

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80202

DATE FILED: November 3, 2022 10:20 AM
CASE NUMBER: 2022CV33085

Petitioners:
DALLAS SCHROEDER, as Clerk and
Recorder for Elbert County

v.

Respondent:
JENA GRISWOLD, in her official capacity as
Colorado Secretary of State

▲ COURT USE ONLY ▲

Case Number: 22CV33085

Division: 209

ORDER RE: MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiff Elbert County Clerk and Recorder Dallas Schroeder’s Motion for Preliminary Injunction, filed October 27, 2022, and Plaintiff’s brief in support, filed October 31, 2022. The Defendant, the Colorado Secretary of State (“Secretary”), filed her brief in opposition on November 2, 2022. The Court held a hearing on November 2, 2022, where Clerk Schroeder and the Deputy Secretary of State, Christopher Beall, testified. The Court also heard additional argument at the hearing. Having reviewed the briefing and considered the additional evidence and argument presented at the hearing, the Court finds and orders as follows:

Factual Background

This matter arises from the Secretary’s Election Order 2022-12 (“Order 2022-12”), issued October 19, 2022, titled “Supervision of November 2022 General Election in Elbert County to Ensure Compliance with Statutory Requirements.” In Order 2022-12, the Secretary appoints an official Election Supervisor in Elbert County in connection with the 2022 general election.

As further background, this was the sixth Election Order directed to Elbert County and Clerk Schroeder in 2022. It was the second election in a row in which

the Secretary ordered the appointment of an Election Supervisor in Elbert County. *See* Ex. 2 (“Election Order 2022-09”). The 2022-12 Order incorporates the prior factual history of those orders, which detail efforts by the Secretary to investigate and uncover steps taken by Clerk Schroeder in late 2021 to make a forensic image of certain voting machines used in prior Elbert County elections and delay a regular security upgrade to Elbert County’s voting system equipment.

The forensic images were stored on two hard drives (two copies) and were given to Clerk Schroeder’s legal counsel with the goal of keeping them from others, including the Secretary, and for Clerk Schroeder’s own future investigation into the integrity of the election equipment. The Secretary viewed this as a potentially serious security breach, particularly given that a similar breach had recently occurred in Mesa County and that Clerk Schroeder was working with people not authorized under the election code to have access to election equipment. Although the Secretary’s investigation was ongoing at the time it was issued, Election Order 2022-09 concluded that an Election Supervisor was necessary because “[i]n light of the circumstances that have been uncovered to date, the Department believes that the risk to election security protocols has not been resolved.” That order appointed an Election Supervisor to cover the June 2022 primary election in Elbert County.

In Order 2022-12, in addition to this past history, the Secretary highlighted more recent events, including that (1) Elbert County failed to verify or count 37 misplaced mail ballots during the regular election counting process for the June 2022 primary election; and (2) Clerk Schroeder had issued press releases, convened press conferences, and held community presentations in August and October 2022 where he expressed (at least from the Secretary’s point of view) a lack of appreciation for the seriousness of the earlier security breaches he initiated and demonstrated an intent to take actions that could undermine voter confidence in Elbert County’s general election.

Based on these operative facts, for the 2022 general election, the Secretary appointed Christi Coburn (the same experienced election official that was appointed for the Elbert County primary election under Order 2022-09) as an Election Supervisor. Order 2022-12 provided her with the following relevant authority:

1. The Secretary of State hereby exercises her authority to supervise the conduct of elections under the Colorado Elections Code in Elbert County, including all activities related to the upcoming November 8, 2022, General Election.

2. Christi Coburn is appointed as an official Election Supervisor with authority to direct the conduct of the election on behalf of the Secretary of State under the authority of Title 1 of the Colorado Revised Statutes. This appointment begins immediately and will continue throughout the 2022 general election or until otherwise revoked by the Secretary of State through subsequent order.
3. The Election Supervisor is authorized to inspect and review the practices and procedures of the elections staff of the Elbert County Clerk & Recorder's Office, with access to all documents and records of Elbert County that she deems appropriate or necessary to her work, and she is further authorized to monitor, direct, instruct, and supervise the elections staff of the Elbert County Clerk & Recorder's Office to take such steps as the Department may deem necessary. The Election Supervisor is also authorized to take remedial actions in consultation with and upon approval from the Department, to address any other or additional deficiencies in election administration that may be identified by her or the Department.

