

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**INDIGENT DEFENDER BOARD OF ORLEANS
PARISH, *et al.***

CIVIL ACTION

VERSUS

No. 07-2798

BIGELOW, *et al.*

SECTION: I/2

ORDER AND REASONS

Before the Court is plaintiffs' motion for a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure.¹ For the following reasons, plaintiffs' motion is

¹ Rule 65 provides:

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character;

DENIED.

BACKGROUND

Plaintiffs are the Indigent Defender Board of Orleans Parish (“IDB”),² on its own behalf and on behalf of its members; Derwyn Bunton, Denise LeBoeuf, Pamela Metzger, and Dane Ciolino; and Nicholas LaCoppola, Farrell Davis, John Doe I, and John Doe II, individually and on behalf of all others similarly situated.³ Defendants are Raymond C. Bigelow, sued in his official capacity as Chief Judge of the Orleans Parish Criminal District Court; and Lynda Van Davis, Benedict Willard, Frank A. Marullo, Jr., Calvin Johnson, Dennis Waldron, Julian Parker, Camille Buras, Darryl Derbigny, Terry Q. Alarcon, and Gerald Hansen, sued in their official capacities as Orleans Parish Criminal District Court Judges. Plaintiffs are suing “to enjoin Defendants, judges in the Orleans Parish Criminal District Court, from unconstitutionally and

and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days’ notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. (c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

²Plaintiffs indicate that the present members of the IDB are Denise LeBoeuf, Pamela Metzger, Dane Ciolino, Derwyn Bunton, Philip Wittmann, Kim Boyle, John Fuller, and Harry Rosenberg. Rec. Doc. No. 20, p. 2.

³Plaintiffs LaCoppola and Davis are indigent persons presently represented in felony proceedings in the Criminal District Court for the Parish of Orleans by counsel provided by the IDB. John Doe I has been booked on criminal charges; however, formal charges have not yet been lodged against him. John Doe II is currently incarcerated pending the district attorney’s formal charges. Plaintiffs’ complaint indicates that the claims brought on behalf of these plaintiffs are brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Rec. Doc. No. 20, p. 3.

illegally interfering with the independence of public defenders in Orleans Parish and from participating in the specific management decisions of the [IDB].”⁴ Plaintiffs contend that defendants are attempting to alter the composition of the IDB to prevent the current board from changing the way in which indigent defendants in Orleans Parish are represented by public defenders. Specifically, plaintiffs charge that, at a May 4, 2007, meeting, defendants voted to reduce the size of the IDB from nine members to seven and to appoint different board members.

Plaintiffs argue that, prior to the disruptions caused by Hurricane Katrina in August 2005, the Orleans Parish indigent defense system provided defendants with unconstitutional “conflicted” representation. Public defenders were assigned to specific courtrooms rather than individual clients. Plaintiffs argue that this system created conflicts because public defenders had to tailor their practice to the judge to whom they were assigned, rather than the individual needs of their clients. Plaintiffs also contend that public defenders began to represent defendants at their arraignment rather than at arrest or at a defendant’s bond hearing, which left defendants languishing in jail for months prior to any contact with an attorney.⁵

Plaintiffs state that, in the aftermath of Hurricane Katrina, the current IDB began implementing policies aimed at alleviating these allegedly unconstitutional policies, including hiring full-time public defenders who are assigned to represent indigent defendants from the time of their first court appearance. According to plaintiffs, however, defendants were unhappy with these attempts at reform and took steps to alter these management decisions. Plaintiffs claim that

⁴Rec. Doc. No. 20, p. 5.

⁵Rec. Doc. No. 20, pp. 10-11.

in April 2006, defendants voted to impose a one-year term limit on all board members, contrary to the tradition of lifetime appointments; a year later, defendants allegedly advised the IDB members that their terms expired simultaneously on April 27, 2007. Defendants next solicited nominations for new board members, reduced the number of board members from nine to seven, and adopted a board consisting of four members of the previous board and three new members.⁶ Plaintiffs contend that these actions will allow defendants to exert improper influence over the IDB's actions and interfere with the previous board's attempts at reform.

