

IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD

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IN RE COMPLAINT OF

MATT WHITAKER

FILED ON NOVEMBER 8, 2011

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ORDER DISMISSING COMPLAINT

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Now, on this 14<sup>th</sup> day of December, 2011, the complaint filed by Matt Whitaker on November 8, 2011 comes before the Iowa Ethics and Campaign Disclosure Board (“Board”). The Board’s staff conducted an extensive investigation that included the depositions of 13 individuals<sup>1</sup> and the review of over 3,000 documents. The Board met six times and discussed at length the complaints filed by Mr. Whitaker. Each board member reviewed all of the evidence and testimony. The Board reviewed the statutes governing the redistricting process and carefully considered every filing by the complainant and Polk County. The Board determines there is no probable cause to believe a violation of Iowa Code section 42.4, subsection 5 occurred. For the reasons that follow, the Board dismisses the complaint.

Under Iowa law, county redistricting and reprecincting take place every ten years in the year immediately following the federal decennial census. Iowa Code §§ 331.208-.210A. Each county board of supervisors shall appoint a temporary county redistricting commission whereby “a majority of the membership shall be appointed by the majority party members of the board [and] the remaining number of members of the temporary county redistricting commission shall be appointed by the minority party members of the board.” *Id.* § 331.210A(1)(b). The Board has the authority to review complaints forwarded by the state commissioner of elections for a determination as to whether a county supervisor district plan was drawn for “improper political reasons.” *Id.* § 68B.32A(16). Iowa law provides:

- No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group. In establishing districts, no use shall be made of any of the following data:
- a. Addresses of incumbent legislators or members of Congress.
  - b. Political affiliations of registered voters.
  - c. Previous election results.
  - d. Demographic information, other than population head counts, except as required by the Constitution and the laws of the United States.

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<sup>1</sup> The five Polk County supervisors, the five temporary redistricting commissioners, the Polk County auditor and two of his employees were deposed.

*Id.* § 42.4(5).

Polk County filed its revised redistricting plan with the state commissioner of elections on October 25, 2011. Matt Whitaker, a resident of Polk County, filed a complaint on November 8, 2011. The complaint alleged “an overall strategy to create 3 solid Democrat-leaning districts”. The complaint incorporated by reference the allegations Mr. Whitaker made in an earlier complaint filed on August 11, 2011.<sup>2</sup> The earlier complaint made several allegations: (1) the Crocker 1 precinct was illegally divided; (2) the shapes of district 5 and district 3 are evidence of gerrymandering; (3) demographic data was improperly considered; and (4) incumbents’ addresses were improperly considered.

The political makeup of Polk County’s registered voters is as follows: 40% Democrats, 30% Republicans and 30% No Party. The Polk County board of supervisors is comprised of three Democrats and two Republicans. Each supervisor named a person to serve on the temporary redistricting commission. The Polk County auditor’s office created a web application system that allowed commissioners to create maps. Each commissioner submitted at least one map for consideration. Ultimately, the commission voted along party lines to adopt a map known as the “Round 3 Plan”, which was approved by the Polk County Supervisors along party lines.

The Board considered each allegation in the complaint. During the investigation, the Board’s staff heard allegations that the three Democrat-appointed commissioners on the temporary redistricting commission were given the option to divide the Crocker 1 precinct—an unincorporated area on the western edge of Ankeny—while the two Republican-appointed commissioners were not. The Board’s investigation revealed that all commissioners received an email on July 5<sup>th</sup> from an employee in the Polk County auditor’s office informing them the county election office intended to split Crocker 1 into two precincts. The employee further offered to work with any commissioner who desired to incorporate a division of Crocker 1 in his map(s). The Board found no evidence that Democrat-appointed commissioners were given this information prior to July 5<sup>th</sup>.

The complaint alleges the “hourglass shape” of district 5 and the “rugged outcropping” of district 3 is evidence of gerrymandering. According to the Merriam-Webster Dictionary, gerrymandering means “to divide (an area) into political units to give special advantages to one group.” District 5 is in the southwest corner of the county. It consists of West Des Moines and part of the north side of Des Moines. Democratic Supervisor Connolly resides in the northern tip of District 5. The Board agrees the shape of district 5 is irregular. However, the Board found no evidence of gerrymandering given the fact district 5 in the Round 3 Plan is actually more competitive in comparison to Polk County’s former map that was in place for the years 2002-

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<sup>2</sup> Polk County filed its initial redistricting plan on August 2, 2011. Mr. Whitaker filed a complaint on August 11, 2011. The state commissioner of elections rejected Polk County’s initial map because the City of Des Moines was placed in more than three supervisor districts. The Board dismissed as moot Mr. Whitaker’s August 11, 2011 complaint after Polk County filed a subsequent plan with the state commissioner of elections.

2011. In the former map, 49% of registered voters in district 5 are Democrats in comparison to 23% of Republicans. Under the new map, only 41% of registered voters in district 5 are Democrats and 30% are Republicans. Moreover, the commissioners had no control over the “rugged” edges of the districts because the district borders followed precinct boundaries which were not within the purview of the temporary redistricting commission (save for Crocker 1).

