

[Cite as *State ex rel. O'Neil v. Cuyahoga Cty. Bd. of Elections*, 2018-Ohio-1101.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106932

STATE OF OHIO, EX REL.
MICHAEL O'NEIL, ET AL.

RELATORS

vs.

THE CUYAHOGA COUNTY BOARD OF ELECTIONS

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion No. 515842
Order No. 516029

RELEASE DATE: March 22, 2018

ATTORNEY FOR RELATORS

Michael J. O'Shea
O'Shea & Associates Co., L.P.A.
The Hoyt Block Building
700 West St. Clair Avenue, Suite 110
Cleveland, Ohio 44113

ATTORNEYS FOR RESPONDENT

Robert J. Triozzi
Director of Law, Cuyahoga County
2079 East Ninth Street
Cleveland, Ohio 44115

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Brendan R. Doyle
Assistant County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PER CURIAM:

{¶1} The relators, Michael O'Neil ("O'Neil"), James Shannon ("Shannon"), and Brigid Talty ("Talty") seek a writ of mandamus in order to compel respondent, Cuyahoga County Board of Elections ("board"), to place their names on the May 8, 2018 primary election ballot as candidates for the Cuyahoga County Democratic Central Committee. In the alternative, the relators seek a writ of mandamus to compel the board to accept each relator as a write-in candidate for the May 8, 2018 primary election. For the following reasons, we decline to issue a writ of mandamus as to either issue.

FACTS

{¶2} On February 7, 2018, each relator filed with the board a separate nominating petition (“petition”) in order to be placed on the May 8, 2018 primary election ballot as a candidate for the Cuyahoga County Democratic Central Committee. O’Neil sought nomination as a candidate for the Cuyahoga County Democratic Central Committee for the municipality of Rocky River, Ward 3, Precinct B. Shannon sought nomination as a candidate for the Cuyahoga County Democratic Central Committee for the municipality of Rocky River, Ward 3, Precinct C. Talty sought nomination as a candidate for the Cuyahoga County Democratic Central Committee for the municipality of Rocky River, Ward 2, Precinct A.

{¶3} In accordance with R.C. 3501.11(K)(1), the board reviewed the petitions to determine their validity. After review, it was determined that all three of the petitions were defective because the declarations of candidacy were all signed and dated after the electors signed and dated the petitions, a violation of R.C. 3513.261. The relators were notified by email or phone that their petitions were defective.

{¶4} On February 12, 2018, an employee of the board, Cory Milne, spoke with the relators’ attorney, Michael O’Shea, at which time Milne indicated that the relators’ petitions were fatally defective. Milne indicated that each relator could withdraw his or her candidacy in order to be eligible to file as a write-in candidate for the same position.

{¶5} On February 15, 2018, the board held a meeting, at 9:30 a.m., at which time it certified candidates to the ballot for the primary election of May 8, 2018. The date and time of the board meeting, and the purpose of the board meeting, were publicly noticed. The board, at the meeting, disqualified the relators’ petitions. The relators did not attend the board meeting. On February 15, 2018, at 3:40 p.m., O’Neil filed, by email, his notice of withdrawal of candidacy from the May 8, 2018 primary election for the office

of Cuyahoga County Democratic Central Committee Member. Shannon and Talty never filed a notice of withdrawal of candidacy with the board. On February 20, 2018, the board received, via messenger, “Declaration of Intent to be a Write-in Candidate” (‘write-in declaration’) for the May 8, 2018 primary election from O’Neil and Shannon. No write-in declaration was received from Talty. The Board did not accept the “Declaration of Intent to be a Write-in Candidate” filed by O’Neil and Shannon. On March 19, 2018, the relators filed this complaint for a writ of mandamus.

