

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Tammy Thomas,	:	Case No. 2:10-cv-00139
	:	
Plaintiff	:	
	:	
vs.	:	Judge John D. Holschuh
	:	
Steven Koebel et al.,	:	Magistrate Judge Norah McCann King
	:	
Defendants	:	
	:	<u>MOTION FOR PRELIMINARY</u>
	:	<u>INJUNCTION</u>
	:	

Plaintiff hereby moves, pursuant to Fed. R. Civ. Pro. 65, for a preliminary injunction enjoining the Village of Middleport and its Mayor from convening and adjudicating cases in the Middleport Mayor’s Court under current policies which deny persons accused of crimes due process of law. Specifically the Mayor, as presiding official, is not a neutral decision maker and he denies those accused of crimes the opportunity to call witnesses, to confront their accuser, and adequate notice of their rights.

Plaintiff requests that bond be set at \$1.00.

MEMORANDUM OF LAW

I. Introduction

One cornerstone of due process is that decisions must be made by a neutral decision maker and not one whose judgment is clouded by conflicts of interest. Tammy Thomas was not afforded that right. She was charged with crimes by Defendant Middleport police officer Steve Koebel. She then complained about excessive force to

his boss¹, the Mayor. When the Mayor heard Koebel's Charges against Ms. Thomas in Mayor's Court he did not let Thomas call witnesses and did not hear any evidence from Koebel. She was found guilty beyond reasonable doubt and sentenced to pay \$ in fines and costs which helped the Mayor meet his obligations as Village chief executive to fund various Village expenses. The Mayor, who presides over the legislative work of Council, the executive work of the village and the judicial work of the Mayor's Court has a blatant and irreconcilable conflict of interest. Moreover, in his operation of the Mayor's Court he denies all procedural due process to those who are accused of crimes such as calling witnesses, confronting their accusers, and providing notice of their rights. This is a "Kangaroo Court²" and must be enjoined.

II. Statement of Facts

1. Plaintiff Tammy Thomas was arrested by Defendant Officer Steven Koebel on or about February 14, 2009³. Ms. Thomas alleges that Defendant Koebel attacked her and inappropriately grabbed her breast, and that he forced his way into her home without probable cause or a warrant⁴.
2. Charges against Ms. Thomas were adjudicated in the Village of Middleport Mayor's Court on February 17, 2009. Defendant Gerlach presided at her trial⁵.
3. Defendant Gerlach⁶ is the Mayor of the Village of Middleport and is therefore the chief executive officer of the Village.⁷ He also presides over the legislative

¹ Steve Koebel was eventually suspended by the Mayor for excessive force against another citizen and for falsifying his report. (Doc.15-11)

² A "Kangaroo Court" is one that is "characterized by irresponsible, unauthorized, or irregular status or procedures," and one where the "principles of law and justice are disregarded or perverted." Webster's Online Dictionary, www.merriam-webster.com. The phrase has historically been used in reference to either mock proceedings, or seemingly legitimate ones which have their integrity compromised.

³ (Doc.15-28)

⁴ Thomas Compl. p. 3

⁵ (Doc.18-7)

- branch of the Village⁸ and presides over the judicial branch of the Village, the Mayor's Court.⁹
4. Defendant Gerlach's duties include: presiding over Village Council meetings¹⁰, voting on Council in the case of a tie¹¹, providing accountings of revenues to Council¹² including those collected through fines and costs imposed through the Mayor's Court¹³, and acting as a decision maker regarding employment matters within the Village.¹⁴
 5. The fines and fees from proceedings in the Mayor's Court generated an estimated \$120,000 for the Village coffers in 2009.¹⁵
 6. Pursuant to policy, Defendant Gerlach refused to permit Ms. Thomas to call her own witnesses during the adjudication of her case.¹⁶
 7. Defendant Gerlach, again pursuant to his own policy, also refused to permit Ms. Thomas to call Defendant Officer Koebel as a witness. In fact, it is the custom and policy of the Mayor's Court that accusing officers are not expected to be present,¹⁷ and the Defendant determines guilt beyond a reasonable doubt without hearing any testimony from such officer.¹⁸

⁶ The Mayor is sued in the amended complaint only in his official capacity and only for injunctive relief.

