

**The State of New Hampshire
Superior Court**

Hillsborough - North

AMERICAN FEDERATION OF TEACHERS, ET AL.

v.

WILLIAM GARDNER, ET AL.

No. 216-2020-CV-0570

ORDER ON DEFENDANT'S MOTION TO RECONSIDER

The plaintiffs have brought this action against William Gardner in his official capacity as New Hampshire Secretary of State and Gordon MacDonald in his official capacity as New Hampshire Attorney General. The Court issued a ruling on October 13, 2020, denying preliminary injunction and/or dismissing most of the plaintiff's claims. The Court, however, ordered the Secretary of State to develop a method to forward an absentee voter registration form directly to an applicant pursuant to RSA 654:16 and :18. The Secretary of State has moved to reconsider that ruling. The Secretary of State acknowledges he has a statutory obligation to forward the absentee voter registration forms to applicants. He argues only that he already complies with that statutory mandate. The plaintiffs have objected pointing to evidence of the inadequacy of the defendant's response.

A party moving for reconsideration is confined to identifying "points of law or fact that the court has overlooked or misapprehended" N.H. R. Civ. P. 12(e) (emphasis added). "[T]he rule does not purport to authorize either party to submit further evidence

bearing on the motion.” Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 492 (1989). It is within the trial court’s discretion to accept new evidence, see id., though absent good cause it should reject it. See State v. Winn, 141 N.H. 812, 814 (1997) (“Because the defendant asserted no reason why she had previously failed to raise the new factual allegations in her original motion to suppress, the trial court correctly declined to consider them [on a motion for reconsideration].”). Similarly, a party is not permitted to introduce a new legal argument which could have been raised and argued earlier. See Cochran v. Quest Software, Inc., 328 F.2d 1, 11 (1st Cir. 2003) (“Litigation is not a game of hopscotch. It is generally accepted that a party may not, on a motion for reconsideration, advance a new argument that could (and should) have been presented prior to the [] [C]ourt’s original ruling. . . . After that point, a litigant should not be allowed to switch from theory to theory like a bee in search of honey.”).

The plaintiffs correctly argue that this Court did not overlook or misapprehend the law or evidence when it issued its original ruling. As noted, there is no dispute about the Secretary of State’s statutory responsibility to forward absentee voter registration forms directly to an applicant. At the hearing on September 24, the Court specifically asked counsel for the defendant whether the Secretary of State sent registration forms directly to an applicant or whether the Secretary of State referred the applicant to the town clerk to get the form. The attorney responded that he did not know the nuances of how that process worked. The defendant did not supplement the record following the hearing. Thus, at the time the Court issued its ruling, the Court’s ruling was accurate based on the information available to it.

The Court will treat the defendant's motion as a submission that the Secretary of State is in compliance with the requirements of RSA 654:16 and :18. The defendant has provided proof in the form of an affidavit and exhibits that it has and continues to respond directly to applicants by providing them the complete absentee registration packet. The Secretary of State has also sent potential voters a direct mailer with contact information for the Secretary of State's Office to request absentee voter registration packets, has broadcast messages through Twitter with the information, and issued a press release following the Court's October 13 order clarifying that registration packets are available directly from the Secretary of State.

The plaintiffs counter this evidence by pointing out that the direct mailer was sent in August 2020. They point to a more recent mailing from the Secretary of State's Office, which only informs potential voters about the ability to obtain the absentee registration packet from their town clerk's office. This more recent mailer does not mention the packet is also available from the Secretary of State directly. The plaintiffs also submit several other sources of information available on the Secretary of State's website that only inform voters about the ability to get the absentee registration packet from their town clerk without reference to the ability to request the registration forms directly from the Secretary of State. The plaintiffs argue that this information is inconsistent with the defendant's obligation under RSA 652:23, which requires the Secretary of State to publish accurate instructions about the voter registration process.

The Amended Complaint asked this Court to order the Secretary of State to make absentee voter registration forms available on the Secretary of State's website or direct

towns to make it available for download from a town's webpage. Amended Compl. (Doc. 16) ¶¶ 155-56. Based on the pleadings and answers to the Court's questions at the hearing, the Court was concerned that the Secretary of State was not providing the absentee registration form directly to voters at all despite the statutory requirements of RSA 654:16 and :18. See Order (Doc. 67) at 11. To remedy this perceived deficiency, the Court ordered: "the Secretary of State must accommodate aspiring voters who contact his office for a registration form by developing a method to forward an absentee voter registration form directly to the applicant." Id. at 13.

While the Secretary of State's inconsistent communications about how to request absentee registration packets may be cause for concern, the plaintiffs did not make that claim and the Court did not order relief on that issue. The Court's order was premised on a belief that potential voters who contacted the Secretary of State for registration packets were redirected to the town or municipal clerk. The Secretary of State has allayed that concern by providing proof through Deputy Secretary of State David Scanlan's affidavit that the Secretary of State fulfills his statutory responsibility as required by RSA 653:16 and :18. Accordingly, no further relief on this issue is required at this time.

November 2, 2020
Date


Judge N. William Delker

Clerk's Notice of Decision
Document Sent to Parties
on 11/02/2020