IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0185

STATE OF WEST VIRGINIA ex rel.,
DONNA BOLEY,

Petitioner,

v.

NATALIE E. TENNANT, Secretary of State of the
State of West Virginia, and FRANK DEEM,

Respondents.

WEST VIRGINIA SECRETARY OF STATE NATALIE E. TENNANT'S RESPONSE TO PETITIONER DONNA BOLEY'S EMERGENCY PETITION FOR WRIT OF MANDAMUS

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I.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The Respondent, Natalie E. Tennant, Secretary of State of the State of West Virginia ("the Respondent Secretary," "Secretary Tennant," or "the Secretary"), does not dispute the accuracy of the statements in the Petitioner's Statement of the Case, p. 1-3 of Petitioner Donna Boley's Emergency Petition.

II.

RESPONSE TO PETITIONER'S SUMMARY OF ARGUMENT

The Respondent Secretary is a "filing officer" who receives and reviews certain election

candidate filings, and who certifies certain candidates for inclusion on the ballot.[1]

Under West Virginia's settled special election mandamus law, the mandamus petition in the instant case that has been brought to test the eligibility of Respondent Frank Deem to be elected to the West Virginia Senate in 2012 properly names the Secretary, who certified Respondent Deem to appear on the ballot, as a respondent.

The Secretary, in her official capacity and in the exercise of the defined and limited powers and duties that her office is granted regarding the certification of candidates to be placed on the ballot, does not take any position on whether the Respondent Frank Deem, in light of all of the facts and circumstances and applicable legal principles, is ineligible to be elected to the West Virginia Senate in 2012. The Secretary does say that Respondent Deem's alleged ineligibility to be elected to the West Virginia Senate in 2012 on the ballot is not facially established by and solely within the "four corners" of his sworn filing document--and that consequently, the Secretary properly certified Respondent Deem to be placed on the ballot.

In ruling on the instant Emergency Petition for Mandamus, this Court need not address the issue of the Secretary's powers and duties with respect to candidate certification for placement on the ballot. This issue is tangential to the issue of Respondent Deem's alleged ineligibilty for election that is raised by the Petitioner. The Respondent Secretary asks this Court not to address the issue of her ballot certification powers and duties. But should this Court do so, whether or not framed in the form of a Syllabus Point, the Secretary submits for the reasons explained herein that a conservative ruling, consistent with longstanding practice, would state as follows:

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[1]Filing officers are not limited to the Secretary of State--who is the filing officer only for candidates for statewide or multi-county races and issues. Filing officers also include county clerks and municipal recorders. *W. Va. Code*, 3-5-7(b)(1-3) [2009].

> In determining under whether to certify persons who have filed candidacy certificates for placement on an election ballot, the Secretary of State and other filing officers who receive candidate filing do not as a general rule have any implied power or duty to question, verify, or investigate the statements in--or otherwise go beyond or behind the "four corners" of--a candidate's filing certificate, except as specifically provided in statute or regulation.

Additionally, should this Court choose to craft any exception to this general rule, any such exception should be carefully and narrowly drawn to avoid creating unintended consequences--and to avoid creating substantial conflicts with longstanding principles, practices, and procedures, including but not limited to the paramount role of courts in West Virginia in determining issues of candidate eligibility.

III.

SECRETARY TENNANT'S RESPONSE TO PETITIONER'S ARGUMENT

A. As stated above, the Secretary, in her official capacity and exercising the limited powers that her office is granted regarding the certification of candidates to be placed on the ballot, does not take any position on whether the Respondent Frank Deem is in light of all of the facts and circumstances ineligible to be elected to the West Virginia Senate in 2012.

B. As also stated above, the Respondent Secretary agrees that a special election mandamus petition, in which a filing officer such as the Respondent Secretary of State or a county clerk or municipal recorder is a respondent, is a proper vehicle for testing the eligibility of a candidate to be placed on the ballot, including the Respondent Frank Deem.

On this latter point, this Court has stated:

> The principal purpose of the liberalized election mandamus is to provide an expeditious pre-election hearing to resolve eligibility of candidates, so that voters can exercise their fundamental franchise rights as to all eligible candidates.

