

CHRONOLOGICAL CASE SUMMARY
CIVIL, WARRICK SUPERIOR COURT NO. 2

FOR CAUSE NO: 87D02-1104-PL-000484
WHITEHOUSE & MOSBY VS VAND. CO. ELECTION BOARD & ALFRED LINDSEY
THE HONORABLE ROBERT R AYLSWORTH

ACTION: CIVIL PLENARY

DATE FILED: 04/18/2011
ORIG FILE DT: 03/23/2011

FUTURE CALENDAR DATES:

ENTRY/FEE BOOK: PAGE: 136
BOOK: 0 PAGE: 0
BOOK: 0 PAGE: 0

ATTORNEYS

PARTIES

18625-82 ROBERT FAULKNER
400 COURT STREET
P.O. BOX 4208
EVANSVILLE IN 47724-4208
PH: 812-464-3966
FAX: 812-464-3968

PLAINTIFF
RANDALL WHITEHOUSE

18625-82 ROBERT FAULKNER
400 COURT STREET
P.O. BOX 4208
EVANSVILLE IN 47724-4208
PH: 812-464-3966
FAX: 812-464-3968

DAVID MOSBY

17883-82 DOUGLAS K BRIODY
LAW OFFICE OF DOUG BRIODY
839 STAHL COURT
EVANSVILLE IN 47715-7166
PH: 812-760-3235
FAX: 866-736-8498

DEFENDANT
VANDERBURGH COUNTY ELECTION BOARD
C/O DOUGLAS BRIODY
1 NW MLK JR. BLVD., RM 214
EVANSVILLE IN 47708

1519-82 LESLIE C SHIVELY
414 CITADEL CIRCLE, SUITE C
P.O. BOX 5717
EVANSVILLE IN 47716
PH: 812-867-1351
FAX: 812-867-1791

ALFRED M LINDSEY
C/O LESLIE C. SHIVELY
SHIVELY & ASSOC. PO BOX 5717
EVANSVILLE IN 47716

FINANCIAL INFO

PAYOR: RANDALL WHITEHOUSE
COURT COSTS - STATE \$70.00
COURT COSTS - COUNTY \$30.00
DOCUMENT STORAGE FEE \$2.00
AUTO RECORD KEEP-ST. \$7.00
JUDICIAL INSURANCE FEE \$1.00
COURT ADMINISTRATION FEE \$5.00

Total: \$146.00

CHRONOLOGICAL CASE SUMMARY
CIVIL, WARRICK SUPERIOR COURT NO. 2

FOR CAUSE NO: 87D02-1104-PL-000484
WHITEHOUSE & MOSBY VS VAND. CO. ELECTION BOARD & ALFRED LINDSEY
THE HONORABLE ROBERT R AYLSWORTH

ACTION: CIVIL PLENARY

DATE FILED: 04/18/2011
ORIG FILE DT: 03/23/2011

JUDICIAL SALARY FEE	\$18.00
CIVIL SERVICE FEE	\$10.00
PUBLIC DEFENSE ADMIN. FEE	\$3.00

CHRONOLOGICAL SUMMARY OF FILINGS AND PROCEEDINGS

*** INCLUDES ENTRIES BETWEEN 09/21/2011 AND 09/22/2011 ONLY ***

MIN Date: 09/21/2011 Notice: N
Input: 09/22/2011

RJO: Y

The court has reviewed the minutes of the 3-3-11 Vanderburgh County Election Board meeting and the transcript of the hearing on the Whitehouse challenge to Lindsey's candidacy for 6th Ward Councilman. The court has also reviewed the parties' submissions. The court cannot, based upon the record before the court, find the actions or ruling of the board to be contrary to law. As such, the court substantially adopts the findings of fact, conclusions of law and judgment proposed by Mr. Briody, the board's counsel, as the court does not believe it could substantially improve upon these as submitted. Court enters its findings of fact, conclusions of law and judgment. Copy of CCS provided to counsel by fax. Order accordingly.
(RJO) (rra/as)

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)

IN THE WARRICK SUPERIOR COURT NO. 2

RANDALL WHITEHOUSE and)
DAVID MOSBY,)
Plaintiffs,)

v.)