⁷ Gerlach Dep. (6:24-25, 7:1)

⁸ Id. at (7:2-4)

⁹ Id. at (7:5-6)

¹⁰ Id. at (5:24-25)

¹¹ Id. at (5:20-23)

¹² Id. at (14:11-16)

¹³ Id. at (19:1-12, 20:7-15)

¹⁴ Id. at (15:7-14)

¹⁵ Id. at (20:4-6)

¹⁶ Id. at (81:6-12)

¹⁷ Id. at (44:12-15)

¹⁸ Id. at (46:2-11)

8. Defendant Koebel confirms that, during his time as a Middleport police officer, he wrote many tickets but was never been asked to testify in Mayor's Court regarding any of them.¹⁹
9. Defendant Gerlach cannot even recall whether he informed Ms. Thomas that she could transfer her case directly to Meigs County Municipal Court, where she would be permitted to call witnesses and to confront her accuser.²⁰
10. Defendant Gerlach is Defendant Koebel's ultimate superior.²¹ He was personally informed by Ms. Thomas of her complaint of excessive force against Defendant Koebel before conducting the criminal proceedings against Ms. Thomas.²²
11. Ms. Thomas' complaints against Defendant Koebel were ignored by the Mayor who convicted her of all charges without hearing any evidence²³.
12. Ms. Thomas' convictions were all dismissed on appeal to the Meigs County Municipal Court²⁴.
13. The Middleport Mayor's Court continues to operate in the manner it did when Ms. Thomas' case was adjudicated.²⁵

III. ARGUMENT

A. Mayor's Courts Generally

§ 1905.01 of the Ohio Revised Code authorizes the Mayor of any Ohio municipal corporation with a population in excess of one-hundred to hear and determine prosecutions for some municipal offenses. Under this authorization, a mayor is permitted

¹⁹ Koebel Dep. (173:11-17)

²⁰ Gerlach Dep. (31:22-25)

²¹ Id. at (61:2-11)

²² Id. at (29:6-16)

²³ Thomas Compl. at 6.

²⁴ Thomas Compl. at 5.

²⁵ Gerlach Dep. (36:11-18)

to adjudicate prosecutions for violations of “an ordinance of the municipal corporation relating to operating a motor vehicle while under the influence of alcohol (OVI).” Ohio Rev. Code § 1905.01(B)(1). The Supreme Court of Ohio further has issued rules and regulations detailing educational and procedural requirements for Mayor’s Courts in Ohio.²⁶ Plaintiff does not make a facial challenge to this statute, nor to the general authorization of such courts and the provision of authority to mayors to adjudicate claims where no conflict exists. Rather, Plaintiff attacks the particular operation of this Mayor’s Court, and the actions of this particular mayor.

Because this was a traffic offense, the Ohio Traffic Rules, promulgated by the Ohio Supreme Court, as well as the Ohio Rules of Criminal Procedure apply. The Traffic Rules require that a mayor presiding over cases in Mayor’s Court hold herself to the same standards required of judges of “courts of record,” and that the Ohio Code of Judicial Conduct applies. Ohio Traffic Rule 16. The Code of Judicial Conduct requires that a judge disqualify herself where her “impartiality might reasonably be questioned.” Ohio Code of Judicial Conduct, Canon 3(E)(1). Additionally, mayor’s are obviously required to comply with the law. *Id.* at Canon 2.

Plaintiff challenges the *way* in which this particular Mayor’s Court was administered. Because Defendant Gerlach was not an impartial and neutral decision-maker, as required by both Ohio law and the United States Constitution, his adjudication of Ms. Thomas’ case was improper. Further, because Ms. Thomas was denied her due process rights to present evidence on her behalf and to confront her accuser, the policies and procedures of this Mayor’s Court are constitutionally unsound.