Ex. 1 at 2. The Order provides that Ms. Coburn was to start immediately and that Elbert County was required to reimburse the Colorado Department of State for her hourly rate, travel, and other reasonable expenses.

Although Order 2022-12 contains almost identical language as Order 2022-09 (which was never challenged), Clerk Schroeder takes issue with additional language in Order 2022-12. Specifically, the language giving the Election Supervisor the authority to “direct the conduct of the election;” to “direct, instruct, and supervise the elections staff of the Elbert County Clerk & Recorder's Office;” and to “take remedial actions in consultation with and upon approval from the Department.” Clerk Schroeder argues that this authority effectively replaces him as the Elbert County Clerk and Recorder and designated election official under the Election Code.

On October 25, 2022, Clerk Schroeder filed this action, seeking judicial review of Order 2022-12 and requesting “immediate injunctive relief” as permitted under C.R.S. § 24-4-106(4.7). After the Court issued its October 27, 2022 Order authorizing a preliminary injunction hearing and finding that C.R.C.P. 65 applies to the injunctive relief sought, Clerk Schroeder filed his formal motion for preliminary injunction.

In the motion and brief in support, Clerk Schroeder argues he is entitled to a preliminary injunction because: (1) the Secretary exceeded her authority to supervise elections when she appointed Ms. Coburn; (2) Order 2022-12 violated Clerk Schroeder’s due process rights under the Colorado Constitution when it was issued without notice or an opportunity to be heard first; and (3) Order 2022-12 was issued in retaliation for Clerk Schroeder speaking out against the Secretary on issues of election integrity and security, and is therefore a violation of his free speech rights under the Colorado Constitution. As set out below, Clerk Schroeder argues each of these claims¹ through the lens of the *Rathke* factors, which the Court must consider before issuing a preliminary injunction.

Standards of Review

1. Preliminary Injunction Standard

To obtain a preliminary injunction under C.R.C.P. 65, a plaintiff must demonstrate: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief; (3) it has no adequate remedy at law; (4) an injunction will not disserve the public interest; (5) the balance of equities favors an injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982). The moving party must demonstrate each *Rathke* factor. *See, e.g., Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 839 (Colo. App. 2007).

2. Standard of Review under the APA

Because this action is (and the Court’s jurisdiction is premised on) a judicial review under the Administrative Procedures Act, § 24-4-106, the Court must consider the applicable standard of review under the APA as it considers whether

¹ Because this matter is a judicial review, Clerk Schroeder does not assert traditional claims, but instead challenges Order 2022-12 on various grounds. However, the Court uses the terms “claims” or “challenges” interchangeably for ease of reference.

Clerk Schroeder can demonstrate a reasonable probability of success on the merits. The Court then turns to Clerk Schroeder's three challenges.

Under the APA, "[t]he county clerk and recorder of any county may commence an action under this section in the Denver district court for judicial review of any final action issued by the secretary of state arising under the 'Uniform Election Code of 1992', articles 1 to 13 of title 1, C.R.S." C.R.S. § 24-4-106(4.7). Upon review, the agency's decision will be upheld unless the District Court finds that it is:

- (I) Arbitrary or capricious;
- (II) A denial of statutory right;
- (III) Contrary to constitutional right, power, privilege, or immunity;
- (IV) In excess of statutory jurisdiction, authority, purposes, or limitations;
- (V) Not in accord with the procedures or procedural limitations of this article 4 or as otherwise required by law;
- (VI) An abuse or clearly unwarranted exercise of discretion;
- (VII) Based upon findings of fact that are clearly erroneous on the whole record;
- (VIII) Unsupported by substantial evidence when the record is considered as a whole; or
- (IX) Otherwise contrary to law, including failing to comply with section 24-4-104(3)(a) or 24-4-105(4)(b).

