STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON
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JAMES E. STEPHENSON,

Plaintiff,

V FILE NO. 75-10l66 AW

ANN ARBOR BOARD OF CITY CANVAS-
SERS and JEROME S. WEISS,

Defendant,

V

ALBERT H. WHEELER, JAMES M. DAHL,
DOROTHY L. CAHN, MARJORIE C. BRAZER,
LeROY CAPPAERT, DEBORA H. FREEMAN,
MARY HELEN S. GILBERT, CHESTER FELDMAN
and HENRIETTA FELDMAN, individually
and as a Class,

Intervening Defendants.

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OPINION OF THE COURT

The City of Ann Arbor, Michigan, on April 7, 1975 held an election for the offices of Mayor and City Councilman. The election of council persons was determined by the plurality system of voting, i.e., the candidate with the most votes was declared the winner.

The Mayor's race was conducted pursuant to a duly adopted Charter Amendment, Section 13.12(b), Ann Arbor City Charter, where by a "Preferential Voting System" was employed. This particular type of preferential voting has been termed the "Ware System" or "Majority Preferential Vote" also referred to as the "M.P.V. System."

The Ann Arbor voters in the November 5, 1974 general election added Section 13.12(b) to their City Charter. The amendment was adopted by a majority of the voters.
Under the "Ware System" of preferential voting, where there are two or more candidates for the office in question, the voter has the right to indicate on his paper ballot, a first and second choice or as many choices in a descending numerical order as there are candidates. If five

candidates were listed on the ballot, then each voter would have the right to indicate by number, his or her first, second, third, fourth and fifth choice. The ballot explanation informed the voter to mark his first choice with the number "1", and his second choice with a number "2" and third choice with a number "3" (Ballot, Exhibit No Two). Thus, the voter indicated by number who his or her next selection would be if his or her first choice was not in the race, or was eliminated from the race under the "Ware" or "M.P.V. System."

Under the "Ware" or "M.P.V. System" as is set forth in the Ann Arbor Charter Amendment, the candidate with the lowest number of votes is dropped or eliminated from consideration (where there are three or more candidates) and the second choice preferences from the ballots cast for the eliminated candidate, are then counted and distributed to the remaining candidates according to the second indicated preference on each ballot.

In the April 7, 1975 Ann Arbor Mayorial election, there were three candidates listed on the paper ballots. They were Carol Ernst, James E. Stephenson and Albert Wheeler.

The results of the election were as follows:

| | |
|---|---|
| First Preference Votes for Stephenson | 14,453 |
| First Preference Votes for Wheeler | 11,815 |
| First Preference Votes for Ernst | 3,181 |
| First Preference votes for Miscellaneous Write-in Candidates | 52 |
| Total Valid First Preference Votes | 29,501 |

No Candidate, whether listed on the paper ballot or by write-in vote received a majority of the valid votes cast as required by the Ann Arbor Charter Amendment.

Following the procedures outlined in the Charter Amendment, write-in candidates, and the ballot candidate with the least number of votes (Ernst) were dropped or eliminated, and the second choice votes wherein they were "First Preference" were counted and distributed among the remaining candidates. Note that because some voters elected not to exercise the option of

choosing a second preference, the total number of Valid countable votes was 29,262.

That count of the "Second Preference" Votes from the Ernst ballots and distribution of them among the two candidates resulted in the following vote totals:

| | |
|---|---|
| Wheeler | 14,684 |
| Stephenson | 14,563 |

In view of the fact that the Charter Amendment required that a majority of the total countable vote was necessary in order for a candidate to be elected, and the total countable vote being 29,262, a majority of the vote was 14,631 plus one, or 14,632.

Candidate Wheeler having received 14,684 votes, after the second preference choices were counted from the eliminated candidate's ballots, thus received a majority of the valid countable votes cast and was declared the winner.

Plaintiff Stephenson brought suit, challenging the Constitutionality of the Preferential Voting system established by the Charter Amendment. As part of that action, Plaintiff Stephenson seeks in a Motion for Summary Judgment, a declaration by this Court, that the Charter Amendment is unconstitutional because it violates the equal protection clauses of the 14th Amendment to the Constitution of the United States, and Article 1, Section II, of the Michigan Constitution of 1963.