²⁶ Mayor’s Court Education and Procedure Rules, available at: <http://www.supremecourt.ohio.gov/LegalResources/Rules/mayor/mayors.pdf>

B. Standard For Granting A Preliminary Injunction

The standard for granting a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure is well established. Though there is no “rigid and comprehensive test,” *Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984), courts generally consider the following four factors: 1) Whether the party seeking injunctive relief has shown a substantial likelihood of success on the merits; 2) Whether the party seeking the injunction will suffer irreparable harm absent the injunction; 3) Whether the injunction will cause others to suffer substantial harm; and 4) Whether the public interest would be served by the preliminary injunction. *Hamilton’s Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007), citing *Connection Distributing Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998).

The “crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits” because the constitutionality, or unconstitutionality, of the government act or policy largely determines whether the party was irreparably harmed and whether the public interest would be best served by injunction. *Hamilton’s Bogarts, Inc.*, 501 F.3d at 649. However, the “probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction.” *State of Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987). Therefore, the greater the injury, the less likely success on the merits must be before an injunction will properly be issued.

1. Plaintiff has a Substantial Likelihood of Success on the Merits

a. Mayor Gerlach is not a Neutral Decision Maker

The standard for determining whether a Mayor's Court violates a defendant's Fourteenth Amendment right to Due Process because the Mayor is impermissibly acting in inconsistent roles has been well-settled by the United States Supreme Court for more than 30 years. Where a Mayor with executive power also serves as judge in Mayor's Court due process rights of those who appear before the Mayor will be violated where the executive/judge's "situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.'" *DePiero v. City of Macedonia*, 180 F.3d 770, 777 (6th Cir. 1999), citing *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)(challenge to Monroeville, Ohio Mayor's Court). Where a Mayor has an interest in, and a responsibility for, the financial condition of the village, there exists a "strong official motive to convict and graduate the fine to help the financial needs of the village." *DePiero*, 180 F.3d at 778 (challenge to Macedonia, Ohio Mayor's Court).

In *Ward*, the Supreme Court found that the plaintiff's rights were violated where a Mayor presiding over a Mayor's Court also had broad executive powers, was the chief conservator of the peace, was president of city council, presided at council meetings, voted on council in case of a tie, accounted annually to the council regarding village finances, and had general supervision of village affairs. *Ward*, 409 U.S. at 58. Likewise, the Sixth Circuit, in *DePiero*, held that an executive with such broad executive powers could not serve as a detached and neutral arbiter in a Mayor's Court. *DePiero*, 180 F.3d at 780. This was so because the Mayor occupied "two practically and seriously inconsistent positions... [which] necessarily involves a lack of due process of law in the

trial[s] ... before him.” *Id.*, citing *Tumey v. Ohio*, 273 U.S. 510, 534 (1927); see also *Rose v. Village of Peninsula*, 875 F. Supp. 442 (N.D. Ohio, 1995) (holding that driver/defendant was denied due process where mayor “wore two hats” by being chief executive responsible for village’s financial condition and acting as a judge, deciding contested traffic cases). Consequently, an executive is not a detached and neutral decision-maker where either: his interests in the financial condition of the village may tempt him to “maintain a high level of contribution from the Mayor’s Court, or where the Mayor has ultimate appointment authority over officers and he may be tempted to give the officers undue credence. *DePiero*, 180 F.3d at 782.

Here, Defendant Gerlach enjoyed broad executive powers. He was the chief enforcer of the laws of the Village of Middleport, presided over the village council, voted on the council in case of a tie, annually accounted to the council regarding village affairs, and had general supervision of all village employees. Gerlach is directly responsible for accounting to the Council for income generated through the Mayor’s court, a body which brought in an estimated \$120,000 in 2009. There exists a temptation for Gerlach, who is self-admittedly responsible for ensuring that Village finances are handled “efficiently,” to generate as much revenue as possible through the Mayor’s Court.

