

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
Northern Division**

KENNETH M. HARPER

PLAINTIFF

VERSUS

CIVIL ACTION: 3:21-cv-60-DPJ-FKB

**BOARD OF SUPERVISORS OF
WARREN COUNTY, MISSISSIPPI;
EDWARD HERRING, in his official capacity
as a member of the Board of Supervisors;
WILLIAM H. BANKS, JR., in his official capacity
as a member of the Board of Supervisors;
SHAWN JACKSON, in her official capacity
as a member of the Board of Supervisors;
JEFFERY P. HOLLAND, in his official capacity
as a member of the Board of Supervisors;and
KELLE BARFIELD, in her official capacity
as a member of the Board of Supervisors**

DEFENDANTS

VERIFIED COMPLAINT

INTRODUCTION

The Plaintiff, the duly elected County Prosecuting Attorney of Warren County, Mississippi, brings this civil action to remedy the Defendants' violations of the Plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States cognizable under 42 U.S.C. § 1983, as follows:

PARTIES

1. The Plaintiff Kenneth M. Harper is the Prosecuting Attorney of Warren County, Mississippi, pursuant to Miss. Code § 19-23-1, et seq., having been elected to this office by the voters in the November 6, 2019 General Election. As an elected officeholder under the laws of

the State of Mississippi, the Plaintiff has a property interest in his office protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

2. The Defendant Board of Supervisors of Warren County, Mississippi is the governing body for the county government of Warren County, a political subdivision of the State of Mississippi.

3. The Defendant Edward Herring is a member of the Board of Supervisors of Warren County, Mississippi. He is sued in his official capacity only and for the purposes of declaratory and injunctive relief.

4. The Defendant William H. Banks, Jr. is a member of the Board of Supervisors of Warren County, Mississippi. He is sued in his official capacity only and for the purposes of declaratory and injunctive relief.

5. The Defendant Shawn Jackson is a member of the Board of Supervisors of Warren County, Mississippi. She is sued in her official capacity only and for the purposes of declaratory and injunctive relief.

6. The Defendant Jeffrey P. Holland is a member of the Board of Supervisors of Warren County, Mississippi. He is sued in his official capacity only and for the purposes of declaratory and injunctive relief.

7. The Defendant Kelle Barfield is a member of the Board of Supervisors of Warren County, Mississippi. She is sued in her official capacity only and for the purposes of declaratory and injunctive relief.

JURISDICTION AND VENUE

8. The Plaintiff brings this civil rights lawsuit pursuant to the Fourteenth Amendment to the United States Constitution and under federal law, particularly the Civil Rights Act of 1871, 42 U.S.C. § 1983. For purposes of the federal civil rights claims brought against the county government defendants each and every one of them were acting under color of statute, ordinance, regulation, custom, or usage of the State of Mississippi, Warren County, Mississippi and the Warren County, Mississippi Board of Supervisors.

9. The Plaintiff seeks declaratory and injunctive relief against the members of the County Board of Supervisors to enjoin them from preventing the Plaintiff from exercising his legal rights as the County Prosecuting Attorney and likewise to order that their unlawful decision to call a special election for the allegedly vacant office of County Prosecuting Attorney, and to make an interim appointment for the allegedly vacant office, be set aside and declared a nullity, and that the Plaintiff be restored to his legal position with all accrued back pay and benefits. By virtue of the unconstitutional actions of the Board of Supervisors, the Plaintiff has suffered irreparable injury and does not have an adequate remedy at law.

10. This Court has authority to grant the Plaintiff's requested declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, implemented through Rule 57 of the Federal Rules of Civil Procedure. This Court is also authorized to grant injunctive relief and damages under 28 U.S.C. § 1343, pursuant to Rule 65 of the Federal Rules of Civil Procedure, and reasonable attorney's fees and costs under 42 U.S.C. § 1988.

11. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

12. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b) because all Defendants reside in this judicial district and a substantial part of the events or omissions giving rise to the Plaintiff's claims occurred in this district.