VANDERBURGH COUNTY ELECTION)
BOARD and ALFRED M. LINDSEY,)
Defendants.)

CAUSE NO. 87D02-1104-PL-484

FILED

SEP 19 2011

Sarah A. Dapper
CLERK WARRICK CIRCUIT AND SUPERIOR COURTS

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND JUDGMENT**

This matter having come before the Court upon the Plaintiffs' Complaint for Declaratory Judgment and Other Relief; and the Court having received and reviewed the written submissions of the parties and heard and considered the arguments of counsel with respect thereto, and being otherwise duly advised in the premises, the Court does now enter the following Findings of Fact, Conclusions of Law, and Judgment herein:¹

FINDINGS OF FACT

1. Defendant Alfred M. Lindsey ("Lindsey") sought the Democratic Party's nomination for election to the Common Council of the City of Evansville, Indiana, as the councilman for the city's Sixth Ward, in 2011.

¹ The Court acknowledges that, on or about June 23, 2011, Plaintiffs filed a written request for the Court to enter Findings of Fact and Conclusions of Law.

2. Plaintiff Randall Whitehouse ("Whitehouse") filed a challenge to Lindsey's candidacy, asserting that Lindsey failed to meet the residency requirements of Ind. Code § 3-8-1-27 (set forth in full below). Plaintiff David Mosby ("Mosby") never filed such a challenge.

3. The election for the office which Lindsey seeks to fill is to be held in the city of Evansville on November 8, 2011.

4. On March 3, 2011, the Defendant Vanderburgh County Election Board (the "Board") held a hearing, at which it heard the testimony of both Whitehouse and Lindsey, heard the arguments of their respective counsel, and received documentary submissions from both parties, with respect to Whitehouse's challenge of Lindsey's candidacy.

5. The Board has filed a certified copy of the Minutes of the Board's meeting of March 3, 2011, including copies of all documents submitted to the Board on that date, which were designated and referred to as consecutively numbered Attachments to the Minutes.

6. Plaintiffs have filed a copy of a Transcript prepared from the audiotapes of the Board's meeting of March 3, 2011, purporting to contain a complete and accurate transcription of the testimony of Whitehouse and Lindsey, their counsel's arguments, the questions of and responses made to the Board by the parties and their counsel, and the reasoning and decision of the Board with respect to Whitehouse's challenge as to Lindsey's residency.

7. At the hearing before the Board, Lindsey testified that he moved to a house located at 1611 Cumberland Avenue in the city of Evansville on October 11, 2010. His own testimony in this regard was supported by the sworn and notarized Affidavit of a Jim Wall, who also resided at that address, with Lindsey, at the same time. (Minutes, p. 2, Attachment #3; Transcript, pp. 13-14.)

8. On December 3, 2010, Lindsey moved into a house located at 433 South Bosse Avenue in the city of Evansville, for which Lindsey produced a signed Agreement of Lease, dated December 1, 2010, and covering the year-long period from December 1, 2010, through November 30, 2011. (Minutes, p. 3, Attachment #4; Transcript, pp. 14-15.)

9. Lindsey also showed the Board his Indiana driver's license, bearing the 433 South Bosse Avenue address, which was issued on December 28, 2010, less than month after Lindsey moved into the South Bosse home. (Minutes, p. 3, Attachment #6; Transcript, pp. 16-17.)

10. It is undisputed that both of these addresses, 1611 Cumberland Avenue and 433 South Bosse Avenue, are situated within the Sixth Ward and inside the corporate limits of the city of Evansville. (Minutes, pp. 3, 5; Transcript, p. 18.)

11. Lindsey testified that he maintains clothing, food, and a television at the South Bosse address, and that he sleeps there on each day when he is not stationed at the fire house where he works. (Minutes, p. 3; Transcript, p. 24.)