Plaintiffs filed their original complaint on May 4, 2007, and defendants filed several motions to dismiss in response. On June 6, 2007, plaintiffs filed a first amended complaint; the Court then provided defendants with an opportunity to amend their motions, which remain pending before the Court.⁷ Plaintiffs allege that defendants' actions violate: (1) the IDB and board members' right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution, (2) the indigent defendants' right to effective assistance of counsel and due process as guaranteed by the Sixth and Fourteenth Amendments, (3) the separation of powers doctrine mandated by Article II, Section 2 of the Louisiana Constitution, and (4) La. Rev. Stat. § 15:144. Plaintiffs seek injunctive relief prohibiting defendants' actions, a declaration by the Court that § 15:144 *et seq.* is unconstitutional on its face or as applied, and costs and attorney's fees. In their Rule 12(b) motions, defendants argue that the Court lacks subject matter jurisdiction over this matter because plaintiffs do not have standing to bring their claims and that

⁶Rec. Doc. No. 20, p. 14.

⁷Rec. Doc. No. 19.

plaintiffs have failed to state legally cognizable claims.

After plaintiffs filed their lawsuit, defendants consented to an informal stay while the matter was initially pending before this Court; defendants agreed not to attempt to impanel new board members until June 15, 2007. When the final day of the stay arrived without any further agreement by the parties, plaintiffs' filed this temporary restraining order. In their motion, plaintiffs contend that the installation of the new IDB will violate the Fourteenth Amendment due process rights of the individual board members. Defendants were served with a copy of plaintiffs' motion the day it was filed, and the Court provided defendants with an opportunity to respond to the motion.

LAW AND ANALYSIS

In a situation such as this where notice and a hearing have occurred, the Court follows the same procedure as it would for a preliminary injunction motion. *See Kan. Hosp. Ass'n v. Whiteman*, 835 F. Supp. 1548, 1551 (D. Kan. 1993) (citing 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2951 (1973)); *see also Fourco Glass Co. v. Zuckerberg*, 470 F. Supp. 273, 275 (E.D. Tenn. 1978).

In order to obtain either a preliminary injunction or a temporary restraining order, the movant bears the burden of proving four substantive requirements. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 441, 94 S. Ct. 1113, 1125, 39 L. Ed. 2d 435 (1974) (holding that party seeking injunction bears burden of demonstrating factors justifying injunction).

The four prerequisites for the issuance of a preliminary injunction are: (1) a

substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the party opposing the injunction; and (4) that the granting of the injunction will not disserve the public interest.

In re Zale Corp., 62 F.3d 746, 765 (5th Cir. 1995); *see Enterprise Int'l, Inc. v. Corp. Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 471 (5th Cir. 1985); *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). “Injunctive relief ‘is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion.’”⁸ *Prime Ins. Syndicate, Inc. v. Orleans Limousines & Transp., Inc.*, No. 07-604, 2007 U.S. Dist. LEXIS 20820, at *5 (E.D. La. Mar. 23, 2007) (Feldman, J.) (quoting *Black Fire Fighters Ass’n of Dallas v. City of Dallas, Tex.*, 905 F.2d 63, 65 (5th Cir. 1990)); *see also Callaway*, 489 F.2d at 573.

Plaintiffs claim that board members have a constitutionally protected property interest in their positions on the IDB entitling them to notice and a hearing--pursuant to the due process rights guaranteed by the Fourteenth Amendment to the United States Constitution--prior to being removed from their positions. The United States Supreme Court explained that due process

⁸At a telephone conference, defendants suggested that the Court would need to resolve the outstanding jurisdictional questions prior to addressing the merits of plaintiffs’ temporary restraining order. As plaintiffs note, however, the Court has inherent authority to address plaintiffs’ motion before fully resolving the issue of jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 293, 67 S. Ct. 677, 695, 91 L. Ed. 884 (1947) (holding that, in issuing a temporary restraining order, “the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief.”); *Jones v. Belhaven College*, 98 F. App’x 283, 284 (5th Cir. 2004) (addressing district court’s extension of temporary restraining order and holding that the court had “the inherent authority to preserve the status quo until the question of its jurisdiction could be resolved”). The cases cited by defendants, *Bhd. of Maint. of Way Employees Div. of Int’l Bhd. of Teamsters v. Union Pac. R.R. Co.*, 475 F. Supp. 2d 819, 831 (N.D. Iowa 2007) (addressing subject matter jurisdiction prior to determining the merits of plaintiffs’ motion for preliminary injunction), and *Ivy v. Carter*, No. 99-0032, 2000 U.S. Dist. LEXIS 4395, at *2 (M.D. Tenn. Feb. 2, 2000) (analyzing jurisdiction in plaintiff’s complaint for permanent injunction), are inapposite to the particular circumstances presented by plaintiffs’ motion for temporary restraining order.

attaches where an individual receiving the benefit has

more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

.....