For purposes of the summary judgment motion the parties hereto agreed that no genuine issue of fact exists, only issues of law. The Court agrees that no genuine issue of fact is before it for consideration and the issue is one of law as raised by the pleadings. Pending decision on this motion, the Court stayed a recount filed by the Plaintiff Stephenson.

The City of Ann Arbor has the duty to insure equal protection of the franchise right to each voter. The equal protection clause of the Fourteenth Amendment to the U.S. Constitution so mandates now that political subdivisions are brought within its coverage by decision of the United States Supreme Court. Avery v Midland County, 390 US 474, 88 S Ct 1114; 20 L Ed 45 (1968).

The equality of voting effectiveness is safeguarded by this Amendment. Reynolds v Simms, 374 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964); Wesberry v Sanders, 376 US 1; 84 S Ct 526; 11 L Ed 481 (1964).

The Michigan Constitution of 1963 additionally guarantees equal protection of the law. Article I, Section 2. And that guarantee likewise extends to the voting franchise.

In view of these provisions and the U.S. Supreme Court interpretation of the guarantees therein provided, does the City of Ann Arbor's Preferential Voting System for the office of Mayor afford equal protection to each voter?

If so, then the Charter Amendment providing for the Preferential Voting System is constitutional. If not, it is unconstitutional. The Michigan Constitution provides that a City has the power and authority to frame, adopt and amend its charter. Article VII, Section 22.

Under the Home Rule Act, MCLA 117.3; MSA 5.2073(a) voting in a municipal election may be partisan, nonpartisan or preferential ballot, or by any other legal method of voting.

The Michigan Statutes do not provide a definition of preferential voting, and only in this oblique manner is mention made of preferential voting. Nevertheless, because preferential voting is authorized in the Home Rule, a form of preferential voting is permissible under that enabling Act.

The voters of the City of Ann Arbor by majority vote November 5, 1974, decided that a form of preferential voting in the Mayorial Contest should be a part of that City's Charter. There is no question that this Charter amendment was adopted in a proper manner and is a part of the Charter and must, therefore, be followed unless the method of preferential voting employed creates inequities and inequalities among the voters and runs afoul of the equal protection guarantees.

The crux of Plaintiff Stephenson's claim of unconstitutionality is that preferential voting under this Charter amendment creates a classification that restricts the franchise of certain voters and thus treats them unequally.

This claimed classification results from certain voters having their second choice ballots counted while the second choice of other voters whose candidate remains in the race, are not so counted. This creates separate classes of voters and affords the vote of some, more weight than others, Plaintiff asserts.

Plaintiff claims there is no "compelling state reason or interest" for creating such classifications, that would render this preferential voting system constitutional.

In Hill v Stone, 95 S Ct 1637 (1975) , 43 LW 4576, and Kramer v Union Fill School District, 395 OS 621, 89 S Ct 1886 (1969), the U.S. Supreme Court stated that a classification may not restrict the franchise on grounds other than residence, age and citizenship unless a compelling state interest was shown.

An examination of these cases reveals classifications of voting rights based on ownership versus nonownership of real property and apportionment of voting districts. Nothing in the Charter Amendment itself speaks to classifications of voters as in the aforecited cases. The Charter Amendment does not discriminate patently or latently against some segment of voters.

All voters for the office of Mayor possessed the same rights that is, the right to, or right not to, select and list their preferences in numerical order.

All voters possessed the right at the same time (election day) to decide who their second choice etc., candidate would be if their first choice were eliminated from the race.

No voter was restricted in his right. Each voted with this same understanding that his second and third choice preferences could be counted if his or her first choice was the candidate with the least number of votes.

No classification was established by the Charter Amendment or City of Ann Arbor to discriminate against any voter or group of voters--all voters possessed the same rights.

Whatever classification that could be said to have existed, created itself, when a voter had his or her first choice candidate eliminated from the race for having the lowest number of votes after it was ascertained that no candidate possessed a majority of the total vote.

In that context, the second preference vote of a voter became viable as his first preference was eliminated from consideration.

That voter in substance still has only one vote that is counted, his or her first choice having been eliminated. His second preference vote is counted the same as the votes for the first two candidates. Such a voter does not have his vote counted twice--it counts only once and if that first preference no longer remains and is eliminated from consideration, his or her second preference is the "counted" vote. Voters for the top two candidates still have their vote counted for their first choice.