12. For the hearing, Whitehouse submitted a number of exhibits showing Lindsey's home address as 10410 New Harmony Road, an address purportedly outside of the city limits of Evansville. (Minutes, p. 1, Attachment #1, pp. 1-2, Exs. 1-A, 1-B, 1-D, 1-E, 1-F, 1-H, 1-I, 1-J, 1-K, 1-L, 1-P, 1-Q, 1-S, and 1-T.) Of these documents, nearly all of them are expressly dated earlier than November 8, 2010, and were in fact used by Whitehouse to establish a timeline for Lindsay dating from February 5, 2008, through October 25, 2010. (*Id.*, Exs. 1-A, 1-B, 1-D, 1-E, 1-F, 1-H, 1-I, 1-J, 1-K, and 1-L.)

13. Whitehouse's documents bearing dates later than November 8, 2010, include: an article appearing in the *Courier & Press*, dated December 5, 2010, (*id.*, Ex. 1-M); Lindsey's voter registration card, showing his change of address to 433 S. Bosse Avenue, as of December

28, 2010, (*id.*, Ex. 1-A); a docket sheet regarding an *Ex Parte* Order for Protection and a Police Incident Report regarding a complaint filed by Lindsey against Whitehouse, both dated February 25, 2011, (*id.*, Exs. 1-N and 1-O); a Contractor's Application License dated February 25, 2011, (*id.*, Ex. 1-P); property tax payment information on the 10410 New Harmony Road address, generated on February 26, 2011, (*id.*, Ex. 1-Q); and a property tax record card and real property parcel information, generated on February 26, 2011, (*id.*, Exs. 1-S and 1-T.)

14. As to these documents, the voter registration card is consistent with Lindsey's testimony as to his move to the South Bosse address in December 2010. (*Id.*, Ex. 1-A.) In the newspaper article, Lindsey is quoted as saying that he moved back into the city of Evansville and its Sixth Ward for purposes of running for election to the Evansville City Council. (*Id.*, Ex. 1-M.) Under questioning by the Board's President, Lindsey confirmed that such was indeed his intent. (Minutes, pp. 3-4; Transcript, pp. 25-26.)

15. The docket sheet and Incident Report concerning Lindsey's complaints against Whitehouse, in fact, do not reference the New Harmony Road address; rather, the Incident Report specifically states it relates to occurrences at or near the South Bosse Avenue address. (*Id.*, Exs. 1-N and 1-O.)

16. With regard to the Contractor's License Application, Lindsey testified that he continued to use the 10410 New Harmony Road address as the location from which he operated his contracting business. (Minutes, p. 4; Transcript, pp. 16, 26-27.) It would not be unexpected for Lindsey to list his business address on the Contractor's License Application. In fact, the "address" called for in the Contractor's License Application does not specify "home address" or "business address." (*Id.*, Ex. 1-P.)

17. Finally, as to the property tax documentation presented, (*id.*, Exs. 1-Q, 1-S, and 1-T), Lindsey testified that his wife, Krista Lindsey, continued to reside at 10410 New Harmony Road, although she does come to visit him on occasion at his South Bosse Avenue address. (Minutes, pp. 2-3; Transcript, pp. 15-16, 24.)

18. Although Whitehouse's counsel asked leave of the Board to question Lindsey at the hearing, counsel raised no objection when advised that such question would not be permitted, as the members of the Board had already questioned both principals. Instead, Whitehouse's counsel replied, "That's fine[.]" and then requested an opportunity for rebuttal argument, which opportunity was granted to both parties. (Minutes, p. 4; Transcript, pp. 29-31.)

19. At its meeting of March 3, 2011, the Board also heard evidence and the arguments of counsel as to Plaintiff Mosby's complaint that certain campaign advertising material being utilized by Lindsey, (Minutes, Attachment #8), violated Ind. Code § 3-14-1-6.

20. The Board determined that the challenged material, consisting of a photograph depicting Lindsey in his firefighter's uniform, fell within the express provisions of I.C. 3-14-1-6(b)(3), and was therefore permissible under the law.

21. Any item which has been designated herein as a Finding of Fact but which should more properly be considered a Conclusion of Law shall be deemed to be a Conclusion of Law set forth below.

CONCLUSIONS OF LAW

1. This matter is an appeal from the decision of a county election board, governed by Ind. Code § 3-6-5-34.

2. On March 23, 2011, Plaintiff Whitehouse timely initiated an appeal of the Board's decision of March 3, 2011, to the Vanderburgh Circuit Court, pursuant to I.C. 3-6-5-34.