State ex rel. Sowards v. County Comm'n of Lincoln County, 196 W. Va. 739, 746 n.3, 474 S.E.2d 919, 926 n.3 (1996). Thus,

> [b]ecause . . . there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case.

Id., 196 W. Va. at 745, 474 S.E.2d at 925. Additionally,

> The eligibility of a candidate for an elective office may be determined in a proceeding in mandamus and, upon a determination therein that a candidate is ineligible to be elected to or to hold the office for which he seeks nomination or election, a writ of mandamus will issue directing the board of ballot commissioners to strike or omit such candidate's name from the primary or general election ballot.

State ex rel. Haught v. Donnahoe, 174 W. Va. 27, 321 S.E.2d 677 (1984)

Unlike ordinary mandamus cases, the special election mandamus procedure to test candidate eligibility is not premised on (1) the existence of and (2) an alleged clear failure to perform certain explicit, unquestionable, and specific duties by the respondent filing officer regarding the certification of candidates for the ballot. Rather, in special election mandamus cases, the filing officer is ordinarily a nominal party, while the real parties in interest are the putative candidate and the parties who challenge that candidate's eligibility. *See, e.g., State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 347, 571 S.E.2d 333, 337 (2002) (footnote omitted):

> McClure subsequently filed a petition for a writ of mandamus in the Circuit Court of Webster County in order to test the eligibility of Sandy's candidacy. Sandy filed a motion to dismiss the petition.

Cf. Good v. Austin, 800 F. Supp. 557, 558-59 (E.D. Mich. 1992) ("Although both suits name Richard Austin, the Michigan Secretary of State, as defendant, he is a nominal party, and the real adversaries are the two groups of plaintiffs, surrogates respectively for the Democratic and Republican parties.").

Thus, in states like West Virginia that allow a special election mandamus procedure to determine candidate eligibility, a party's ability to invoke the procedure (and a court's ability to make

a determination regarding eligibility) is not premised on the existence of a particular power or duty on the part of the filing officer to go beyond or behind the documentation supplied by the candidate. *See Miller v. Burk*, 188 P.3d 1112, 1119 n.27 (Nev. 2008), where the court stated:

> Several real parties in interest and the Washoe County Registrar of Voters also argue that, because filing officers are not required by law to exclude a candidate from a ballot so long as the candidate provides the declaration required by statute, an extraordinary writ directing those filing officers to exclude a candidate from the ballot for reasons unrelated to the candidate's compliance with declaration of candidacy is improper. That argument is unpersuasive. Because, as discussed below, real parties in interest have not met the Article 15, Section 3(2) qualification for reelection, the law requires that their names be excluded from the 2008 election ballots. See NRS 293.182(5)(a) (providing that, if a candidate "fails to meet any qualification required for ... office pursuant to the Constitution or a statute of this [s]tate," the candidate's name must not appear on the ballot for the election to the office). Thus, **even though no law directs the filing officers to inquire into a candidate's qualifications for office, a writ of mandamus may issue** to require the filing offices to comply with the law by excluding the candidates' names from the ballot.

Id.[2]

Additionally, courts in other states have been very reluctant to imply any power or duty on the part of a filing officer to go behind the facial or "four corners" sufficiency of a candidate's filing documents--unless such a power and duty is explicitly set forth in the statutes. Thus, in *State ex rel. McAulay v. Reeves*, 81 P.2d 860, 863 (Wash. 1938), the court stated:

> Certainly, there is nothing in the above statute limiting the right to file a declaration of candidacy or suggesting that the officer whose duty it is to receive the filing may refuse to file it, if it be in proper form and accompanied by the proper fee. Nor, as far as we are advised, has the right been limited by any judicial decision other than the *Chealander* Case. We do not think the rule laid down in that case should be further extended. In fact, **to hold that the respondent, in the instant case, had the**

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[2]*Compare State ex rel. Cherry v. Stone*, 265 So. 2d 56, 58 (Fla. Dist. Ct. App. 1972) and *State ex rel. Shevin v. Stone*, 279 So. 2d 17, 22 (Fla. 1972) where the Florida court, applying traditional strict mandamus requirements, held that the lack of an explicit duty by the filing officer to go beyond the candidate's filing statement precluded the use of mandamus against the officer to test candidate eligibility.