The complaint relied on several emails between the commissioners and the commission’s attorney in support of the allegation that demographic data was impermissibly considered by the commission. Two emails were from the commission’s attorney defining “demographic data.” Commissioner Ned Chiodo testified he asked the commission’s attorney for the definition of “demographic data” because he wanted to ensure he did not consider any prohibited information when he drew his map. The Board finds this explanation reasonable because if a commissioner did not care whether he acted within the bounds of the law, it is doubtful he would ask the commission’s attorney for clarification on prohibited criteria. Another email from the commission’s attorney included countywide population data by race and the attorney’s analysis that Polk County’s minority population is not large enough to constitute 50% or more of the electorate in any district. Commissioner Tom Whitney testified he asked the commission’s attorney to review voter-dilution case law because Whitney was concerned that the statutory framework that allows Des Moines to be split into more than one district but no other city (because none of them has a population greater than the ideal population for one district) could have the effect of diluting the minority vote in Des Moines. While Iowa Code section 42.4(5) prohibits the consideration of demographic information other than population, the data about race was harmless because it was countywide data and therefore could not be used to draw districts in a way to augment or dilute the voting strength of a language or racial minority group. Moreover, the complaint did not provide any evidence or analysis that Polk County’s redistricting map was drawn to dilute or augment a racial group.

The complaint also relied on a May 31, 2011 email from the commission’s attorney to Commissioner Michael Gartner, which stated “You posed the following question: if two incumbent supervisors reside in the same district after redistricting has taken place, does the winner of the subsequently required election in 2012 serve a new four-year term or does he/she merely serve a continuation term of two years?” Gartner testified he asked the question because he was curious and because it had been posed to him by “political-type” people although he could not recall who they were. While the Board is troubled by this email and finds Gartner’s explanation inadequate, it does not think the email alone is sufficient to prove the map was drawn for improper political reasons.

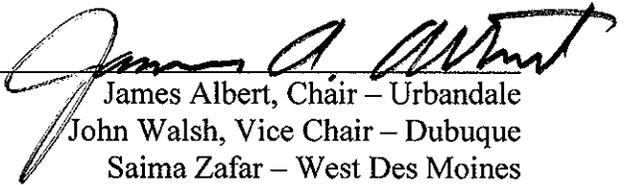
Finally, the complaint alleged the incumbents’ addresses were improperly considered by the commission. Each commissioner testified to at least a general awareness of where each incumbent supervisor lived. For example, each commissioner acknowledged he knew Republican Supervisor Brownell lived in Clive and Republican Supervisor Giovannetti lived in Urbandale. Each commissioner testified he associated Democratic Supervisor Mauro with the south side of Des Moines. All of the commissioners denied taking one or more incumbent

supervisor's addresses into account when drawing the map. The complaint takes issue with the fact the two Republican supervisors were placed in the same district while each Democratic supervisor was placed in his or her own district. The Board finds these facts are not enough to prove the incumbents' addresses were used. For a map to comply with the technical requirements of the redistricting rules (Des Moines in no more than 3 districts, no other city in more than 1 district, districts contiguous and within 1% deviation of the ideal population), the cities of Clive and Urbandale must be in the same district. Thus, the fact that the two Republican supervisors are in the same district is not evidence that the incumbents' addresses were taken into account. Moreover, because the Democratic incumbent supervisors live at least 8 miles from one another, the Board does not find it suspicious that no two Democratic incumbents were placed in the same district.

In summary, the Board determines on the basis of the investigation by the Board and its staff that there is not probable cause to believe the existence of facts that would establish Polk County's supervisor district plan was drawn for "improper political reasons."

At this point, the Board wishes to voice its displeasure with the current statutory framework for drawing county supervisor district plans, which blatantly favors the political party in control of the board of supervisors and breeds suspicion by the minority political party. The framework is inherently contradictory in that it establishes a temporary redistricting commission that is appointed by the board of supervisors and mirrors the political makeup of the board of supervisors while admonishing the commissioners to refrain from taking political information into account when drawing their maps. The system motivates supervisors to appoint political allies to the commission to safeguard the interest of their respective political parties. The statutory framework is further flawed by creating a nearly impossible standard for the Board to review whether maps are drawn for improper political reasons. Iowa law prohibits the "use" of political information, such as the political affiliations of registered voters and the addresses of incumbents. The information that shall not be utilized is publicly available. Absent an admission or "smoking gun" document, it is virtually impossible for the Board to find a map was drawn for improper political reasons. Moreover, the Board is frustrated that there is no statutory requirement for commissioners to save their work product for review. The Board urges the general assembly to establish a statutory framework for county redistricting plans similar to the process currently in place to draw general assembly and congressional districts.

By direction of the Board,

  
James Albert, Chair – Urbandale  
John Walsh, Vice Chair – Dubuque  
Saima Zafar – West Des Moines  
Carole Tillotson – Windsor Heights  
Jonathan Roos – Polk City  
Mary Rueter – DeWitt