Code Regs. tit. 2, § 18701.) On this record, the connection is too speculative to be called anything more than tenuous.

Petitioners also argue that Chanin is violating his professional ethical obligations to his clients in the Allen case by advocating for further reforms before exiting the NSA. This is speculative. Without some evidence to support it, the court is not inclined to presume he is violating such duties. More importantly, petitioners do not explain how Chanin's alleged violation of ethical duties to a third party would support these petitioners' efforts to set aside a decision participated in on the Selection Panel.

Finally, while Oakland Municipal Code section 2.45.025 provides that a person in Chanin's position is disqualified from service on the Selection Panel due to a "conflict of interest," Chanin was appointed before the ordinance was enacted and is thus, by the ordinance's own terms, expressly exempted from that provision. (Petitioners were unable to demonstrate that, given the length of his service, the exemption no longer applies.) To the extent that Chanin's "conflicts of interest" support one or more of petitioners' claims, petitioners have not met their burden to demonstrate a likelihood of prevailing on that issue.

CONSTITUTIONAL DUE PROCESS VIOLATION. Petitioners also assert that they have a probability of succeeding on their "constitutional due process" claim. They have not, however, demonstrated that the selection process, which they allege was conducted without adequate procedural protections, threaten any deprivation of life, liberty or property. (See, e.g., *Horn v. Cnty. of Ventura* (1979) 24 Cal.3d 605, 612.) The numerous authorities they cite involved hearing processes in which such rights were adjudicated, including e.g. decisions by planning commissions (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470; *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal. App. 4th 1012) or the Department of Toxic Substances Control to impose potential restrictions on real property (*Beck Dev. Co. v. S. Pac. Transportation Co.* (1996) 44 Cal.App.4th 1160), or the revocation of a charter school's charter (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197), for example.

No significant property interest is at stake here. Petitioners argue they have an interest in constitutional due process, but that is a circular argument; without a property interest, such specific procedural protections cannot be found to apply. (*Horn, supra*, 24 Cal.3d at p. 612.)

Zumwalt v. Trustees of Cal. State Colleges (1973) 33 Cal. App. 3d 665 is inapposite. There, a professor was summarily removed from the chairmanship of his department without notice or explanation. The court reasoned that the professor was entitled to due process because his own employer's decision to summarily remove him had inflicted damage to his academic reputation and career prospects. (*Id.* at p. 680.) The court characterized the professor's loss as "a public employee's deprivation of status". (*Ibid.*) That is type of interest is at least similar to others, in the employment context, that have been characterized as a vested fundamental right, and is not similar to the stakes in this case.

The court also finds that the decision of the Selection Panel is not adjudicative in nature, in that it was not adjudicating the property or other "rights" of the petitioners. Instead, the Selection Panel

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was making what is essentially a legislative (political) decision to recommend certain persons to the City Council for appointment to the Police Commission. Although the decision may impact petitioners in personal or individual ways, the decision is one of policy and therefore legislative. (See, e.g., *Orange Cnty. Cable Commc'ns Co. v. City of San Clemente* (1976) 59 Cal.App.3d 165, 171 [“the City Council, in choosing to award a franchise, was clearly acting in a legislative capacity”]; see also *City Council of City of Santa Barbara v. Superior Ct. In & For Santa Barbara Cnty.* (1960) 179 Cal.App.2d 389 [when refuse collection rate can only be changed by ordinance, it is legislative in character; court cannot by mandate compel amendment].)

It is “well settled...that only those governmental decisions which are Adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements.” (Horn, *supra*, 24 Cal.3d at p. 612.) Thus, petitioners have not demonstrated a likely entitlement to the due process protections of such a hearing (e.g., to put on an evidentiary record before a neutral or impartial decision maker, to be represented by counsel, to receive a written decision, or any of the other hallmarks of due process in a judicial or quasi-judicial setting). While they were entitled to fair process, such process is limited to rudimentary due process (notice and a hearing) which would appear to be satisfied by the Selection Panel’s own procedures. These entitled petitioners to submit an application for the Selection Panel’s review and to participate in an interview, and required the Selection Panel to vote on their selections in open session. (Oakland City Charter § 604(c)(3)a.; OMC 2.45.030.) Petitioners have not presented evidence that the Selection Panel failed to follow these procedures.