C.R.S. § 24-4-106(7)(b).

In all cases, "the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply the interpretation to the facts duly found or established." C.R.S. § 24-4-106(7)(d). In addition, the court "must give deference to the reasonable interpretations of the administrative agency that is authorized to administer and enforce the statute at issue." *Gessler v. Grossman*, 488 P.3d 53, 58–59 (Colo. App. 2015). Generally, when a party challenges the sufficiency of the evidence supporting an agency's final decision, the court will "examine the record in the light most favorable to the agency decision." *Schlapp ex rel. Schlapp v. Colorado Dep't of Health Care Pol'y & Fin.*, 284 P.3d 177, 181 (Colo. App. 2012) (citation omitted). The court will not decide the facts

and will uphold the decision if there is substantial evidence in the record as a whole. *Id.*

Analysis

A. Plaintiff has not demonstrated a reasonable probability of success on the merits.

1. Clerk Schroeder is unlikely to succeed on the merits of his first challenge because Order 2022-12 is lawful.

For his first challenge, Clerk Schroeder argues that the Secretary exceeded her authority when she issued Order 2022-12, because she does not have statutory or constitutional authority to appoint an Election Supervisor with the power to conduct an election—a role Clerk Schroeder argues is reserved in the Election Code to him as a county clerk and recorder. The Secretary argues that the Order does not replace Clerk Schroeder as the designated election official or clerk and recorder, directly or indirectly, and that the authority granted to the Election Supervisor falls within the broad range of supervisory powers given to the Secretary under the Election Code.

Colorado’s Election Code establishes a hierarchy among the state’s election officials. The Secretary of State is Colorado’s “chief state election official.” C.R.S. § 1-1.5-101(h); *see also* C.R.S. § 1-1-107(1)(e) (Secretary serves as the “chief state election official” within the meaning of the federal Help America Vote Act of 2002 (“HAVA”)); *Marks v. Gessler*, 350 P.3d 883, 889 (Colo. App. 2013) (acknowledging that “the General Assembly declared that ‘[i]n Colorado, the secretary of state is the chief state election official’ . . .”). This designation is not an honorary title for the Secretary, but means that the Secretary occupies a higher position in the elections hierarchy than Clerk Schroeder, as the Clerk and Recorder of Elbert County.

When the General Assembly implemented the requirements of HAVA in 2003, it explained that “HAVA mandates a greater role for the state governments and, in particular, the chief election official of each state, in overseeing and coordinating elections and in enforcing and implementing uniform standards in elections.” C.R.S. § 1-1.5-101(1)(g). The General Assembly also modified C.R.S. § 1-1-110(1) to establish that county clerk and recorders across the state must “consult with the [Secretary] and follow the rules and orders promulgated by the [Secretary] pursuant to this code.” Previously, the Election Code only required county clerk and recorders to consult the Secretary’s rules and regulations when

rendering decisions or interpretations under Election Code. C.R.S. § 1-1-110(1) (2002).

This hierarchy is re-enforced throughout the Election Code by giving the Secretary supervisory responsibility over elections and county clerk and recorders across the state. The Election Code also ensures that the powers and duties granted to county clerk and recorders are subject to the Secretary's supervisory powers:

- The Secretary is authorized to supervise the conduct of elections in Colorado. C.R.S. §§ 1-1-107(1)(a); 1-7.5-104.
- The Secretary is authorized to enforce the provisions of the Election Code and her administrative orders by injunctive action in state district court. C.R.S. §§ 1-1-107(1)(b); 1-1-107(2)(d); 1-1.5-104(1)(d).
- The Secretary is authorized to promulgate such rules as she finds necessary for the proper administration and enforcement of the state's election laws. C.R.S. § 1-1-107(2)(a).
- The Secretary is authorized to supervise mail ballot elections and to promulgate rules governing procedures and forms necessary to conduct mail ballot elections. C.R.S. § 1-7.5-106.
- The Secretary is authorized "to inspect . . . and review the practices and procedures of county clerk and recorders, their employees, and other election officials" in the conduct of elections and the registration of electors. C.R.S. § 1-1-107(2)(b).
- The Secretary may deploy personnel in certain circumstances. C.R.S. § 1-1.5-104(2)(a)(II) (Secretary may "[s]end one or more official election observers to any county in the state to examine the conduct of any aspect of any election giving rise to [an] allegation of noncompliance" with the Code); § 1-7.5-106(2) (Secretary "may appoint any county clerk and recorder

as an agent of the secretary to carry out the duties prescribed in this article”).