> **right to make a determination of the relator's eligibility for the office for which he desired to file** would be something more than a mere extension of the narrow rule of the *Chealander* Case. It **would amount to a judicial decision that it is the right of every filing officer to determine the eligibility of candidates as to whose eligibility a colorable question can be raised, and to determine it according to that officer's individual construction of constitutional provisions and statutes and according to his individual findings of fact, with the added danger that in times of stress his determination might be influenced by his prejudices or by partisan considerations**. We find nothing in our statutes or in our decisions indicating that such powers have been conferred upon such officers. The right to exercise a power so sovereign in its nature as the judicial power cannot be successfully spelled out by mere inference or conferred by judicial decision.

Id. (emphasis added).

Thus, in holding that a filing officer must strictly confine him- or herself to considering information apparent from the "four corners" of a filing certificate, in *Fischnaller v. Thurston County*, 584 P.2d 483, 485 (Wash. 1978) the court stated:

> Under the decisions of *State ex rel. McCaffrey v. Superior Court*, 20 Wash.2d 704, 149 P.2d 156 (1944) and *State ex rel. McAulay v. Reeves*, 196 Wash. 1, 81 P.2d 860 (1938), it is clear that an officer with whom an aspiring candidate must file may not reject a declaration of candidacy on the grounds that the candidate is ineligible **if that rejection is based on extrinsic factual knowledge or involves the interpretation of statutory or constitutional provisions.**

Id. (emphasis added). The *Fischnaller* court also stated:

> We hold that the auditor has a right to reject a declaration of candidacy which **on its face** demonstrates a failure to comply with plainly stated applicable residence requirements fixed by the Washington State Constitution and pertinent statutory provisions of the concerned governmental subdivision of the state, **so long as no resort is had to extrinsic facts or to interpretations of the constitution or statutory provisions.**

Id. at 486 (emphasis added).

In the instant case, the Petitioner suggests that the Secretary might desire this Court to "clarify" her authority with respect to going beyond the document that she receives as a filing officer

to determine the eligibility of a candidate. Respectfully, and while not challenging the propriety of her inclusion as a respondent filing officer in the instant special election mandamus case, Secretary Tennant does not believe that she needs clarification of her authority in this case. That authority, as shown herein, is limited to considering the facial sufficiency of the sworn certificate that is submitted by the candidate--with certain limited exceptions that are specifically spelled out in the statutes, as set forth hereinafter.

To be clear: no Code section affirmatively gives the Secretary of State any general power to investigate or determine the eligibility of candidates to be placed on a ballot, or to refuse to certify a candidate if the four corners of the candidate's filing do not indicate ineligibility without recourse to extrinsic information--except insofar as two Code sections, discussed hereinafter, set forth certain narrow circumstances in which the Secretary is required to determine eligibility, and may therefore refuse to certify candidates to be placed on the ballot.

One of the two specific circumstances is set forth in *W.Va. Code*, 3-5-7(i) [2009]:

> (i) A candidate who files a certificate of announcement for more than one office or division and does not withdraw, as provided by section eleven, article five of this chapter, from all but one office prior to the close of the filing period shall not be certified by the Secretary of State or placed on the ballot for any office by the board of ballot commissioners.[3]

The other specific circumstance is set forth in *W.Va. Code*, 3-5-7(e) [2009]:

> (e) The Secretary of State or the board of ballot commissioners, as the case may be, may refuse to certify the candidacy or may remove the certification of the candidacy upon receipt of a certified copy of the voter's registration record of the candidate showing that the candidate was registered as a voter in a party other than the one named in the certificate of announcement during the sixty days immediately preceding the filing of the certificate: Provided, That unless a signed formal complaint of

[3]The Secretary of State was required to exercise this authority during the most recently concluded filing period for a Wood County candidate.

> violation of this section and the certified copy of the voter's registration record of the candidate are filed with the officer receiving that candidate's certificate of announcement no later than ten days following the close of the filing period, the candidate shall not be refused certification for this reason.[4]

The foregoing two circumstances are the only instances in the *West Virginia Code* w ere the Secretary is given specific authority to refuse to certify a candidate for inclusion on the ballot. Applying the principle of *inclusio unius est exclusio alterius*, the Legislature's inclusion of these two specific responsibilities among the Secretary's duties implies that no other certification-refusal responsibilities should be implied without similar authorization.