3. The proceeding was transferred to this Court upon a Motion for Change of Venue from the County filed by Lindsey in the Vanderburgh Circuit Court, and a subsequent Notice of Change of Venue from the Judge filed by Plaintiffs in the Warrick Circuit Court.

4. As this matter is an appeal from a county election board, the Court may neither conduct a trial *de novo* nor substitute its decision for that of the Board. Rather, the Court may only examine the Board's decision to determine if it was incorrect as a matter of law. Unless the decision is illegal, the decision must be upheld. *Price v. Lake County Board of Elections and Registration*, No. 45A03-1103-PL-128, 2011 Ind. App. LEXIS 1423, at *5-*6 (Ind. Ct. App. July 29, 2011); *Clay v. Marrero*, 774 N.E.2d 520, 521 (Ind. Ct. App. 2002).

5. The evidentiary record before the Court consists of the Minutes and the Transcript of the Board hearing of March 3, 2011.

6. At a hearing held before this Court on August 9, 2011, the parties consented to the matter being presented to the Court for decision upon written materials, to consist of briefs and proposed Orders, submitted by the parties.

7. I.C. 3-8-1-27 provides as follows:

A candidate for membership on common council of a second or third class city must:

- (1) have resided in the city for at least one (1) year; and
- (2) have resided in the district in which seeking election, if applicable, for at least six (6) months; before the election.²

² Although the issue has not been addressed by any of the parties, the Court takes judicial notice that, based upon its population, Evansville is statutorily considered as a city of the second class, according to Indiana's municipal designations. Ind. Code § 36-4-1-1(a).

8. The election referred to in I.C. 3-8-1-27 is the municipal or general election in which a candidate actually seeks election to office, and not a primary election which confers only a party's nomination to stand for election. Ind. Code § 3-8-1-1.7; *Price*, 2011 Ind. App. LEXIS 1423, at *6-*7; *In re Nomination of Parker*, 580 N.E.2d 1006 (Ind. Ct. App. 1991).

9. Accordingly, Lindsey must have resided within the city of Evansville prior to November 8, 2010, and in its Sixth Ward prior to May 8, 2011, to satisfy the residency requirements of I.C. 3-8-1-27.

10. Ind. Code § 3-5-2-42.5 defines "residence" as follows:

"Residence" means the place:

- (1) where a person has the person's true, fixed, and permanent home and principal establishment; and
- (2) to which the person has, whenever absent, the intention of returning.

11. The Indiana Supreme Court has stated that, "[r]esidency requires a definite intention and 'evidence of acts undertaken in furtherance of the requisite intent, which makes the intent manifest and believable.'" *State Election Board v. Bayh*, 521 N.E.2d 1313, 1318 (Ind. 1988) (quoting *In re Evrard*, 263 Ind. 435, 440, 333 N.E.2d 765, 767 (1975)). A self-serving statement of intent, standing alone, does not a residence make. However, when the statement of intent and conduct in furtherance of such intent conjoin, a new residence is established. *Id.*

12. In this case, it appears that Lindsey maintained his legal residence at 10410 New Harmony Road for some period of time prior to October 11, 2010. The relevance of such residence, however, is merely historical, as the only questions at issue here are Lindsey's residency within the city of Evansville as of November 8, 2010, and within its Sixth Ward no later than May 8, 2011.

13. Beginning on October 11, 2010, Lindsey became a resident of the Sixth Ward in the city of Evansville, residing first at 1611 Cumberland Avenue for approximately eight (8)

weeks. Both Lindsey's testimony and the supporting affidavit of Jim Wall, that Lindsey lived at that address, went unchallenged.

14. From December 3, 2010, on, Lindsey made his residence at 433 South Bosse Avenue, also located in Evansville's Sixth Ward. His testimony established that his basic necessities, such as food and clothing, were housed there, and that he returned to that abode each day when he was not on duty at the fire station. This testimony, too, was not subject to any attack at the Board hearing.

15. On December 5, 2010, Lindsey was represented in certain local media as asserting that he had moved back into the city of Evansville for purposes of seeking election to represent the Sixth Ward on the city council. At the hearing before the Board, he confirmed that reestablishing residency within the city, in order to run, was his intent all along.