- The Secretary is authorized to compel testimony and production of documents. C.R.S. § 1-1.5-104(2)(a)(I).
- The Secretary is authorized to “review or inspect” voting system components “at any time.” C.R.S. § 1-5-621(1).
- “[T]he county clerk and recorder shall conduct the election by mail ballot under the supervision of, and subject to rules promulgated . . . by, the secretary of state.” C.R.S. § 1-7.5-104.

Based on the foregoing, although the Election Code does not expressly state that the Secretary may appoint an “official Election Supervisor,” it is clear that the Secretary has the authority to supervise elections and appoint someone to supervise an election at the county level, including the conduct of a clerk and recorder and their elections staff. This is different from a passive role of monitoring or observing, but supervising necessarily requires the ability to also direct and instruct when necessary to ensure compliance with the Election Code. Stated differently, a clerk and recorder that is subject to the Secretary’s supervision is necessarily subject to the Secretary’s direction and instructions. Without that authority, the Secretary could not perform its statutorily mandated job as chief election official.

Focusing on the language of Order 2022-12, it is important to note that Order 2022-12 does not state anywhere that Clerk Schroeder is removed from his role or stripped of any responsibilities that belong to the designated election official under the Election Code. The Order itself states the Election Supervisor stands in the shoes of the Secretary, not Clerk Schroeder. In fact, the Secretary has made clear in this proceeding that it does not claim to have the power to unilaterally remove a designated election official or a clerk and recorder from office. The Secretary emphasizes that is not the purpose or intent of Order 2022-12 and points to a dispute in Mesa County where the Secretary filed a lawsuit asking the District Court to remove Tina Peters as the designated election official in that county. The undisputed evidence at the hearing showed that Clerk Schroeder has continued his role as the Elbert County Clerk and Recorder and designated election official for Elbert Court without interruption from Order 2022-12 or the Election Supervisor.

Nevertheless, Clerk Schroeder still argues that the language in Order 2022-12 gives the Election Supervisor the ability to take over his elected and statutory roles (even if she has not done so yet), and the Secretary does not have the power to do that directly or indirectly through an Election Supervisor. The Court disagrees that Order 2022-12 conveys this broad authority, directly or indirectly. Rather, the Election Supervisor’s authority to “direct the conduct of the election;”² to “direct, instruct, and supervise the elections staff of the Elbert County Clerk & Recorder’s Office;” and to “take remedial actions in consultation with and upon approval from the Department” all fall within the Secretary’s supervisory authority over elections in Colorado. Moreover, this authority is not unlimited, but is implicitly limited to ensuring compliance with the Election Code and any “deficiencies in election administration.” Ex. 1 at 2.

Clerk Schroeder also argues that if the Election Supervisor used her authority to take over the election in Elbert County, it would defeat the will of the Elbert County voters and their right of self-government under Article 2, Section 1 of the Colorado Constitution. More specifically, he argues that his election to the county office of clerk and recorder represents the will of the people of Elbert County to put him in charge of Elbert County elections, not the Secretary or her appointees. Putting aside that Order 2022-12 does not remove Clerk Schroeder from office or as designated election official in Elbert County, a clerk and recorder is not a constitutionally created office, and its powers are limited to what the General Assembly provides by way of statutory power. *See* C.R.S. §§ 1-1-110 and 1-7.5-104. Currently, as set out above, that power is subject to the supervision of the Secretary, and Clerk Schroeder was elected into that supervised role. While it may be a unique situation in that a statewide official has supervisory power over a locally elected official, the sole fact that Clerk Schroeder is elected does not confer the kind of autonomy he seeks to assert here.

