

Case No. 2011-2152

**IN THE SUPREME COURT
OF THE STATE OF OHIO**

**STATE OF OHIO, *EX REL.*
ROBERT E. WATERS**

Relator,

v.

LESLIE JUNIOR SPAETH, ET AL.,

Respondents.

Original Action for Mandamus

RESPONDENTS' MERIT BRIEF

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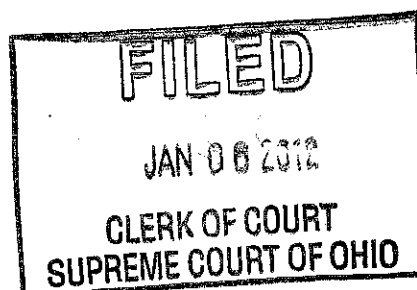
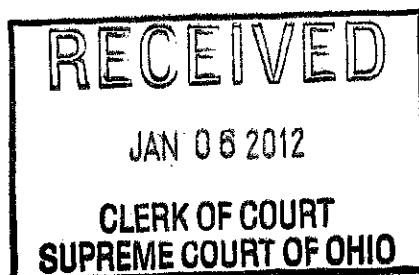


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RESPONDENTS' MERIT BRIEF

I. STATEMENT OF FACTS

This is an original action for mandamus seeking “review of a decision of the Warren County Board of Elections relating to the March 6, 2012, primary.” Relator asks the Court to issue a writ of mandamus to compel Respondents to place his name on the ballot for Republican Party Central Committee – 15th Precinct for the March 6, 2012, primary.

On December 7, 2011, Relator filed petitions to be a candidate for Republican Party Central Committee – 15th Precinct at the March 6, 2012, primary. The Warren County Board of Elections voted not to certify the Relator’s petitions. The declaration for candidacy which Relator filed on December 7th was for *election* to the party central committee and not for *nomination* as a party candidate in the general election.

On May 4, 2010, in the primary election held, Relator requested and received a Libertarian ballot as evidenced by the signature roster for the primary election where Relator signed and marked the “L” for the Libertarian ballot. (See Affidavit of Keir Holeman).

On February 18, 2010, Relator filed his declaration for candidacy and petitions to be a candidate for nomination to the office of state representative as a member of the Libertarian Party. (See Affidavit of Keir Holeman).

In paragraph 19 of the verified complaint, Relator states that he voted in the Libertarian primary in May 2010.

II. ARGUMENT

RELATOR IS NOT ENTITLED TO THE WRIT OF MANDAMUS SOUGHT IN THAT THE WARREN COUNTY BOARD OF ELECTIONS, RESPONDENTS HEREIN, HAVE NOT ENGAGED IN FRAUD, CORRUPTION, OR ABUSE OF DISCRETION AND HAVE NOT ACTED IN CLEAR DISREGARD OF APPLICABLE LEGAL PROVISIONS.

To be entitled to a writ of mandamus, Relator must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of Respondents to provide it, and the lack of an adequate remedy at law. State ex rel. Husted v. Brunner, 123 Ohio St.3d 288, 2009-Ohio-5327; quoting State ex rel. Heffelfinger v. Brunner, 116 Ohio St.3d 172, 2007-Ohio-5838. Relator herein does not have a clear legal right to the requested relief, and Respondents have no corresponding clear legal duty to provide it. The standard in this case is whether the Respondents 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.

Respondents' duties regarding examining petitions are set forth in R.C. 3501.11(K) and R.C. 3501.39. R.C. 3501.11(K) places a duty upon a board of elections to review, examine, and certify the sufficiency and validity of petitions and nominating papers. R.C. 3501.39(A) states:

"The Secretary of State or Board of Elections shall accept any petition described in Section 3501.38 of the Revised Code unless one of the following occurs:

- (1) A written protest against a petition or candidacy naming specific objections is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition is invalid in accordance with any section of the Revised Code providing a protest procedure.
- (2) A written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition violates any requirement established by law.
- (3) The candidate's candidacy or the petition violates the requirements of this chapter, Chapter 3513 of the Revised Code, or any other requirements established by law."

As there has been no protest filed against Relator's candidacy, the board of elections rejected Relator's petitions because Relator's candidacy or the petition violates the requirements established by law, specifically R.C. 3513.191(A).