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). “A person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.” *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

In support of their arguments, however, plaintiffs rely solely on their claim that it is the “long-standing tradition in Orleans Parish for IDB members to be appointed for life to the [IDB]”; plaintiffs provide self-serving affidavits from four board members who attest to this tradition.⁹ Though at least one Louisiana court has found that board members may have a protected property interest in their board positions, *see Walker v. State ex rel. Louisiana Legislature*, 917 So. 2d 1229, 1235 (La. App. 2d Cir. 2005), given the limited reasoning presented in that court’s written opinion, the Court does not find *Walker* particularly helpful.

⁹Rec. Doc. No. 25, p. 9.

Alternatively, the Fifth Circuit ruled in *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 825 (5th Cir. 1986), that a Louisiana civil servant who had no written employment contract and had served a single one-year term had no property right to reappointment. *See also Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 439 (5th Cir. 2001) (finding no expectation of continued employment where plaintiff doctors had no contracts with health clinic and clinic's executive committee rescinded employment agreements adopted by the board of directors); *Latessa v. N.J. Racing Comm'n*, 113 F.3d 1313, 1318 (3d Cir. 1997) (finding no mutually explicit understanding in lone statement that employment would continue "generally speaking" if one 'keeps his nose clean' and lives up to expectations" and that a property interest in the position was not created); *cf. Perry*, 408 U.S. at 600, 92 S. Ct. at 2699 (finding mutual understanding that might justify plaintiff's claim of entitlement to continued employment where *de facto* tenure program was documented in faculty guide and university system's guidelines)

While the lack of an explicit contractual interest in his reappointment will not foreclose plaintiffs' due process claims *per se*, *see Perry*, 408 U.S. at 596, 92 S. Ct. at 2697, given plaintiffs' failure to present other evidence to support their expectation of reappointment to the IDB, the Court cannot find that plaintiffs' have a substantial likelihood of prevailing on the merits of their case.¹⁰

Nor does the Court find that plaintiffs' have demonstrated the necessary risk of

¹⁰Plaintiffs contend that the one-year term limit imposed by defendants in April 2006 is a similar unconstitutional deprivation of plaintiffs' property interest in their continued appointment to the IDB. The Court notes, however, that while La. Rev. Stat. § 15:144 *et seq.* does not grant plaintiff lifetime tenure on the IDB, § 15:144(D) allows defendants to "adopt rules and regulations to establish policy regarding the appointment of members to the indigent defender board."

irreparable harm. Plaintiffs contend that “[t]he installation of new Board members will irreparably harm the Plaintiffs’ ability to continue their work to reform the system of providing constitutionally effective and conflict-free representation to indigent defendants.”¹¹ The Court does not find that an interruption in plaintiffs’ quest to reform the current system of indigent defense in Orleans Parish is so irreparable as to warrant the requested injunctive relief. The alleged harm to plaintiffs’ ability to advocate for and implement reform is not irreparable. If the Court later determines that plaintiffs’ complaint requesting a preliminary injunction has merit, the actions of defendants can be undone and plaintiffs reinstated. Moreover, the Court finds the potential harm to defendants--measured in terms of the requested relief’s affront to comity and federalism--is not clearly outweighed by the potential harm to plaintiffs. The Court does not lightly entertain the task of enjoining the actions of a state court bench and finds that plaintiffs have not demonstrated the need for such an undertaking.

In conclusion, there can be no disagreement that it is in the public interest to have criminal defendants vigorously represented by competent and effective counsel. The Court does not question the fact that plaintiffs are sincere in their request for such relief and that plaintiffs have unselfishly and with sacrifice provided their services for the benefit of the community. The Court’s order today should not be construed to pass judgement on the ultimate merit of or justification for plaintiffs’ claims. However, applying the stringent heuristic required of a motion for a temporary restraining order, the Court does not find that plaintiffs have made a sufficient showing to warrant such a drastic measure.

¹¹Rec. Doc. No. 25, pp. 12-13.

Accordingly, based on the record before the Court and for the above and foregoing reasons, **IT IS ORDERED** that plaintiffs' motion for a temporary restraining order is **DENIED**.

IT IS FURTHER ORDERED that counsel will participate in a **status conference** with the Court on **Tuesday, June 26, 2007, at 3:00 p.m.**, to discuss how the case will proceed at this juncture. Counsel may participate by telephone if they notify the Court prior to the conference.

New Orleans, Louisiana, June 22nd, 2007.



LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

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