LEGAL ANALYSIS

A. Mandamus: general standards

{¶6} In order for this court to issue a writ of mandamus, the relators must demonstrate, by clear and convincing evidence, that they possess a clear legal right to the requested relief, that the respondent possesses a clear legal duty to provide the requested relief, and there exists no other adequate remedy in the ordinary course of the law.¹ *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940; *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

{¶7} Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and issued only when the right and duty is absolutely clear. Mandamus will not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953); *State ex rel. Connoles v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (8th Dist. 1993); *State ex*

¹We find that the relators have established that they lack an adequate remedy in the ordinary course of the law, because of the proximity of the May 8, 2018 primary election, *State ex rel., Greene v. Montgomery Cty. Bd. of Elections*, 121 Ohio St.3d 631, 2009-Ohio-1716, 907 N.E.2d 300.

rel. Dayton-Oakwood Press v. Dissinger, 32 Ohio Law Abs. 308, 1940 Ohio App. LEXIS 1173 (1940).

{¶8} The Supreme Court of Ohio has also established that the facts submitted in support of the complaint for mandamus and the proof produced must be plain, clear and convincing before a court is justified in using the “strong arm of the law” by way of granting a writ of mandamus. *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967).

{¶9} In addition to the three-part test that must be applied to a complaint for a writ of mandamus, the Supreme Court of Ohio has established that “[i]n extraordinary actions challenging the decisions of the Secretary of State and boards of elections, the standard is whether they engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions.” *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, 778 N.E.2d 32.

{¶10} Herein, the relators have not alleged fraud or corruption on the part of board. Thus, the issues before this court are whether the board abused its discretion or clearly disregarded applicable law by: 1) holding that the relators’ petitions were fatally defective; and 2) rejecting the relators’ requests for write-in candidacy.

B. Mandamus: Defective Petitions

{¶11} The relators, through their initial argument for a writ of mandamus, argue that the petitions submitted to the board contained a simple technical defect that did not result in a fatal flaw that prevented their names from being placed on the May 8, 2018 primary election ballot.

{¶12} On February 7, 2018, the relators filed their petitions to run as candidates for the Democratic Party County Central Committee. O’Neil signed and dated his petition on February

5, 2018, but all of his elector signatures were dated February 4, 2018; Shannon signed and dated his petition on February 3, 2018, but all of his elector signatures were dated between January 24, 2018, and January 30, 2018; and Talty signed and dated her petition on February 2, 2018, but nine out of ten of her elector signatures were dated between January 24, 2018, and February 2, 2018. The board rejected each petition, as fatally flawed, because each relator failed to sign and date their respective circulated petition before the signatures of the electors were placed on the petitions. The relators argue that their failure to sign and date the petitions prior to circulation constituted a simple technical defect that did not result in a fatal flaw that prevented the board from placing the relators as candidates for the Democratic Party County Central Committee on the May 8, 2018 primary election ballot. We disagree.

{¶13} The Supreme Court of Ohio, in *State ex rel. Simonetti v. Summit Cty. Bd. Of Elections*, 151 Ohio St.3d 50, 2017-Ohio-8115, 85 N.E.3d 728, held that a candidate is required to sign the statement of candidacy on the petition before collecting signatures from electors, per R.C. 3513.261, and the failure to sign the statement of candidacy prior to collecting signatures from electors results in a fatal flaw that mandates invalidation of the nominating petition. The Supreme Court of Ohio also held that substantial compliance with the signature and date requirements of R.C. 3513.261 will not allow acceptance of a defective petition by a board.

We also reject [relator's] argument that his name should be placed on the ballot because he substantially complied with R.C. 3513.261. In this respect, citing *State ex rel. Stewart v. Clinton Cty. Bd. of Elections*, 124 Ohio St.3d 584, 2010-Ohio-1176, 925 N.E.2d 601, ¶ 28, he contends that public policy favors “free competitive elections” over “absolute compliance with each technical requirement in the petition form.”