There is no deliberate scheme or practice that classifies voters under this system of voting. Each voter has the same right at the time he casts his or her ballot. Each voter has his or her ballot counted once in any count that determines whether one candidate has a majority of the votes. Each voter has the same opportunity as the next voter in deciding whether or not to list numerical preferences for his or her candidate and has the same equality of opportunity as any other voter if his or her candidate is eliminated as the lowest vote-getter, and his or her second choice preference becomes the viable vote.

This Court further finds nothing unconstitutional in the Charter Amendment that requires the winning candidate to have a majority of the votes cast in an election for the office of Mayor. Much has been said and written on the subject of a winning candidate for office, assuming that office with the backing (by votes) of less than a majority of those voting. Who can say that the voters of Ann Arbor do not know what they want, by their mandate that the Mayor of the City be elected by a majority of the voters. Far better to have the People's will expressed more adequately in, this fashion, than to wonder what would have been the results of a run-off election not provided for.

The fact that the Charter Amendment in question consolidates two elections into one, does not of itself create a classification nor discriminate against any group of voters. It possesses a monetary savings to the municipality in question and is not a factor to be overlooked.

Basic to all, is the right of self determination by the Ann Arbor voters. Their Charter Amendment was voted into effect by a majority of those voting November 5, 1974. The fact that "Ware" or preferential voting system is "different" from the system of voting we have come to know in this State, does not affect its validity.

This Court finds no classification of voters or their rights, created under this system of preferential voting, as the U.S. Supreme Court found in Hill v Kramer, supra.

Under the Michigan Constitution, Article VII, Section 22, the City of Ann Arbor has "the power and authority to frame, adopt and amend its charter". The provisions of Michigan's Constitution as concerns municipalities are to be liberally construed, in their favor, Section 34.

Thus, it is clear that the City of Ann Arbor could and did amend its charter to provide for a system of voting permitted by state statute, MCLA 117.3; MSA 5.2073(a). So long as that system of voting meets constitutional requirements, however "different" it may seem to some, it is a permissible form of voting.

Examined from every angle and tested against the standards of Hill v Stone, supra, this Court finds no classification or suspect classification of voters or their rights that would violate the equal protection clauses of either the United States or Michigan Constitutions. Nor can there be found any infringement of a fundamental right of any voter of the City of Ann Arbor in the exercise or operation of this voting system. All voters possess the same right to vote, to list numerical preferences and are subject to the same possibility of having their first preference eliminated and second or third etc., preference then counted in order to achieve the election of their Mayor by a majority of the total countable votes cast in the election.

The Court also finds no merit to Plaintiff's claim that certain voters have an opportunity

to change their minds and their votes while others do not have that right under this "M.P.V." System. Each voter has an equal opportunity and right at the time he or she casts his or her ballot election day. The fact that each person voting lists different orders of preference does not mean that some voters have greater rights than others. Each voter is on an equal footing with the next voter as to whether his first preference, second preference etc. will remain in the "elimination process". It is the equal right to list preferences and the equal opportunity to be eliminated or to stay in the running that accords each voter the same rights, not the possibilities of whose first or second preference may or may not stay in the counting. Each voter is given the same rights at the same time, that is, the time of casting his or her ballot. It is then that a voter may "change his or her mind" by consciously deciding who his or her first, second or third preference is for the office of Mayor. Thus, at the time of vote casting, each voter who chooses to make more than one preferential selection, in effect exercises his or her mental process of changing his or her mind, as the voter decides that a certain candidate meets his tests for Mayor in the event his or her first choice does not remain in the the running. This Court finds no constitutional infringement or prohibition against changing one's mind in this fashion, inasmuch as each voter is given the same right to do so at the same time and each voter's ballot is given the equal right to be counted in the same manner as any other voter's ballot. Each voter has the same rights as the next one. Nothing in the "M.P.V." system weighs one voter's rights over the other. The M.P.V. system, thus has the same effect as a run-off election, except that it consolidates it into one election.

