

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHRIS BROOKS, FRANCIS RENCOUNTRE,
GLORIA RED EAGLE, SHARON CONDEN,
JACQUELINE GARNIER, JENNIFER RED
OWL, EDWINA WESTON, MICHELLE
WESTON, MONETTE TWO EAGLE, MARK
A. MESTETH, STACY TWO LANCE, HARRY
BROWN, ELEANOR WESTON, DAWN
BLACK BULL, CLARICE MESTETH,
DONOVAN L. STEELE, EILEEN JANIS,
LEONA LITTLE HAWK, EVAN
RENCOUNTRE, CECIL LITTLE HAWK, SR.,
LINDA RED CLOUD, LORETTA LITTLE
HAWK, FAITH TWO EAGLE, EDMOND
MESTETH and ELMER KILLS BACK, JR.,

Plaintiffs,

v.

JASON GANT, in his official capacity as
SOUTH DAKOTA SECRETARY OF STATE,
SHANNON COUNTY, SOUTH DAKOTA,
FALL RIVER COUNTY, SOUTH DAKOTA,
SHANNON COUNTY BOARD OF
COMMISSIONERS, JOE FALKENBUERG,
ANNE CASSENS, MICHAEL P. ORTNER,
DEB RUSSELL, AND JOE ALLEN in their
official capacity as members of the Board of
Commissions for Fall River County, South
Dakota, BRYAN J. KEHN, DELORIS
HAGMAN, EUGENIO B. WHITE HAWK,
WENDELL YELLOW BULL and LYLA
HUTCHINSON in their official capacity as
members of the County Board of Commissioners
for Shannon County, South Dakota, SUE

Case No.: 12-5003

**DEFENDANTS' JOINT
REPLY TO PLAINTIFFS'
RESPONSE TO
DEFENDANTS' JOINT
MOTION TO DISMISS
PLAINTIFFS' MOTION FOR
PRELIMINARY
INJUNCTION**

GANJE, in her official capacity as the County)
 Auditor for Shannon and Fall River Counties, and)
 JAMES SWORD, in his official capacity as)
 attorney for Shannon and Fall River Counties,)
)
 Defendants.)

COME NOW, Defendants Jason Gant (“Gant”), in his official capacity as Secretary of State, Defendants Shannon County, South Dakota; Fall River County, South Dakota; Shannon County Board of Commissioners; Bryan J. Kehn, Deloris Hagman, Eugenio B. White Hawk, Wendell Yellow Bull, and Lyla Hutchinson in their official capacity as members of the county board of commissioners for Shannon County, South Dakota; Fall River County Board of Commissioners; Joe Falkenburg, Anne Cassens, Michael P. Ortner, Deb Russell, and Joe Allen, in their official capacity as members of the county board of commissioners for Fall River County, South Dakota; Sue Ganje, in her official capacity as the County Auditor for Shannon and Fall River Counties; and James Sword, in his official capacity as State’s Attorney for Shannon and Fall River Counties (“County Defendants”) and submit this Joint Reply to Plaintiff’s Response to Defendants’ Joint Motion to Dismiss Plaintiffs’ Motion for Preliminary Injunction.

Additional Facts

On March 6, 2012 Shannon County and Fall River County entered into an amended contract which eliminated the no-notice, no reason termination/resignation provisions. The amended contract specifically states:

Shannon shall not attempt to remove any County Official, unless the County Official has committed misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression or gross partiality. If said misconduct is suspected Shannon shall refer said matter to the proper

authorities for investigation. Only after said investigation is completed shall Shannon County take action.

Fall River County shall refrain from making threats to cancel the contract herein which provides for the elections services contained in the contract herein. Fall River and Shannon shall deal with each other in good faith and shall maintain the current auditor services through the 2012 election cycle.

Affidavit of Sara Frankenstein, Exhibit 9.

Also on March 6, 2012 Shannon County and the Fall River State's Attorney, James Sword, entered into an amended contract which also eliminated the no-notice, no reason termination/resignation provisions of that contract. The amended State's Attorney contract specifically provides:

A. Shannon shall not attempt to remove State's Attorney, unless the State's attorney has committed misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression or gross partiality. If said misconduct is suspected Shannon shall refer said matter to the proper authorities for investigation. Only after said investigation is completed shall Shannon County take action.

B. State's Attorney shall refrain from making threats to cancel the contract herein which provides for legal services contained in the contract herein. State's Attorney and Shannon shall deal with each other in good faith and shall maintain the current legal services through the 2012 election cycle.