Further, Gerlach is the ultimate decision-maker with regard to hiring and retention of Village employees. As the ultimate superior to Defendant Koebel, Gerlach clearly faces the temptation to give the officer “undue credence.” In fact, Koebel wasn’t even required to testify regarding his charges against Ms. Thomas. Instead, Gerlach convicted Ms. Thomas using the ticket issued by Koebel as the only evidence against her²⁷. There is no distinguishable difference between Gerlach and the Mayors in question in *Ward* and

²⁷ Gerlach Dep. (60:4-9)

DePiero. Consequently, Gerlach cannot be a detached and neutral decision-maker in the Village of Middleport Mayor's Court, and Ms. Thomas' constitutional rights were violated.

b. Gerlach's Mayor's Court denies to the accused basic rights to due process.
The right to present evidence, including the right to obtain witnesses in one's favor, is provided to all citizens under the Sixth Amendment, as incorporated to the states by the Fourteenth. Additionally, that amendment requires that defendants be "confronted with the witnesses against him." U.S. Const. Am. 6. The right to due process is "the right to a fair opportunity to defend against the State's accusations." An opportunity for a defendant to be heard in her own defense is "basic in our system of jurisprudence." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), citing *In re Oliver*, 333 U.S. 257 (1948). Within this concept, it is well-settled that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.*

Defendant Gerlach refused to permit Ms. Thomas present any evidence on her behalf. He claims that he is able to find an individual guilty without hearing any evidence other than the written reports of ticketing officers, even where the defendant's in-court assertions are materially different and where the defendant seeks to offer witness testimony.²⁸ Further, Defendant Gerlach's Mayor's Court does not afford a defendant, including Ms. Thomas, an opportunity to confront her accuser. In fact, the only time this opportunity is afforded is when the ticketing officer happens to be on duty during the adjudication of the defendant's charges.²⁹ Clearly this situation rarely arises as Defendant

²⁸ Gerlach Dep. (81:13-25; 82:1-8)

²⁹ *Id.* at (56:14-25)

Gerlach cannot even recall the last time it occurred.³⁰ This customary procedure represents the policy of the Middleport Mayor's Court. This policy directly violates the Fourteenth Amendment rights of defendants like Ms. Thomas.

c. Tammy Thomas has Standing to seek injunctive relief and the issues are not moot

i. Ms. Thomas has Standing

A plaintiff challenging the constitutionality of a particular governmental policy, regulation or action must show that there is an "actual case or controversy." U.S. Const. Art. III § 2. A litigant may not pursue a claim where the risk of a constitutional deprivation is "imaginary or speculative." *Younger v. Harris*, 401 U.S. 37, 42 (1971). However, it is not necessary for a litigant to expose herself to "actual arrest or prosecution" to challenge policy or actions that deter the exercise of constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

While *Los Angeles v. Lyons* held that an individual seeking an injunction against police officers' use of chokeholds must fail where the risk of future violation was tenuous because the plaintiff failed to show the immediate threat that he would be pulled over and put in a chokehold again, the Court there also noted that the plaintiff had failed to show that the police department authorized the use of the chokeholds, or that all officers used the chokeholds. 461 U.S. 95 (1983). Here, the policy maker for the Village of Middleport Mayor's Court, Defendant Gerlach, *has* authorized the constitutional deprivations at issue and, because Defendant Gerlach is the only individual adjudicating cases before that body, in a sense "all" judges in the Mayor's Court are applying unconstitutional methods.

ii. The issues are not moot

³⁰ Id. at (57:6-8)

Additionally, a number of cases have recognized that a controversy is not dead simply because it a violation is not certain to be repeated. If a controversy is “capable of repetition, yet evading review,” an actual controversy exists. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). A case or controversy meets this requirement where: 1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and 2) there is a reasonable expectation that the same complaining party would be subject to the same action again. *Roe v. Wade*, 410 U.S. 113 (1973).

