

[Cite as *State ex rel. Kinner v. Kelly*, 2015-Ohio-4120.]

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

STATE OF OHIO ex rel. JAN KINNER

*Relator*

v.

JAN KELLY, DIRECTOR  
MONTGOMERY COUNTY BOARD OF ELECTIONS, et al.

*Respondents*

Appellate Case No. 26836

[Original Action in Mandamus And Prohibition]

**DECISION AND FINAL JUDGMENT ENTRY**

September 30, 2015

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PER CURIAM:

{¶ 1} Jan Kinner filed this mandamus and prohibition action on September 11, 2015, naming Jan Kelly and Steven P. Harsman as respondents. Kelly is the director of the Montgomery County Board of Elections (MCBOE); Harsman is the Deputy Director. Kinner did not name the MCBOE itself or any of its members. Kinner seeks to run for a

seat on the Kettering City Council in the November 3, 2015 election. After the MCBOE refused to certify his candidacy, he filed the complaint currently before the court.

**{¶ 2}** Kinner asks this court for the following relief:

The Respondents, through mandamus relief, should be compelled to certify the Relator's candidacy for Kettering City Council, District 3 and place his name on the ballot for the 3 November 2015 general election. The Relator further seeks an order prohibiting Respondents from printing ballots for the 3 November 2015 General Election that affect the City of Kettering pending the Court's resolution of this matter.

Throughout his complaint, however, Kinner asserts that the MCBOE itself acted or should have acted – e.g., “the BOE has abused its discretionary authority” and “the BOE should immediately reverse its 25 August 2015 decision, certify my petition and place [my] name on the 3 Nov 2015 ballot.”

**{¶ 3}** Kelly and Harsman filed a motion to dismiss. They argue that they, as director and deputy director of the MCBOE, are not the proper respondents in this action. They assert that the MCBOE, which is not a party, has the sole authority to take the action Kinner seeks to compel. Respondents also move to dismiss on the merits of the case.

**{¶ 4}** In response, Kinner argues that he believes the proper respondents were named, but asserts that such an error does not affect the merits of the case. He acknowledges that he could seek to amend his complaint or file a new one, but, given the short time until the election, instead asks this court for “some latitude regarding the naming of the proper parties.” He asks this court to continue its consideration of his complaint on the merits, and to issue a writ of mandamus and “direct the Montgomery

County Board of Elections” to certify his candidacy and place his name on the ballot. Because we agree that Kelly and Harsman are not proper respondents, we sustain their motion to dismiss. We make no order directed to the MCBOE.

### **Writ of Mandamus**

{¶ 5} To be entitled to a writ of mandamus, Kinner “must establish a clear legal right to certification of his candidacy and placement of his name on the November [3, 2015] election ballot, a corresponding clear legal duty on the part of the board of elections to certify his candidacy and place his name on the ballot, and the lack of an adequate remedy in the ordinary course of law.” *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 115 Ohio St.3d 405, 2007-Ohio-5346, 875 N.E.2d 578, ¶ 8.

{¶ 6} The board of elections is the proper respondent in a mandamus action because it is the entity empowered by statute to take the action the relator seeks to compel. See R.C. 3501.11(K). As noted, the mandamus standard requires proof that the *respondent* has a clear legal duty to perform the act at issue. Here, because the MCBOE is the entity with the statutory authority to take the actions requested (certifying Kinner’s candidacy and including his name on the ballot), it is the only entity that could be compelled to do so.

{¶ 7} R.C. 3501.06(A) provides: “There shall be in each county of the state a board of elections consisting of four qualified electors of the county, who shall be appointed by the secretary of state, as the secretary’s representatives.” “Each board of elections \* \* \* shall do all of the following: \* \* \* Review, examine, and certify the sufficiency and validity of petitions and nomination papers, and, after certification, return to the

secretary of state all petitions and nomination papers that the secretary of state forwarded to the board.” R.C. 3501.11(K). A board is also responsible for various tasks concerning ballots, including contracting for the printing of ballots and ensuring their delivery to polling places. R.C. 3501.11(F), (H). Applied here, it is clear that the MCBOE is the entity that would be responsible for certifying Kinner’s petition for a seat on the Kettering City Council and providing ballots with his name on them.

**{¶ 8}** A board of elections has other statutory functions. The “members of the board shall \* \* \* select a resident elector of the county, other than a member of the board, as director, and a resident elector of the county as deputy director. All such officers shall continue in office, at the pleasure of the board, for two years.” R.C. 3501.09; see *also* R.C. 3501.11(D). “The director, deputy director, and other employees of the board are not public officers and shall serve, during their term of office, at the discretion of the board.” R.C. 3501.14. The director’s other responsibilities are also outlined by statute:

The director of the board of elections shall keep a full and true record of the proceedings of the board and of all moneys received and expended; file and preserve in the board’s office all orders and records pertaining to the administration of registrations, primaries, and elections; receive and have the custody of all books, papers, and property belonging to the board; and perform other duties in connection with the office of director and the proper conduct of elections as the board determines.