In addition to the foregoing two circumstances, two of this Court's opinions have briefly discussed in *dicta* whether a third Code section, *W.Va. Code*, 3-5-9 [2005], may give the Secretary some type of additional implied eligibility-determination authority.

W.Va. Code, 3-5-9 [2005] states:

> By the eighty-fourth day next preceding the day fixed for the primary election, the Secretary of State shall arrange the names of all candidates, who have filed announcements with him or her, as provided in this article, and who are entitled to have their names printed on any political party ballot, in accordance with the provisions of this chapter, and shall forthwith certify the same under his or her name and the lesser seal of the state, and file the same in his or her office. [emphasis added]

W.Va. Code, 3-5-9 [2005] was discussed in a 1972 opinion authored by Justice Richard Neely, *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 527-28, 223 S.E.2d 607, 616 (1972):

> The Court recognizes that the Secretary of State is not charged by W.Va.Code, 3-5-9 (1964) with judicial duties; however, he [or she] is charged with certifying only those persons who are "entitled to have their names printed on any political party ballot." The Code provision does not set forth how the Secretary of State shall determine entitlement, but it may be reasonably inferred that the Secretary should

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[4]Note that even in this circumstance, the Secretary of State does not have authority to take action at his or her own initiative. Someone must file a written complaint before the Secretary may act.

> refuse to place on the ballot any person whose certificate of candidacy shows ineligibility **on its face.**[5] . . . As the Secretary of State accepted the certificate of candidacy and filing fee of the Governor, the question of the extent to which the Secretary of State should go behind a certificate of candidacy is not fairly raised. [emphasis added].

In a footnote in a subsequent case, *State ex rel. Harden v. Hechler*, 187 W. Va. 670, 674 n. 6, 421 S.E.2d 53, 57 n. 6 (1992), this Court also addressed *W.Va. Code*, 3-5-9 [2005], stating:

> We recognized in *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 527, 223 S.E.2d 607, 616, appeal dismissed, *Moore v. McCartney*, 425 U.S. 946, 96 S.Ct. 1689, 48 L.Ed.2d 190 (1976), that under W.Va.Code, 3-5-9, the certification statute for primary elections, the secretary of state is charged with certifying only those persons who are '*entitled to have their names printed on any political party ballot.'* The Code provision does not set forth how the Secretary of State shall determine entitlement, but it may be reasonably inferred that the Secretary should refuse to place on the ballot any person whose certificate of candidacy shows ineligibility **on its face**.

Id. [emphasis added]. *Cf. Marquis v. Thompson*, 109 W. Va. 504, 155 S.E. 462, 464 (1930) (". . . the returns **on their face**, if the allegations of the petition be true, show that ballots counted were cast by voters of the independent school district. **No outside evidence** would be necessary.") (emphasis added.)

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[5]Justice Neely also stated in his *dicta* that the Secretary of State would be "entitled" (not "required") to refuse to certify a "notoriously and obviously" unqualified candidate for the ballot under very limited circumstances:

> Furthermore, we believe that in the case of an open and notorious disqualification for office such as a filing certificate tendered by a seven year old child, the Secretary of State would similarly be entitled to decline to have the individual's name printed on the ballot.

Id.

The hypothetical "open and notorious" example of an unqualified seven-year-old child candidate that Justice Neely chose might not necessarily be apposite--because a candidate's stated date of birth is not required on the candidate's certificate, which may be filed by mail. This example illustrates the complexity that can arise when the filing officer is asked to go behind the filing document itself.

It has been also argued to the Respondent Secretary that an implied authority or duty to refuse to certify the Respondent Deem to be on the ballot is based upon *W.Va. Code*, 1-2-1(f) [2011], which states *inter alia* that: "no person may file a certificate of candidacy for election from a senatorial district . . . if he or she resides in the same county and the same such senatorial district wherein also resides an incumbent senator." However, nothing in this statute references the Secretary, or grants her any duties of enforcement. Moreover, the lack of any grant of authority or duty in current *W.Va. Code*, 1-2-1(f) [2011] for the Secretary to go beyond a candidate's filing certificate is reinforced by recently introduced legislation, 2012 Senate Bill 542 (Attachment A hereto), which would specifically prohibit the Secretary of State from accepting a certificate of announcement from a candidate for State Senate when there is a sitting senator from the same county as the candidate.