In *U.S. v. Howard*, 480 F.3d 1005 (9th Cir. 2007), the Ninth Circuit analyzed the “too short in duration” prong and held that a pretrial policy of shackling defendants could be enjoined despite the fact that the plaintiffs’ criminal pretrial proceedings were over. This was so because the defendants in the criminal cases could not have brought challenges before the harm imposed by the shackling was complete. *Id.* at 1009. Likewise here, there was no chance for Ms. Thomas to seek an injunction barring the impropriety of Defendant Gerlach’s service as an adjudicator, nor to the deprivations of her due process rights that occurred during the hearing.

To show that a challenged action or policy is capable of repetition, a plaintiff is not required to show that it is more likely than not to occur again. *Honig v. Doe*, 484 U.S. 305, 319 n. 6 (1988). Further, plaintiff’s can satisfy this requirement by showing that the harm is likely to reoccur, even if the plaintiff herself will not be harmed again. *See Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005) (no evidence that individual plaintiff, a political candidate, would be subject to harm again in the future, but controversy was likely to reoccur because it was reasonably certain that some candidate would run in the future).

Here, Ms. Thomas continues to be a resident of the Village of Middleport. It is likely that she will come into contact with the Mayor's Court again in the future. The population of Middleport is 2,525.³¹ Defendant Gerlach estimates that the Mayor's Court collects \$120,000 in fines per annum.³² Consequently, it is likely that a significant number of cases come through the Mayor's Court every year. In a small town like Middleport, this significantly increases Ms. Thomas' chances of becoming involved with the court again. Additionally, all traffic violations proceed through the Mayor's Court. Therefore, many Middleport citizens will also be exposed to the harm caused by the unconstitutional operation of the court by Defendant Gerlach.

2. Ms. Thomas will Suffer Irreparable Injury Absent and Injunction

The denial of an individual's right to due process under the Fourteenth Amendment constitutes irreparable harm. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984), *citing* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948, at 440 (1973), and cases cited therein. Though Ms. Thomas fully intends to avoid any interaction with law enforcement in Middleport, it is likely that she will again be charged with a traffic infraction in the Village of Middleport.

In *Rose v. Village of Peninsula*, the court permitted a claim for an injunction to go forward in a case alleging the impropriety of a Mayor's judicial role. Though the Mayor at issue was afforded absolute judicial immunity with regard to claims for damages, the court held that there was no immunity with regard to claims for injunctive relief. 839 F.

³¹ Official Website for the Village of Middleport, Meigs County, <http://www.village.middleport.oh.us/VOM/WELCOME.html>

³² Gerlach Dep. (20:4-6)

Supp. 517, 528 (N.D. Ohio 1993). Likewise here, because Mayor Gerlach is incapable of serving as a neutral decision-maker, any future contested hearings involving similarly situated individuals will result in the same constitutional deprivation.

3. The Injunction will Not Cause Others Substantial Harm

No other citizen of Middleport, nor any of the members of its government, will suffer any substantial harm if the Defendant is enjoined from convening and operating Mayor's Court as it is presently operated. § 1905.01 of the Ohio Revised Code and the Mayor's Court Education and Procedure Rules promulgated by the Ohio Supreme Court set out how to establish and operate a Mayor's Court in a manner that comports with due process. Following statutory and constitutional law can hardly be said to cause substantial harm.

d. The Public Interest will be Served by the Injunction

Clearly every citizen of Middleport is entitled to receive a constitutionally sound hearing when they are charged with civil and criminal violations within the Village's jurisdiction. The right to due process of law is fundamental to judicial systems in this country. An injunction is certainly in the public's best interest where it prevents deprivations of the constitutional rights of individuals.

IV. CONCLUSION

This Court should issue a preliminary injunction restraining the Defendant Village of Middleport and its Mayor from convening and adjudicating case in the Middleport Mayor's Court. Plaintiff requests that a hearing be set at the earliest possible date. Finally, Plaintiff requests that bond be set at \$1.00.

Respectfully submitted,

s/Alphonse A. Gerhardstein

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2010 a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Alphonse A. Gerhardstein
Attorney for Plaintiff