Petitioners suggest that the foregoing is immaterial because this case involves the exercise of a “ministerial function” by the City Council, which will inevitably approve the recommended candidates. Even assuming that is the case as a practical matter, the court must look to the discretion afforded to the City Council by applicable law. (*United Assn. of Journeymen v. City & Cnty. of San Francisco* (1995) 32 Cal. App. 4th 751, at 759.) And the Charter specifies that the Council retains the ability to accept or reject the slate presented. (Charter § 604(c).)

SUBSTANTIVE CHALLENGE AS “ABUSE OF DISCRETION” UNDER CCP 1085.

Petitioners then argue that even if the recommendation of candidates for appointment constitutes a legislative act, which would prevent the court from interfering with the Selection Panel’s decision under the separation of powers doctrine (*Monarch Cablevision, Inc. v. City Council, City of Pac. Grove* (1966) 239 Cal.App.2d 206, 211), an applicable exception exists. Citing *Tailfeather v. Bd. of Supervisors* (1996) 48 Cal.App.4th 1223, petitioners assert they will prove at trial that confirming the Selection Panel’s nominees under these circumstances would be “so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law,” and injunctive relief would be proper.

Although petitioners bear a heavy burden under this “highly deferential” inquiry, they have not even explained what “discretion” the City Council enjoys or how it was exceeded. The first step is to identify the source and contours of the Selection Panel’s discretion. (See, e.g., *United Assn. of Journeymen v. City & Cnty. of San Francisco* (1995) 32 Cal.App.4th 751, 759, 768. See also *Monarch Cablevision, supra*, at p. 210 [examining applicable laws providing nature and scope of decisionmaker’s discretion].) Petitioners failed to identify legal constraints on the Selection Panel’s discretion, which are clearly set forth in City Charter section 604(c)(1). Nor have petitioners provided any evidence to show that either of the recommended candidates do not

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meet applicable criteria, such that this court could conclude that the Selection Panel's recommendations are so "palpably unreasonable and arbitrary" that they constitute an abuse of the discretion granted to the Selection Panel in Charter section 604(c)(1).

ORDER. Petitioners expressed, both in their papers and oral argument, their views that Chanin's conduct is a breach of the trust placed in him by the people of the City of Oakland, and is undermining the best interests of the City. Whether or not that is true, here, to obtain the provisional relief sought here, petitioners bear the burden of demonstrating they will suffer some irreparable harm if an injunction does not issue, and that there is some likelihood of success on one or more of their legal claims. Particularly on the latter prong, petitioners' efforts fell far short. It is for that reason that the request for temporary restraining order staying the City Council's consideration or confirmation of the Selection Committee's recommended candidates for the Police Commission is hereby DENIED.

Clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record.

Dated: 08/15/2023



Jenna Whitman / Judge

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	FILED Superior Court of California County of Alameda 08/15/2023
PLAINTIFF/PETITIONER: TYFAHRA MILELE et al	Chad Finke, Executive Officer / Clerk of the Court
DEFENDANT/RESPONDENT: JAMES B. CHANIN et al	By: <u>Juanita Moore</u> Deputy J. Moore
CERTIFICATE OF ELECTRONIC SERVICE CODE OF CIVIL PROCEDURE 1010.6	CASE NUMBER: 23CV038479

I, the below named Executive Officer/Clerk of Court of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the General Order (Court Order Denying Request for Temporary Restraining Order) entered herein upon each party or counsel of record in the above entitled action, by electronically serving the document(s) from my place of business, in accordance with standard court practices.

Ann M. Kariuki
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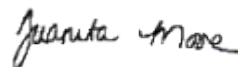
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Chad Finke, Executive Officer / Clerk of the Court

Dated: 08/15/2023

By:



J. Moore, Deputy Clerk