FACTS

13. The Plaintiff is the County Prosecuting Attorney of Warren County, Mississippi, an elected office created pursuant to Miss. Code Ann. § 19-23-1, et seq. The Plaintiff was elected to this office by the voters in the November 6, 2019 General Election.

14. After the November 2019 election the Plaintiff was given assurances by the incoming members of the County Board of Supervisors that the position would become a full time position, which would entitle him to a full salary equal to 90 percent of the salary of the county judge, which would be approximately \$121,500.

15. However, when the Plaintiff took office in January 2020, he learned that he only would be receiving the same salary and expense allowance that had been received by the previous county prosecutor that had served part-time, which was \$72,219.00 with \$1,000 a month for office expense.

16. During this January 2020 time frame, the Attorney for the Board of Supervisors told the Plaintiff that the Board was not going to increase his salary but was going to increase his office allowance from \$1,000.00 to \$1,500.00.

17. The Board Attorney also told the Plaintiff to submit a request for full time salary of \$121,500 for the next fiscal year beginning October 2020, which the Plaintiff later did by letter, a copy of which is attached as Exhibit "A."

18. On September 8, 2020, the Board of Supervisors adopted a new budget for the fiscal year beginning in October of that year, and the Plaintiff was later told by the deputy chancery clerk, who was in charge of board minutes, that the Board had not changed his salary.

19. On Monday, September 14, 2020, the Plaintiff, in a moment of great frustration, submitted a letter of resignation to the Board of Supervisors. The Letter, which is attached as Exhibit "B, says the following: "Please accept this letter as my resignation as Warren County Prosecuting Attorney effective September 14, 2020 at 5:00 p.m."

20. Almost immediately afterwards, Warren County Judge Marcie Southerland encouraged the Plaintiff to withdraw the resignation letter, and the President of the Board of Supervisors, the Defendant Jeffrey P. Holland, told the Plaintiff he could withdraw his resignation letter. The Board President told the Plaintiff that such a withdrawal was acceptable to the other four members of the Board of Supervisors and Southerland.

21. At 8:00 a.m. on Thursday, September 17, 2020, the Plaintiff submitted a letter to Board "withdrawing and rescinding the letter of resignation." See Exhibit "C," attached. The Board of Supervisors in turn removed the agenda item regarding the Plaintiff's resignation from the agenda of the Monday, September 21, 2020, Board meeting.

22. On Friday, October 9, 2020 the Plaintiff received a call from Southerland regarding youth court procedures during which the Plaintiff cited youth court rules. Southerland told the Plaintiff she was tired of the Plaintiff citing rules every time she told him what she wanted him to do. Southerland then told the Plaintiff that she wanted him to prosecute an individual for violation of a protective order she had previously issued, but which did not meet statutory requirements for prosecution and on which no charge had been made. Southerland

wanted the Plaintiff to prosecute this person through use of a subpoena for him to show cause and have the hearing the following Monday or Tuesday (both she and her court administrator had been improperly earwigged about this matter beforehand). The Plaintiff told Southerland that he had talked with members of the Warren County Sheriff's Department and they told him that the individual had done nothing for which he should be prosecuted. Southerland informed the Plaintiff that she did not care what law enforcement said. The Plaintiff told Southerland that she could not tell him, as county prosecutor, what to do regarding this prosecution, and Southerland hung up the telephone on him.

23. On the following Wednesday, October 14, 2020, the Plaintiff received an email from the Board Attorney with copies of Mississippi attorney general opinions which Southerland had given to him. The attorney general opinions were in regard to resignations of public officers.

24. On Monday October 19, 2020, Southerland met with the Board of Supervisors in executive session where she falsely told them she was afraid she could be sued for decisions she made since, in her view, the Plaintiff was not serving legally as prosecutor because of the Plaintiff's September 14, 2020 resignation letter, and that they, the Board, could be held liable individually for any money the county government paid the Plaintiff.

25. On Tuesday, October 20, 2020, the Board met with Southerland again in executive session and, afterwards, voted to seek a Mississippi attorney general's opinion regarding the Plaintiff's withdrawn resignation, and, moreover, also unlawfully voted to withhold salary and expense payments to the Plaintiff until receipt of the attorney general's opinion. A copy of the Board minutes for the October 20, 2020 meeting is attached as Exhibit

“D.” The Plaintiff then sought to meet with the board in executive session, as Southerland had, to discuss these matters, but the Plaintiff was told by the Board Attorney that he could not do so.

26. Southerland then issued an order appointing another attorney as youth court prosecutor, relieving the Plaintiff from that position.

27. The Board received a response from the Mississippi Attorney General on December 8, 2020.

28. The Plaintiff continued working as the prosecutor for the Warren County Justice Court even though he was not being paid.

29. On December 14, 2020, the Plaintiff received an email from the Board Attorney stating that he could be on the agenda for the Board meeting that morning from 9:15 to 9:30 to discuss his position as county prosecutor in open session. The agenda for that meeting lists Plaintiff as the county prosecutor. At that meeting the Plaintiff informed the Board that it was his position that he was still the duly elected county prosecutor and that he should be allowed to serve the term of office for which he was elected.

30. On December 21, 2020, the Board, having received a response from the Mississippi Attorney General on their opinion request, voted to place the Plaintiff’s withdrawn September 14, 2020 resignation letter on their minutes “for information.” Remarkably, the Board did not vote to accept the Plaintiff’s resignation. The Board then voted to order the County Election Commission to hold a special election for the allegedly vacant position of county prosecutor. The Board further ordered that the allegedly vacant position be advertised to solicit resumes for interim prosecutor. A copy of the December 21, 2020 Board minutes are attached as Exhibit “E.” The Plaintiff later applied for the interim position.

31. On January 19, 2021, the Plaintiff met with Board for an “interview” for the position of “interim” county prosecutor. The Plaintiff told the Board, as he had on December 14, 2020, that it was his position that he was still the duly elected county prosecutor and offered to show them legal authorities which supported his position. The Plaintiff was told that the Board members were not interested in rehashing the action which they had already taken on December 21, 2020. Later that day, the Plaintiff received a call from the Board Attorney telling him that the Board had appointed Stephen McMillin, Esq. --who had finished third in the 2019 general election for the office-- as interim county prosecutor.

LEGAL POSITION REGARDING DUE PROCESS ARGUMENT

32. The Due Process Clause of the Fourteenth Amendment protects an individual's interests in life, liberty, and "property." An elected county official who is entitled to hold an office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process. *Gordon v. Leatherman*, 450 F.2d 562, 565 (5th Cir. 1972); *Crowe v. Lucas*, 595 F.2d 985,993 (5th Cir. 1979).

33. At common law, both an official's tendering of his resignation and its acceptance by the proper authority was required to effectuate the resignation. *Edwards v. United States*, 103 U.S. 471, 473-474, 26 L.Ed. 314 (1880). See also Floyd R. Mechem, *Treatise on the Law of Public Offices and Officers* § 414 (1890) ("At common law, the resignation of a public officer was not complete, so far as the public is concerned, until it was duly accepted by the proper authorities."). Here, the Plaintiff withdrew his resignation before it was accepted by the Board of Supervisors, and the Board even told the Plaintiff that it would be acceptable for him to withdraw the resignation. A resignation that must be acted upon in some way may be withdrawn

before acted upon. 67 C.J.S. *Officers* § 216, Withdrawal and repudiation (“A resignation generally may be withdrawn before it is accepted.”).

34. “The common law forms the basis of [Mississippi’s] system of jurisprudence, and remains in force until repealed, changed, or modified by statute.” *Brassiell v. Brassiell*, 228 Miss. 243, 87 So.2d 699, 701 (Miss. 1956) quoting *Hemingway v. Scales*, 42 Miss. 1. Once the Plaintiff withdrew the resignation of office on September 17, 2021, the Board of Supervisors had no legal right to determine that the office was vacant and order a special election.

COUNT 1:

THE DECISION OF THE WARREN COUNTY BOARD OF SUPERVISORS ON OCTOBER 20, 2020, TO WITHHOLD SALARY AND EXPENSE PAYMENTS TO THE PLAINTIFF VIOLATED THE PLAINTIFF’S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

35. The Plaintiff incorporates by reference the allegations in paragraphs 1 through 34 above, as if fully set forth herein.

36. The decision of the Warren County Board of Supervisors on October 20, 2020, to withhold salary and expense payments to the Plaintiff violated the Plaintiff’s right to due process of law under the Fourteenth Amendment to the U.S. Constitution.

COUNT 2:

THE DECISION OF THE WARREN COUNTY BOARD OF SUPERVISORS ON DECEMBER 21, 2020, TO ORDER THE WARREN COUNTY ELECTION COMMISSION TO HOLD A SPECIAL ELECTION FOR THE VACANT POSITION OF COUNTY PROSECUTOR AND TO SOLICIT RESUMES FOR AN INTERIM COUNTY PROSECUTOR VIOLATED THE PLAINTIFF’S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

37. The Plaintiff incorporates by reference the allegations in paragraphs 1 through 34 above, as if fully set forth herein.

38. The decision of the Warren County Board of Supervisors on December 21, 2020, to order the Warren County Election Commission to hold a special election for the vacant position of county prosecutor and to solicit resumes for an interim county prosecutor violated the Plaintiff's right to due process of law under the Fourteenth Amendment to the U.S. Constitution.

COUNT 3:

THE DECISION OF THE WARREN COUNTY BOARD OF SUPERVISORS ON JANUARY 18, 2020, TO APPOINT AN INTERIM COUNTY PROSECUTOR VIOLATED THE PLAINTIFF'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

39. The Plaintiff incorporates by reference the allegations in paragraphs 1 through 34 above, as if fully set forth herein.

40. The decision of the Warren County Board of Supervisors on December 21, 2020, to appoint an interim county prosecutor violated the Plaintiff's right to due process of law under the Fourteenth Amendment to the U.S. Constitution.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for relief as follows:

A. That this Court issue a Temporary Restraining Order, Preliminary Injunction, and a Permanent Injunction enjoining the Defendant Board of Supervisors of Warren County,

Mississippi and the five defendant board members from interfering with the Plaintiff's legal rights as county prosecutor.

B. That this Court issue a Temporary Restraining Order, Preliminary Injunction, and a Permanent Injunction ordering the Defendant Board of Supervisors of Warren County, Mississippi and the five defendant board members to rescind their December 21, 2020 action and cause the Plaintiff to be reinstated to his lawful position as county prosecutor with all accrued back pay and benefits, including salary, life insurance, monthly office expense, and retirement contribution.

C. That this Court award the Plaintiff nominal damages against the County Defendants for the violation of the Plaintiff's constitutional rights;

D. That this Court adjudge, decree, and declare the rights and other legal relations within the subject matter here in controversy so that such declaration shall have the full force and effect of final judgment;

E. That this Court retain jurisdiction over the matter for the purposes of enforcing this Court's order;

F. That this Court declare the Plaintiff is a prevailing party and award the Plaintiff the reasonable costs and expenses of this action, including reasonably attorney's fees in accordance with 42 U. S .C. §1988;

G. That this Court grant such other and further relief as this Court deems equitable and just under the circumstances.

Respectfully submitted this the 29th day of January, 2021.

KENNETH M. HARPER

Sam Begley

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VERIFICATION OF COMPLAINT

I, Kenneth M. Harper, declare as follows:

1. I am the Plaintiff in this action.
2. I have read the foregoing complaint and know of the contents thereof.
3. Based on my own knowledge, the contents of the foregoing complaint are true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 29, 2021 at Vicksburg, Mississippi.


KENNETH M. HARPER