“[T]he general rule is that, unless there is language allowing substantial compliance, election statutes are mandatory and must be strictly complied with.” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 15. Here, R.C. 3513.261 provides that a nominating petition” shall be

substantially in the form prescribed in this section.” Thus, the statute requires only substantial compliance with the prescribed “form” of the nominating petition, but the statute contains no language regarding substantial compliance as to other matters.

When considering questions of substantial compliance with an election statute, we examine whether the requirement at issue “serves a public interest and a public purpose.” *Stern v. Cuyahoga Cty. Bd. of Elections*, 14 Ohio St.2d 175, 180, 237 N.E.2d 313 (1968). As previously discussed, the requirement that a candidate sign the statement of candidacy on the petition paper before the nominating petition is circulated advances two public interests: it guarantees adequate notice of the candidate’s identity to electors and ensures that the petition will not be used for a candidacy other than the one intended by the signers. See *Wilson*, 69 Ohio St.3d at 15, 630 N.E.2d 319. These interests do not relate merely to the “form” of a nominating petition but go to its very substance. [Relator’s] substantial-compliance argument, therefore, is unavailing.

Simonetti, supra, at ¶ 27.

{¶14} Thus, we find that the board did not abuse its discretion or clearly disregard applicable law by rejecting the relators’ petitions. The relators have failed to establish that they possess a clear legal right to be placed as candidates for the Cuyahoga County Democratic Central Committee on the May 8, 2018 primary election ballot.

C. Mandamus: Write-in Candidacy

{¶15} The relators, through their second argument in support of the complaint for a writ of mandamus, argue that the board was required to accept their written requests for withdrawal of candidacy and be permitted to proceed as write-in candidates for the Democratic Party County Central Committee in the May 8, 2018 Primary Election. We disagree.

{¶16} Initially, we find that neither Shannon or Talty submitted any written requests to the board to withdraw their petitions as candidates for the Democratic Party County Central Committee. In addition, Talty did not submit a declaration for write-in candidacy. Therefore, Shannon and Talty cannot demonstrate any legal right to the claim that they should have been

deemed write-in candidates by the board. *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110; *State ex rel. Ministerial Day Care Assn. Realtor v. Zelman*, 8th Dist. Cuyahoga No. 82128, 2003-Ohio-2653.

{¶17} We further find that O’Neil did not timely file the notice to withdraw his petition as a candidate for the Democratic Party County Central Committee on the May 8, 2018 primary election ballot, which prevented the board from accepting O’Neil’s Declaration of Intent to be a Write-in Candidate on the May 8, 2018 primary election ballot. In *State ex rel. Coble v. Lucas Cty. Bd. of Elections*, 130 Ohio St.3d 132, 2011-Ohio-4550, 956 N.E.2d 282, the Supreme Court of Ohio held that in order for a candidate to submit a second nominating petition for the same office, the candidate must timely withdraw his candidacy before the board has approved or disapproved the original petition and then timely submit a second nominating petition.

{¶18} In *Coble*, the Ohio Supreme Court reaffirmed the decision rendered in *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, wherein the court held that “R.C. 3513.052 does not prevent the application of R.C. 3513.261 and 3513.05 to bar a second nominating petition for the same office at the same election after the first nominating petition has been ruled invalid.” *Id.* at ¶ 36. In other words, if a board has held a certification meeting, as required by R.C. 3513.05, a candidate is not permitted to file a withdrawal of his original petition for candidacy after the board has met for the purpose of certification of the ballot.

{¶19} O’Neil did not timely file his withdrawal of the original nominating petition, which prevented him from filing a declaration of intent to be a write-in candidate. The board did not abuse its discretion or clearly disregard applicable law by rejecting O’Neil’s attempt to be

declared a write-in candidate. O'Neil has failed to establish a clear legal right to require the board to accept his write-in declaration.

{¶20} Accordingly, we grant the board's motion for summary judgment. Costs to the relators. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶21} Writ denied.

EILEEN A. GALLAGHER
ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON
JUDGE

KATHLEEN ANN KEOUGH
JUDGE