In any event, to the extent there is any ambiguity in how far the Secretary’s supervisory powers extend, when applying the deferential standard for review under the APA and what this Court considers the Secretary’s clear authority to supervise elections and a clerk and recorder’s clear obligation to follow the Secretary’s regulations and orders, the Court finds that Clerk Schroeder is unlikely to succeed on this challenge.

² Given the Election Supervisor the power to “direct the conduct of the election,” and not the broad authority to “conduct the election,” is consistent with a supervisory role, and not an instruction to take the place of Clerk Schroeder.

2. Clerk Schroeder is unlikely to succeed on the merits of his second challenge because the APA provides the due process Clerk Schroeder seeks in his capacity as the Elbert County Clerk and Recorder.

Clerk Schroeder next claims that he was denied due process when the Secretary issued Order 2022-12, because it removed him from his role as the Elbert County Clerk and Recorder and as the designated election official of Elbert County. As set out above, the factual basis for this argument is flawed because he was not removed from any position. But even assuming he was removed by way of the Order, and that removal deprived Clerk Schroeder of a property right, he is afforded due process rights under C.R.S. § 24-4-106(4.7)—which provides for this judicial review and the ability to seek injunctive relief. Due process does not always require pre-deprivation notice and opportunity to be heard, and Clerk Schroeder does not cite any law mandating that here in the context of a fast-paced election schedule.

Accordingly, the Court finds that Clerk Schroeder is not likely to succeed on the merits of this claim.

3. Clerk Schroeder is unlikely to succeed on the merits of his third challenge because the evidence does not show that the Secretary's actions were retaliatory for Clerk Schroeder's public statements.

Clerk Schroeder also asserts that because Order 2022-12 was retaliation for protected speech, the Order violates his free speech rights under the Colorado Constitution. While the Court agrees that Clerk Schroeder may have a valid constitutional argument if he was retaliated against for his protected political speech, the record before the Court fails to establish any such retaliation. The only evidence of retaliation presented by Clerk Schroeder is the timing of Order 2022-12. He contends that he and his office were cleared of any problematic issues by the Election Supervisor in a report dated July 6, 2022, and that Order 2022-12 was only issued after he began to speak out against the Secretary in August and October 2022.

Here, however, Deputy Secretary Christopher Beall testified that the prospect of appointing another Election Supervisor was raised after Elbert County failed to verify or count 37 misplaced mail ballots, an event that occurred after the Election Supervisor's July 6, 2022 recommendation. That need was reinforced, according to Deputy Secretary Beall, when Clerk Schroeder continued to justify in August and October that he did nothing wrong when he imaged election equipment and provided it to unauthorized individuals and refused to turn the drives over to the

Secretary. Deputy Secretary Beall further testified that these events were enough to make him and the Secretary believe Clerk Schroeder was a security risk to the election in Elbert County such that supervision was necessary. The Court finds this explanation credible and that it provides factual support (other than retaliation) as to why an Election Supervisor was appointed for the 2022 general election.³ When this testimony is weighed against Clerk Schroeder’s argument about timing, the Court finds that Clerk Schroeder is unlikely to prevail on his retaliation argument.

B. The remaining *Rathke* factors do not favor entering an injunction.

An injunction here will not serve the public interest, nor do the equities favor one. The Secretary issued Order 2022-12 to safeguard the election process in Elbert County—not to punish or remove Clerk Schroeder—and the Court sees little harm in allowing an Election Supervisor to support the Secretary’s and Clerk Schroeder’s joint interest *and obligation* to ensure that the general election is conducted in compliance with Colorado’s Election Code and the Secretary’s orders and rules.

Conclusion

For all the foregoing reasons, Clerk Schroeder’s Motion for Preliminary Injunction is DENIED.

DATED: November 3, 2022.

BY THE COURT:



Alex C. Myers
District Court Judge

³ To be clear, by credible, the Court means that it was apparent from Deputy Secretary Beall’s testimony that he and the Secretary genuinely believed Clerk Schroeder to be a security risk. In making this finding, the Court does not (and need not in this proceeding) determine that Clerk Schroeder does or does not pose such a risk.