R.C. 3513.191(A) provides that no person shall be a candidate for nomination or election at a party primary if the person voted as a member of a different political party at any primary election within the current year and immediate preceding two calendar years. In paragraph 19 of the verified complaint, Relator avers, “Relator, a resident of Warren County, voted in the Libertarian primary in May 2010.” Such admission is supported by his signature on the voter roster for that primary indicating Relator requested a Libertarian ballot. May 4, 2010, was within the immediate preceding two calendar years of December 7, 2011, the date Relator filed his petition to be elected to the Republican Party Central Committee. May 4, 2010, was also within the immediate preceding two calendar years of the upcoming March 6, 2012, primary election. By the pure language of the statute, Relator is not eligible to be a candidate for election to a position on the Republican Party Central Committee at the March 6, 2012, primary election. Therefore, Respondents did not act in clear disregard of applicable legal provisions. Further, there is no evidence of or any argument that Respondents engaged in fraud or corruption.

R.C. 3513.191(B) and (C) are not applicable to this case. Subsections (B) and (C) are both applicable to candidates for *nomination* as a candidate for a political party. Relator seeks to be a candidate for *election* at a primary and neither subsections are applicable. One who seeks election to the office of member of a party central committee at a primary election does not seek “party nomination for an office or position at a primary election” within the meaning of those words as used in R.C. 3513.04. State ex rel. Moss v. Franklin County Bd. of Elections, 69 Ohio App.2d 115, 432 N.E.2d 210 (Ohio App. 10 Dist. 1980).

Relator argues that this Court should settle a question where two counties have interpreted the Revised Code differently. However, other than mere allegations, Relator provides no evidence of such a conflict or that any Court has ruled upon that question.

Respondents submit that mandamus is not appropriate to settle such questions, if such even exists.

Relator appears to rely upon a distinction between a major political party and a minor political party but the reasoning therefor is somewhat unclear. R.C. 3513.191 does not distinguish between a minor or major political party.

Relator also argues that the Libertarian Party ceased to exist, apparently by operation of law, citing R.C. 3517.01(A)(1). Relator further argues that the Libertarian Party only exists at the pleasure of the Secretary of State. Respondents assume Relator is making reference to Secretary of State Directive No. 2011-38 wherein, Ohio boards of elections are instructed to recognize certain political parties, including the Libertarian Party, and to grant ballot access to candidates of those parties for the 2012 election cycle. (See Affidavit of Keir Holeman). Rather than being at the pleasure of the Secretary of State, Relator overlooks that the directive is actually based upon a federal court decision ordering that the Libertarian Party be recognized for the 2012 election.

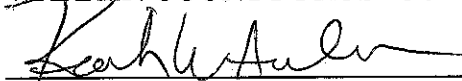
R.C. 3513.191(A) does not prevent a person from changing his party affiliation or membership during the 2-year "look back." The only thing he cannot do, pertinent to this case, is be elected at a primary to a position on the Central Committee of the Republican Party. See State ex rel. Bible v. Board of Elections of Hamilton County, 22 Ohio St.2d 57, 258 N.E. 2d 227 (Ohio 1970). Relator, by his own admission, voted as a member of the Libertarian Party at the primary election held on May 4, 2010, and thus, under the provisions of R.C. 3513.191, he is disqualified from being a candidate for the office of member of the Warren County Central Committee of the Republican Party in the March 6, 2012, primary.

III. CONCLUSION

Respondents have not engaged in fraud, corruption, or abuse of discretion and have not acted in clear disregard of applicable legal provisions. Therefore, Relator has not established a clear legal right to the requested relief, nor a corresponding clear legal duty on the part of Respondents to provide it. Respondents respectfully request the Court to dismiss the complaint with costs assessed to Relator.

Respectfully submitted,

DAVID P. FORNSHELL
PROSECUTING ATTORNEY
WARREN COUNTY PROSECUTOR'S OFFICE

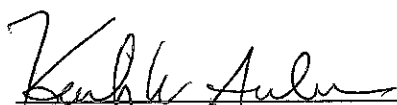


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CERTIFICATE OF SERVICE

5th I hereby certify that the foregoing was served by regular, U.S. mail and by email on the day of January, 2012, upon the following:

Robert E. Waters
926 Meadow Lane
Lebanon, OH 45036
Email: 15thprecinct@gmail.com



Keith W. Anderson (0003358)