

Case No. 2021-1072

In the
Supreme Court of Ohio

STATE EX REL. ROBERT “BEN” GRUMBLES,
Relator,

v.

DELAWARE COUNTY BOARD OF ELECTIONS,
Respondent.

Original Action in Mandamus

Expedited Election Matter Under S.Ct.Prac.R. 12.08

RELATOR’S MERIT BRIEF

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INTRODUCTION

Citing no statute, case law, or any other legal authority, the Delaware County Board of Elections refused to certify Relator Robert “Ben” Grumbles’s candidacy for a four-year term on the Orange Township Board of Township Trustees at the November 2, 2021 general election. The Board of Elections decided that because Mr. Grumbles is currently serving a four-year term on the Board of Township Trustees that commenced on January 1, 2020, he is prohibited from seeking a different four-year term on the same body that would commence on January 1, 2022. However, there is no such prohibition in Ohio law—the Board of Elections made it up. Because the Board of Elections made up a restriction to keep Mr. Grumbles off the ballot when he otherwise satisfied the statutory requirements to run for the Board of Township Trustees, Mr. Grumbles seeks a writ of mandamus to compel the Board of Elections to certify his name for placement on the November 2, 2021 election ballot. Further, because the Board of Elections demonstrably engaged in bad faith conduct in rejecting Mr. Grumbles’s candidacy, Mr. Grumbles also seeks an award of reasonable attorneys’ fees as part of the costs of this case.

STATEMENT OF FACTS

In the 1940s, the Ohio General Assembly enacted a law providing that in each township there shall be a board of township trustees consisting of three members. *See* R.C. 505.01. Two trustees would be elected to four-year terms first at the at the 1949 general election and then every four years thereafter, and the third trustee would be elected to a four-year term first at the 1951 general election and then every four years after that. *Id.* The General Assembly decided further that the terms for those elected would commence January 1 following their election. *Id.*

Fast forward to present day Orange Township in Delaware County, one member of the Orange Township Board of Township Trustees was most recently elected to a four-year term at

the 2019 general election while the other two four-year terms are up for election at the 2021 general election. Relator Robert “Ben” Grumbles is the Orange Township Trustee who was elected at the 2019 general election; his four-year term commenced on January 1, 2020. Verif. Compl. ¶ 8.

On August 4, 2021, Mr. Grumbles filed a nominating petition and statement of candidacy with Respondent Delaware County Board of Elections to run at the November 2, 2021 election for one of the two four-year terms on the Orange Township Board of Trustees that would commence on January 1, 2022. Verif. Compl. ¶ 10. If elected to the new four-year term, Mr. Grumbles would have to resign from or vacate his term on the Board of Trustees that commenced on January 1, 2020, and a replacement to the Board of Trustees would be selected to fill the unexpired term in accordance with R.C. 503.24. *See* Verif. Compl. ¶ 11.

Despite being a qualified elector and resident of Orange Township and despite timely filing a valid and sufficient petition, the Board of Elections refused to certify Mr. Grumbles’s name for placement on the November 2, 2021 general election ballot. Verif. Compl. ¶ 13. This occurred once at the Board of Elections’ August 16, 2021 meeting and then again at a reconsideration hearing held on August 25, 2021. *Id.* ¶ 13, 35; Board of Elections’ Draft August 16, 2021 Meeting Minutes at *6 (Exh. B to Verif. Compl.); Board of Elections’ Draft August 25, 2021 Meeting Minutes at *4 (Exh. F to Verif. Compl.).¹

At the Board of Elections’ August 16, 2021 meeting, the Board Members had a discussion with their staff and legal counsel about whether Mr. Grumbles was prohibited from seeking a four-year term that would commence on January 1, 2022 given that he had been elected to a different four-year term on the same body that would not expire until December 31, 2023. Verif. Compl. ¶

¹ The Board of Elections confirmed in its Answer that the draft minutes for the August 16, 2021 and August 25, 2021 meetings attached to the Verified Complaint are genuine. Ans. ¶ 7-8.

13-22; Draft August 16, 2021 Meeting Minutes at *5-6 (Exh. B to Verif. Compl.). The Board of Elections’ two attorneys explained that they had both researched the question and did not know the answer. Draft August 16, 2021 Meeting Minutes at *5-6 (Exh. B to Verif. Compl.). The Board of Elections’ Director added that she had contacted the Ohio Secretary of State’s legal counsel about it, but the Secretary’s office never got back to her. *Id.* One of the Board of Elections’ attorneys even suggested that, in the face of this uncertainty, the Board of Elections could reach a tie decision on the matter so that the Board could send the question to the Secretary of State to decide instead. *Id.*; see R.C. 3501.11(X) (providing that the Secretary “shall summarily decide” questions presented by tie votes of the boards of elections).

When the Board Members themselves weighed in on Mr. Grumbles’s candidacy, Board Chair Ed Helvey expressed a “concern” about the appointment process that would ensue if Mr. Grumbles is elected to a new term at the November 2, 2021 election. *Id.* Another Board Member, Steve Cuckler, explained his “belief” that if something is not expressly allowed in the law, then it is not allowed at all. *Id.* Chair Helvey indicated that he was fine not certifying Mr. Grumbles to the ballot because Mr. Grumbles could challenge the Board’s decision in court. *Id.* The Board of Elections then unanimously passed a motion to not certify Mr. Grumbles’s candidacy. *Id.*

Following the August 16, 2021 meeting, the Board of Elections’ Director emailed Mr. Grumbles a copy of a letter dated August 16, 2021 informing him of the Board’s decision. Verif. Compl. ¶ 23; Answ. ¶ 1. The explanation given in the letter was that the Board “determined that you do not meet all of the qualifications for the Office of Orange Township Trustee as it appears on the November 2, 2021 ballot because you already hold the office of Orange Township Trustee.” *Id.*; Board’s August 16, 2021 Letter (Exh. C to Verif. Compl.) (emphasis added). The letter did not cite any law, case law, or other legal authority for this determination, though it informed Mr.

Grumbles that he could request a reconsideration hearing that would take place on August 25, 2021. Verif. Compl. ¶ 24; Board's August 16, 2021 Letter (Exh. C to Verif. Compl.).

After Mr. Grumbles received this letter, he emailed the Board of Elections' legal counsel asking what the legal authority was for the Board's decision to not certify his candidacy. Verif. Compl. ¶ 25; Email Exchange (Exh. D to Verif. Compl.). The Board's legal counsel refused to give Mr. Grumbles an answer, citing the attorney-client privilege. Verif. Compl. ¶ 25; Email Exchange (Exh. D to Verif. Compl.).

Mr. Grumbles subsequently retained legal counsel who requested the Board of Elections to hold a reconsideration hearing on Mr. Grumbles's candidacy. