DEPARTMENT 86 LAW AND MOTION RULINGS

Case Number: 22STCP01633 **Hearing Date:** July 13, 2022 **Dept:** 86

CHANG v. GLASCO, et al.
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[Tentative] ORDER DENYING PETITION FOR WRIT OF MANDATE

Petitioner, Diana Chang, seeks a writ of mandate prohibiting Respondents, Gene Glasco, Arcadia City Clerk, and Dean C. Logan, Los Angeles County Registrar-Recorder/County Clerk, from taking any actions that would cause the name of Arcadia City Councilmember Sho Tay to be excluded from the November 8, 2022 ballot based on Arcadia City Charter section 401.[1]

Respondent Logan and Respondent Glasco separately oppose the petition.

Respondent Logan argues he is not the elections official for the November 8, 2022 General Municipal Election for the City of Arcadia. Therefore, Respondent Logan contends he "has no authority or duty over these matters and cannot have failed to perform any duty or committed any errors, omissions or neglect as to matters outside the scope of his duties." (Logan Opposition 2:10-12.) Respondent Logan does not take a position on the substantive issues raised by the petition.

Respondent Glasco contends Petitioner is not entitled to relief in this proceeding. Respondent Glasco asserts the Charter for the City of Arcadia (the Charter) and its term limits provision precludes Tay from running for re-election.

Respondent Glasco's request for judicial notice (Glasco RJN) is granted.
Respondent Logan's request for judicial notice (Logan RJN) is granted.

Respondent Glasco's evidentiary objections to the Declaration of Bradley W. Hertz are both overruled.

Respondent Glasco's evidentiary objections to the Declaration of Sho Tay are sustained except as to paragraph 9 which is overruled. (The court reads the objection to paragraph 14 as a secondary evidence objection.)

The Petition is DENIED.

STATEMENT OF THE CASE

The issue before the court is the proper interpretation of section 401 of the Charter. That provision sets forth the eligibility requirements for the office of councilmember for the City Council. This court is tasked with the proper interpretation of the following sentence within Charter section 401:

> "A Councilmember who has been elected for two consecutive four-year terms . . . shall not be eligible to hold the office of Councilmember again until two years after expiration of the second consecutive term." (Hertz Decl., Ex. 1.)

The parties do not dispute the underlying facts resulting in the controversy before the court.

On April 8, 2014, Tay won election to the City Council for a four-year term. (Tay Decl., ¶ 1; Hertz Decl., Ex. 2.) Tay served the four-year term. (Tay Decl., ¶ 1.)

Just prior to the completion of his first term in office, Tay filed nomination papers for a second four-year term on the City Council. (Tay Decl., ¶ 4.) At the close of the nomination period, Tay was the only person who had filed nomination papers for City Council in electoral district three. (Tay Decl., ¶ 4; Hertz Decl., Ex. 4.)

As there were no other candidates running for City Council in electoral district three, pursuant to Elections Code section 10229, the City Council adopted a resolution appointing Tay "in lieu of an election" "resulting in a cost savings to the City in the range of $14,000 to $15,000." (Hertz Decl., Ex. 4.) The resolution specified Tay "is appointed to the office to which he was nominated, and is considered to be the same as being elected, pursuant to Section 10229(a)(3) of the California Elections Code." (Hertz Decl., Ex. 4.) The resolution also specified Tay "shall qualify and take office and serve exactly as if elected at the General Municipal Election for the office." (Hertz Decl., Ex. 4.)

Pursuant to the City Council's resolution, Tay is currently serving his second four-year term on the City Council. (Tay Decl., ¶ 5.)

In late 2021, Tay inquired of the City (through City Attorney Stephen Deitsch) "as to the City's interpretation of Charter section 401 and how, if at all, that might impact [his] desire to seek election in 2022 for another four-year term on the City Council." (Tay Decl., ¶ 6.) The City Attorney advised Tay that Charter section 401 "prohibits [him] from seeking election in 2022 for another four-year term on the City Council." (Tay Decl., ¶ 7.)

Petitioner wishes to vote for Tay for City Council in the November 8, 2022 election. Petitioner contends the City is denying her right to vote for Tay based on the City's allegedly "incorrect interpretation of [the City's] 'term limit' law." (Pet., ¶ 1.)

This proceeding ensued.

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STANDARD OF REVIEW

Petitioner seeks relief from the court pursuant to Code of Civil Procedure section 1085 and Elections Code section 13314.

Code of Civil Procedure section 1085 provides in part:

> "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins, as a duty arising from an office, trust, or station . . . ."

A "traditional writ of mandate . . . is a way to compel a public entity to perform a legal, typically, ministerial duty." (*Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 204.)

"To obtain a writ of mandate under Code of Civil Procedure section 1085, the petitioner has the burden of proving a clear, present, and usually ministerial duty on the part of the respondent, and a clear, present, and

beneficial right in the petitioner for the performance of that duty." (*Marquez v. State Dept. of Health Care Services* (2015) 240 Cal.App.4th 87, 103.) "A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment." (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593.)

Finally, Elections Code section 13314 provides that an elector may seek a writ of mandate alleging that an error or omission has occurred or is about to occur in the printing of a ballot. A writ shall issue only upon proof that the error is in violation of the Elections Code or the California Constitution, and that the issuance of the writ will not interfere with the conduct of the election.[2] (Elec. Code § 13314, subd. (a)(2).)

ANALYSIS

The parties dispute whether Charter section 401 precludes Tay from running for City Council in the November 8, 2022 election.

As noted earlier, Charter section 401 states in pertinent part:

> "A Councilmember who has been elected for two consecutive four-year terms . . . shall not be eligible to hold the office of Councilmember again until two years after expiration of the second consecutive term." (Hertz Decl., Ex. 1.)

There is no question by the time of the November 8, 2022 election Tay will have already served two-terms as a councilmember—from 2014 to 2018 and from 2018 to 2022. Petitioner contends, however, Charter section 401 does not preclude Tay from running for election to serve a third term. Petitioner argues Tay was not elected to his second term; he was appointed by the City Council. Thus, according to Petitioner, as Tay was not "elected for two consecutive four-year terms," he may run for re-election on November 8, 2022. (Charter § 401.)

Petitioner's argument "is remarkably simple." (Opening Brief 11:7; Reply 4:14.) She contends the plain language of Charter section 401 must control. Petitioner asserts "elected" means elected, not appointed; there is nothing more to the claim. The issue, according to Petitioner, is "whether City Charter section 401 means something other than what it says." (Opening Brief 11:16-17.)

Petitioner reinforces her plain language argument with examples demonstrating the distinctly different meanings of the words "elected" and "served."

For example, Petitioner reports term limit laws often draw a distinction between the words elected and served. Certain Southern California municipalities, unlike the City, "clearly identify that term limits are implicated when an elected official 'serves' a certain number of terms in office." (Opening Brief 11:20-21.) Petitioner notes term limits for the City of Los Angeles, the City of West Hollywood, the County of Los Angeles and the County of Orange all turn on whether an elected official has served in office versus being elected. The City of Los Angeles "does not permit a councilmember to 'serve more than three terms of office.' " (Opening Brief 11:22.) The County of Los Angeles precludes supervisors from running for re-election where the supervisor has been "elected or served in such office for three consecutive terms."[3] (Hertz Decl., Ex. 8.)

To further bolster her argument, Petitioner advises the City is in the process of considering whether to amend Charter section 401 to read: "Council Members who are elected or appointed shall serve no more than three, four-year terms as City Council Members." (Hertz Decl., ¶ 7.) The potential Charter amendment, according to Petitioner, suggests Petitioner's interpretation is the correct one. That the City is considering the

change demonstrates the City does not believe Charter section 401 as written bars Tay from running for City Council in November 2022.

Petitioner contends *Pope v. Superior Court* (2006) 136 Cal.App.4th 871 (*Pope*) makes clear her plain language interpretation controls the court's resolution of the controversy here. In *Pope,* a council member died two years into his four-year term. The city council then appointed the deceased council member's wife, Ms. Barovsky, to serve in the office pending a special election. Five months later, through the special election, Ms. Barovsky was elected to the remaining 17 months of her deceased husband's term. Following that term, Ms. Barovsky was elected to a four-year term. At the conclusion of that term, she sought re-election to another four-year term. (*Id.* at 874.)

The term limit law for the city provided: "No person shall be elected as a member of the city council for more than two four year terms . . . ." (*Ibid.*) A majority of the court found nothing ambiguous about the term limit law; the clear and unambiguous language controlled the provision without extrinsic aids. The court noted Ms. Barovsky had been appointed by the city council to serve for five months, had been elected to serve a remaining 17-month term, and had been elected to one four-year term. The court found Ms. Barovsky could run for office because she had only been elected to one four-year term. (*Id.* at 877.) During the court's discussion, the court noted "[e]lected does not mean appointed." (*Ibid.*)

Finally, Petitioner argues denying Tay the right to run for City Council will deprive Petitioner of her rights under the First and Fourteenth Amendment of the United States Constitution. While Petitioner concedes term limits are constitutional, she argues "they are reviewed closely to determine the degree to which they infringe on these rights due to the significance of the right to vote and run for office."[4] (Opening Brief 16:10-12.)

Respondent Glasco argues section 10229, subdivision (a) of the Election Code, applicable here through Charter section 1102,[5] undermines Petitioner's claim. The court agrees.

Elections Code section 10229, subdivision (a) provides in relevant part:

> "If . . . only one person has been nominated for any office that is elected on a citywide basis, or . . . only one person is nominated to be elected from or by a legislative district . . . the city elections official shall submit a certificate of these facts to the governing body of the city and inform the governing body of the city that it may, at a regular or special meeting held before the municipal election, adopt one of the following courses of action: (1) Appoint to the office the person who has been nominated. . . . **The person appointed, if any, shall qualify and take office and serve exactly as if elected at a municipal election for the office.** . . ." (Emphasis added.)

A person appointed to office through the process authorized by Elections Code section 10229, subdivision (a) is thus appointed in advance and in lieu of an election. In practical terms, through the statute, the Legislature has authorized a city's governing body to accelerate the choice of the electorate. That there is a single qualified candidate for election necessarily dictates the results of the election—there is no contest and no choice for the electorate because only one candidate has qualified for office. Where the appointment is made in advance of the election, Elections Code section 10229, subdivision (a) dictates that the appointment is treated "exactly as if elected at a municipal election for the office." (Elec. Code § 10229, subd. (a).) The appointment is consistent with the will of the voters and eliminates the formality and "expense" of an uncontested and "unnecessary" election. (See Opening Brief 14:14.)

In response to Respondent Glasco's reliance on Elections Code section 10229, subdivision (a), Petitioner makes a series of arguments. The arguments are not persuasive.

Petitioner initially argues the state statute has no application on term limits for the City Council because such matters are of local concern. (Opening Brief 14:8-11.) Petitioner's home rule argument fails, however, because the City has expressly adopted and incorporated the state's election law into the Charter unless the state law conflicts with the Charter. (Charter § 1102.) As Petitioner has not identified any conflict between Elections Code section 10229, subdivision (a) and a provision in the Charter, the state law is applicable here.

Petitioner also asserts the statute "actually supports the conclusion that 'elected' does not, and cannot, mean 'appointed.' " (Opening Brief 14:12-13.) Petitioner argues the statutory provision "in no way affects[] any provision of term limit laws." (Opening Brief 14:18.) Petitioner reaches her conclusion because Elections Code section 10229, subdivision (a) makes no express reference to term limits. That the statute makes no express reference to term limits, however, does not mean the statute has no application in the context of Charter section 401.

From the court's perspective, the issue is how, if at all, does Elections Code section 10229, subdivision (a) inform on the interpretation of Charter section 401. The state statute specifies a person appointed by a city's governing body in advance of an uncontested election—in an effort to avoid the "expense" of an "unnecessary" election—"take[s] office and serve[s] exactly as if elected . . . ." (Elec. Code § 10229, subd. (a). Opening Brief 14:14.) An individual taking office "exactly as if elected" would fall within Charter section 401's term-limit provision for elected Councilmembers. The state statute equates appointment through Elections Code section 10229, subdivision (a) with an election to office.

Petitioner further believes the Legislature adopted Elections Code section 10229 because "[t]here could be an argument that an appointed Councilmember is not permitted to exercise the same authority as an elected one, because an appointed Councilmember has not received the consent of the voters to act on behalf of the governed." (Opening Brief 14:23-25.) Petitioner contends "the Legislature codified section 10229 in order [to] provide an appointed official, via statute, the same authority and serve as it vested in an elected official." (Opening Brief 14:26-15:2.) While Petitioner may be correct, the argument ignores the statute's reference to taking office and does not suggest why the individual who serves "exactly as if elected" in terms of his or her authority should not be treated "exactly as if elected" for purposes of the City's term-limit law.[6]

Finally, Petitioner argues Tay served his second term with a "qualitatively different" power "than the power vested in an elected official." (Reply 2:21.) Given Elections Code section 10229, subdivision (a)'s directive that Tay "serve exactly as if elected," Petitioner's claim appears unsupported. In fact, Petitioner's position seems contradicted by the statute.