Affidavit of Sara Frankenstein, Exhibit 10.

Argument

Plaintiffs' motion for a *preliminary* injunction is moot as the relief requested has been voluntarily granted by Defendants. *Bacon v. Neer*, 631 F.3d 875, 877 (8th Cir. 2011); *CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 621 (1st Cir. 1995).

Generally, the conditions at the time of the hearing of the suit, rather than as they existed at the suit's commencement, will be the basis for any injunctive relief. Thus, conduct that has been discontinued after an action is brought to restrain such conduct is generally an insufficient basis for injunctive relief.

42 Am.Jur.2d *Injunctions* § 3 (footnote omitted). Shannon County has secured funding for 46 days of early voting for the 2012 elections, has agreed to provide services for 46 days of early voting for the 2012 elections and has provided assurances that county officials will carry out election services for the 2012 elections. Concerning the March 3, 2012 article in the Rapid City Journal, Shannon County Commissioners did not grant 46 days of early voting for each 2012 election only because of extra money left over from the 2011 Shannon County budget. The newspaper omitted the fact that the Secretary of State committed additional HAVA funds which led to an article which does not accurately reflect what happened at the meeting. *See* Affidavit of James G. Sword.

While voluntary cessation does not always deprive the court of its power to determine the legality of the practice, “a case may still be rendered moot if the defendant is able to demonstrate that ‘there is no reasonable expectation that the wrong will be repeated’”. *Arkansas Medical Soc., Inc. v. Reynolds*, 6 F.3d 519, (8th Cir. 1993) (quoting *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1494 (8th Cir. 1988)).

In this case, Shannon County has secured HAVA funds to reimburse the county for early voting election expenses and has agreed to provide 46 days of early voting for the 2012 elections. It further has revised the contract between Shannon County and Fall River County and the Shannon County State’s Attorney contract to ensure county officials will carry out the elections services for Shannon County in 2012. Concerning the request for a *preliminary* injunction, there is no reasonable expectation that Shannon County will subsequently change its mind and refuse to provide 46 days of early voting for the 2012 elections, especially considering it has assurance for funding. There further is no reasonable expectation that county officials will

not carry out the election services when the contracts have been amended to eliminate the no-notice, no reason termination/resignation provisions.

“A ‘reasonable expectation’ is something more than a merely physical or theoretical possibility; rather, there must be a demonstrable probability that the same controversy, involving the same complaining party, will recur.” *U.S. v. Sanders*, 276 Fed.Appx. 532, 533 (8th Cir. 2008). *Accord CMM Cable*, 48 F.3d at 622-623 (“It is not enough that a consummated event could, theoretically, happen again. Rather, for an event to be ‘capable of repetition’ in the requisite sense, there must be a reasonable expectation of reoccurrence.”)

The exception to the mootness doctrine has two prongs: “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.” *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010) (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). The second prong requires, however, that the party invoking jurisdiction show a “demonstrated probability” or “reasonable expectation” not merely a “theoretical possibility” that it will be subject to the same government action. *Lopez*, 617 F.3d at 341 (citing *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010)).

Merely demonstrating that city government will “have an opportunity to act in the same allegedly unlawful manner in the future” is not enough to satisfy the second prong of the exception absent a reasonable expectation that the government *will* act in that manner. *Id.* (citing *Libertarian Party*, 595 F.3d at 217). There is no reasonable expectation Shannon County will not provide 46 days of early voting and accordingly, Plaintiffs’ request for a preliminary injunction is moot.

Additionally, Plaintiffs cannot demonstrate that irreparable harm will result without a preliminary injunction as the Defendants have agreed to provide the services requested by Plaintiffs. As such, there is no likelihood that irreparable harm will occur and Plaintiffs cannot establish the factors needed to obtain a preliminary injunction. *See generally Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

Defendants are not arguing that the entire case is moot and are not requesting dismissal of Plaintiffs' request for a permanent injunction. Plaintiffs are still free to pursue that claim. However, at this time, the activity sought to be enjoined by the request for a *preliminary* injunction has occurred rendering a preliminary injunction moot.

Dated this 7th day of March, 2012.

**GUNDERSON, PALMER, NELSON
& ASHMORE, LLP**

By: /s/Sara Frankenstein

Sara Frankenstein

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CERTIFICATE OF SERVICE

I hereby certify on March 7, 2012, a true and correct copy of **DEFENDANTS' JOINT REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

was served electronically through the CM/ECF system upon the following individual:

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