Plaintiff has failed to demonstrate any true classification restricting the franchise of certain voters. Even if such a classification were found, this Court finds that a compelling state interest exists that would permit a classification in vote counting under such a M.P.V. system, as the City of Ann Arbor provides in its charter. The State does possess a great interest in speedy determination of elections, reduced election costs, involvement of a greater base of voters, affording greater voice in government by minorities and having the elected officer-holder

be one who is the choice of a majority of the voters.

The argument by Plaintiff that the M.P.V. system employed here, violates the "one-man, one-vote" requirement of Baker v Carr, 369 US 186; B2 S Ct 691; Reynolds v Simms, supra, and Wesberry v Sanders, supra, likewise fails when the tests of those cases are applied to the manner and method this M.P.V. system employed to determine the winner. Again, each voter is given the same equal opportunity at the time he or she casts his ballot. His or her vote is not "weighed differently" from any other votes in the election. Each voter will have one of his or her preferences counted if he or she elects to make more than one preference. The fact that a few voters may decide not to make more than one preference does not render the system unconstitutional. It is a choice or right possessed that the voter may or may not exercise.

To count every second preferential vote as Plaintiff urges, would make the system self-defeating and in essence would encourage voters not to make a second or third choice, since it would work to defeat that voter's first choice. In "M.P.V.", the second choice of a voter is not counted unless his or her first choice is eliminated from the election first.

An examination of the one-man, one-vote cases discloses that the Court was concerned with certain voter's votes being weighted more than other voters. A voter in one district would have one vote for a particular office while a voter in another district would have two votes for a similar office in the same Representative Body, due to the second voting area only having half the population of the first area. This situation violated equal protection rights guaranteed to all voters under the United States Constitution. What violated equal protection there, was the inequitable effect of giving some voters two votes and other voters only one vote for their representative to the same representative body.

Under the "M.P.V. System", however, no one person or voter has more than one effective vote for one office. No voter's vote can be counted more than once for the same candidate. In the final analysis, no voter is given greater weight in his or her vote over the vote of another voter, although to understand this does require a conceptual understanding of how

the effect of a "M.P.V. System" is like that of a run-off election. The form of majority preferential voting employed in the City of Ann Arbor's election of its Mayor does not violate the one-man, one-vote mandate nor does it deprive anyone of equal protection rights under the Michigan or United States Constitutions.

Plaintiff cited Wattles Ex Rel Johnson v Upjohn, 211 Mich 514, 179 NW 335 as authority for its claim that Preferential Voting is unconstitutional. While Wattles was decided under the 1908 Michigan Constitution, the crux of the matter is that the facts in the present case are clearly distinguishable from Wattles. In Wattles, the Court was dealing with a multiple office situation involving proportional representation. The Preferential System employed was the "Hare" System, which is clearly different from the "Ware" or "M.P.V." System used in Ann Arbor.

This difference is well set forth in Representation of Minorities In An At Large Election in City and Village Governments under Michigan Law, by Leon H. Weaver, M.S.U., at pages 43-47.

Likewise, in Maynard v Board of Canvassers, 84 Mich 228; 47 NW 756, the system of voting struck down by the Court was not the "Ware" or "M.P.V. System" but a cumulative voting system that clearly violated equal protection of voting rights. See also 29 C.J.S. Elections, page 53.

The Michigan Courts, heretofore, have not ruled on the constitutionality of the "Ware" or "Majority Preferential Voting" system as was employed by the City of Ann Arbor in its Mayorial race.

For the reasons set forth herein, and because of the obligation of this Court to scrutinize carefully any attack on the constitutionality of a State statute and self-determination rights this Court finds and determines the "Ware" or "Majority Preferential Voting" System as adopted and employed in the Ann Arbor Mayorial race to be constitutional and not violative of the equal protection clauses of the United States or Michigan Constitutions.

Accordingly then, the Summary Judgment Motion of the Defendants herein is granted and the Summary Judgment Motion of the Plaintiff is denied.

Counsel for the Defendant, Albert H. Wheeler et al shall within 10 days prepare the Judgment pursuant to this Opinion and have the same approved as to form by counsel for the Plaintiff and present the same to the Court for signature. In the event of disagreement or failure to agree upon the form of the Judgment settlement of it shall be noticed for hearing within the same period of time.

This being a question of public import and precedent, no costs or attorney fees are awarded Either party.

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James G. Fleming
Circuit Judge