Petitioner asserts:

> ". . . an appointed official [under Elections Code section 10229, subdivision (a)] essentially serves based on the authority—and only at the pleasure—of the City Council which appointed him or her. (See, e.g., Cal. Elec. Code section 10229(d).) As the City Clerk points out [citation],[7] Elections Code section 10229(d) provides that the Arcadia City Council could have passed an ordinance and forced Councilmember Tay to appear on a special election ballot prior to the November 8, 2022 election. The Arcadia City Council therefore has the capacity to withdraw its Councilmember appointments, should an appointed Councilmember ever stray too far from the majority's good graces. Regardless of how many appointment statutes the City Clerk can find in state law, the relevant appointment statute—Elections Code section 10229—clearly

> establishes that an appointment is different in kind, not just in terminology, and thus demonstrates that being appointed to City Council is not the same thing as being elected to City Council." (Reply Brief 2:23-3:8.)

The relevance of Elections Code section 10229, subdivision (d) to these proceedings escapes the court. Elections Code section 10229's reference to Government Code section 36512 in both subdivisions (a) and (d) is relevant only where a city's governing body fills a vacancy in office. The court is unable to discern any authority for Petitioner's position that a city's governing body can subject an official appointed under Elections Code section 10229, subdivision (a) to a special election after appointment.

Finally, the court disagrees with Petitioner's view she and other citizens of the City have been deprived of their individual rights. The City Council's appointment process through Elections Code section 10229, subdivision (a) did nothing more than avoid the expense of an unnecessary election with a clear legal result. Had the election proceeded in 2018, Tay, as the only qualified individual on the ballot, would have taken office and served his second term. Charter section 401 does not allow him to take office again without having waited two years after the expiration of his current and second term.[8]

The application of Charter section 401 under the circumstances here is necessarily informed by Elections Code section 10229, subdivision (a). While Tay may have been appointed to his second term by the City Council through Elections Code section 10229, subdivision (a) because he necessarily would have assumed office through his unopposed re-election bid, his appointment is treated "exactly as if elected at a municipal election . . . ." (Elec. Code § 10229, subd. (a).) Thus, the statute makes Tay's appointment equivalent to an election for purposes of Charter section 401.

CONCLUSION

Based on the foregoing, the petition is denied.

IT IS SO ORDERED.

July 13, 2022

Hon. Mitchell Beckloff
Judge of the Superior Court

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[1] Petitioner also seeks an injunction and declaratory relief.
[2] There is no dispute an order issued promptly by the court in this matter will not interfere with the coduct of the election.
[3] Respondent argues the referenced laws were all adopted between 1996 and 2013 after the Legislature passed Elections Code section 10229 in 1980. (Opposition 16:1-2, 20:12-13.)
[4] Petitioner does not attack the validity of Elections Code section 10229.
[5] Charter section 1102 provides: "PROCEDURE FOR HOLDING ELECTIONS. Unless otherwise provided by ordinance hereinafter enacted, all elections shall be held in accordance with the provisions of the Elections Code of the State of California, as it exists or is amended, for the holding of municipal elections, so far as the same are not in conflict with this Charter."
[6] The court appreciates Petitioner's position "the drafters clearly determined that there may be challenges to the authority of an appointed officer where that officer was not granted authority via the electoral process but instead by the appointment process." (Opening Brief 15:9-11.) The Legislature, however, created the context in which such a challenge would occur—appointment to office to avoid the expense of an unnecessary election. The statute ensures where an appointment to office is made by a city's governing body

pursuant to Elections Code section 10229, subdivision (a), the individual appointed "shall qualify and take office and serve exactly as if elected . . . ."

[7] In a footnote, Respondent Glasco writes: "A city may choose to adopt an ordinance requiring a special election with respect to an in-lieu appointment, see § 10229(d), but the default is for the appointee to serve the full term. Arcadia has not adopted such an ordinance." (Opposition 9 fn. 3.)

[8] Adopting Petitioner's argument would allow the City Council to use the appointment process in Elections Code section 10229, subdivision (a) to avoid Charter section 401's term limits provision whenever it favored a particular unopposed candidate for office.