R.C. 3501.13(A). Under these statutes, the MCBOE itself has authority to perform the acts Kinner seeks to compel, while Kelly and Harsman lack such authority. The director and deputy director are not members of the board of elections and have no authority to

control the board's actions. Rather, they are appointed by the board to assist it with the administration of elections. Accordingly, we agree that Kelly and Harsman are not the proper respondents for this mandamus action.

### **Prohibition**

{¶ 9} To be entitled to a writ of prohibition, Kinner “must establish that (1) respondents are about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law.” *Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff*, 101 Ohio St.3d 256, 2004-Ohio-812, 804 N.E.2d 419, ¶ 9. As in a mandamus action, the “proper respondent in a prohibition case [concerning] placement of names or issues on the ballot is the board of elections.” *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, 882 N.E.2d 420, ¶ 30, citing *Campaign to Elect Larry Carver Sheriff* at ¶ 11.

{¶ 10} A board of elections is the proper respondent in prohibition because it may exercise quasi-judicial authority, while a director and deputy director may not. See *Wellington* at ¶ 36; Compare R.C. 3501.11 (board's responsibilities) with R.C. 3501.13 (director's responsibilities). “Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that *require* a hearing resembling a judicial trial.” (Emphasis in original.) *State ex rel. Wright v. Cuyahoga Cty. Bd. of Elections*, 120 Ohio St.3d 92, 2008-Ohio-5553, 896 N.E.2d 706, ¶ 7 (internal citations and quotations omitted). A board of elections acts as a quasi-judicial body when, for example,

it considers election protests. *State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections*, 80 Ohio St.3d 302, 306, 686 N.E.2d 238 (1997). We take no position on whether a prohibition claim would have been proper as against the MCBOE under the circumstances alleged.

{¶ 11} Here, Kinner's prohibition claim concerns printing of ballots for the November 3, 2015 election, rather than an election protest. Statutory responsibility for the printing of ballots lies with the MCBOE, rather than Kelly and Harsman:

Each board of elections \* \* \* shall do all of the following:

\* \* \*

(F) Advertise and contract for the printing of all ballots and other supplies used in registrations and elections;

\* \* \*

(H) Provide for the delivery of ballots, pollbooks, and other required papers and material to the polling places;

R.C. 3501.11. We therefore agree with Kelly and Harsman that they are not proper respondents in Kinner's prohibition claim.

### **Dismissal is Required**

{¶ 12} The Supreme Court of Ohio has repeatedly held that a complaint is defective when the relator fails to name the proper respondent. See, e.g., *State ex rel. Sherrills v. State*, 91 Ohio St.3d 133, 742 N.E.2d 651 (2001) (mandamus complaint defective because it named the State of Ohio); *State ex rel. Johnson v. Jensen*, 140 Ohio St.3d 65, 2014-Ohio-3159, ¶ 5 (a petition naming the wrong party is "fatally defective"). Such a complaint must be dismissed. *State ex rel. Keener v. Village of Amberley*, 80 Ohio St.3d

292, 685 N.E.2d 1247 (1997). In *Keener*, the court found that “Relators failed to name the proper respondents in this action, and the named respondents do not have a duty to perform any of the requested acts.” *Id.* at 293. As in this case, “respondents’ motion to dismiss alerted relators to this problem, *i.e.*, failure to name the village council or its members as parties, even though they sought to compel duties owed by council and its members. Relators, however, did not specifically oppose this part of respondents’ dismissal motion in their motion to strike or seek leave to amend their complaint.” *Id.* at 293-294. The court sustained the motion to dismiss and dismissed the case, without examining the merits of the case.

{¶ 13} Here, Kinner appears to acknowledge the error in naming the parties. He asks this court for some latitude with the named parties, and to nonetheless order the MCBOE to certify his petition and place his name on the ballot. We have no authority to do so. It is axiomatic that a “trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, and was not a party to the court proceedings.” *State ex rel. Doe v. Capper*, 132 Ohio St.3d 365, 2012-Ohio-2686, 972 N.E.2d 553, ¶ 13 (internal citations and quotations omitted). While this court has jurisdiction over this *type* of case pursuant to Section 3(B)(1), Article IV of the Ohio Constitution, we may render judgment only as against those *parties* who have properly been brought before us. *Doe, supra*. The MCBOE has not been made party to this action, and we can make no order compelling it to act.

{¶ 14} Respondents’ motion to dismiss is SUSTAINED. The Complaint for Writ of Mandamus and Prohibition is DISMISSED.

SO ORDERED.

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JEFFREY E. FROELICH, Presiding Judge

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MIKE FAIN, Judge

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MARY E. DONOVAN, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).

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JEFFREY E. FROELICH, Presiding Judge

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