16. Such intent, expressed publicly, and coupled with the acts of actually taking up a physical presence within the jurisdiction he sought to represent, provides the requisite joinder of intent and act necessary to establish residency within the city of Evansville and its Sixth Ward sufficient to meet the requirements of I.C. 3-8-1-27.

17. The Board was presented with substantial evidence to support its decision that Lindsey has been a resident of the city of Evansville, and its Sixth Ward, continuously since October 11, 2010.

18. In light of the existence of such substantial evidence, the Court cannot say that the Board's decision was incorrect as a matter of law, or that the Board abused its discretion in rendering the decision it did. *Clay*, 774 N.E.2d at 522.

19. With respect to the homestead exemption on 10410 New Harmony Road, the Court notes that no evidence was offered by any party to show when Lindsey first claimed

conduct of the hearing, both by failing to assert any objection before the Board, and with Whitehouse's counsel even going so far as to declare express consent to that procedure which was outlined by the Board's President.

residence at that property or that he was entitled to a homestead exemption there at such time. The evidence presented, however, does show indisputably that Krista Lindsey is a record owner of such real estate, and that it continues to be her principal place of residence. She, therefore, is fully entitled to continue to claim a homestead exemption on such property as against the real property taxes assessed thereon.

20. Furthermore, as pointed out by Lindsey, Indiana law specifically authorizes married persons to establish separate residences for voting purposes. Ind. Code § 3-5-5-14 provides: "A married person who does not live in a household with the person's spouse may establish a separate residence from the residence of the person's spouse." *Id.* Whitehouse has offered no authority for the proposition that one spouse claiming a homestead exemption for property tax purposes precludes the other spouse from maintaining a separate residence in accordance with this provision.

21. Although Whitehouse points to certain statements of a lone Board member made in partial support of her vote, to argue that such reasons do not justify the decision reached by the Board as a whole, the Court is not bound by such statements. As a rule, boards and commissions speak and act officially only through their minutes and other records of their duly organized meetings. *Brademas v. St. Joseph County Comm'rs*, 621 N.E.2d 1133, 1137 (Ind. Ct. App. 1993). In the present case, the Board spoke and acted through a majority of its membership, and not through the voice of a single Board member, as reflected in the Minutes, to declare that Lindsey satisfactorily established residency in accordance with statutory requirements.

22. As to Whitehouse's argument that he was denied due process by the Board, in failing to have an opportunity to cross-examine Lindsey at the hearing, the Court determines that Whitehouse waived any objection to such procedure as was established by the Board for the

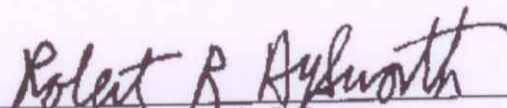
JUDGMENT

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED THAT Judgment should be and it is now and hereby **ENTERED** in favor of the Defendants, and each of them, and against the Plaintiffs, and each of them, upon Plaintiffs' Complaint for Declaratory Judgment and Other Relief, and that Plaintiffs shall take nothing by way of their Complaint.

IT IS FURTHER ORDERED THAT Defendant Alfred M. Lindsay appropriately and satisfactorily established his legal residency within the corporate limits of the City of Evansville as of October 11, 2010, or otherwise prior to November 8, 2010, and within the Sixth Ward of the City of Evansville as of October 11, 2010, or otherwise prior to May 8, 2011, such that he may stand for election to the Common Council of the City of Evansville on November 8, 2011.

IT IS FURTHER ORDERED THAT each of the decisions made and actions taken by Defendant Vanderburgh County Election Board on March 3, 2011, were just and proper, based upon the evidence presented to the Board and the Board's application of the law thereto, and that each of the said decisions and actions are now and hereby **AFFIRMED**.

ALL OF WHICH IS SO ORDERED this 19 day of Sept., 2011.



Hon. Robert R. Aylsworth, Judge
Warrick Superior Court No. 12

DISTRIBUTION TO:

Robert R. Faulkner, Esq.
Douglas K. Briody, Esq.
Leslie C. Shively, Esq.