The foregoing-discussed opinions and statutes, taken together, strongly suggest that any *W.Va. Code*, 3-5-9 [2005]-based implied candidate eligibility determination power in the Secretary of State would arise only if she can exercise that power with reasonable legal certainty--and, importantly, **only if her determination is based entirely upon the "four corners" facial sufficiency of the certificate of announcement**. *Cf.* Syllabus Point 2, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999). ("Assessment of the facial sufficiency of an indictment is limited to its "four corners," and, because supplemental pleadings cannot cure an otherwise invalid indictment, courts are precluded from considering evidence from sources beyond the charging instrument.") To go any further--to generally authorize a filing officer like the Secretary (or scores of county clerks and recorders), in the case of any of the hundreds of candidates who file for office, to go beyond or behind the four corners of each candidate's filing certificate document, even when there is alleged "notorious or obvious" ineligibility --would create a slippery slope indeed.

For example, in the instant case the residence of the other Senator from Wood County is not contained on Mr. Deem's filing certificate. How and when does the filing officer "know" whether the other Senator still "resides" in Wood County--or what Mr. Deem's residence intentions are? How "notorious" or "obvious" is that information, and what is its significance? How much, if any, should the "personal" or "official" knowledge of the filing officer be taken into account? How to treat whispers and hints?

Here is another real and recent example of the steepness of the potential slope that could result from an "implied" power or duty to investigate beyond the four corners of a candidate's filing document. A county clerk was recently pressed by the local media about whether she was going to certify "unqualified" candidates for the office of magistrate in the 2012 primary. The clerk, with all honest intent, decided to require the candidates to submit to her a copy of their high school diploma (information not required to be submitted by law). Now, it is alleged that one of the submitted documents was forged. At what point does the clerk stop the investigation that she began? The Secretary urges this Court to consider these potential questions and issues when resolving the instant case. **This Court should not inadvertently imply any power or duty for any filing officer that would improperly make these essentially ministerial officials subject to political pressure to make candidate ballot eligibility determinations in a fashion that goes beyond the explicit direction of the Legislature, and the narrow, facial confines of a candidate's filing certificate.**

IV.

CONCLUSION

In its ruling on the instant Emergency Petition for Mandamus, this Court need not (and, the Secretary submits, should not) discuss the issue of the Secretary's powers and duties with respect to

candidate eligibility determination for placement on the ballot. But should this Court do so, any such discussion or ruling should take account of the submission of the Secretary herein, and the suggested language in her Summary of Argument section *supra.* Wherefore, the Respondent Secretary of State Natalie Tennant respectfully submits the foregoing Response to the Emergency Petition for Writ of Mandamus filed by the Petitioner Donna Boley.

Respectfully submitted,

THOMAS W. RODD
Counsel for Respondent

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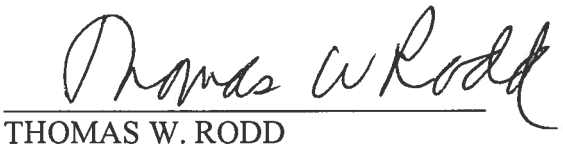
ATTORNEY GENERAL



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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Natalie E. Tennant, state that I am a Respondent in the foregoing and attached "Response to Emergency Petition for Writ of Mandamus," that I have read the same, and that the facts and allegations therein contained are true and correct to the best of my belief and knowledge.

2/21/12
DATE

Natalie E. Tennant
NATALIE E. TENNANT

CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of a WEST VIRGINIA SECRETARY OF STATE NATALIE E. TENNANT'S RESPONSE TO PETITIONER DONNA BOLEY'S EMERGENCY PETITION FOR WRIT OF MANDAMUS upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 21st day of February, 2012, addressed as follows:

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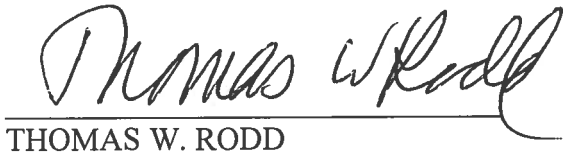

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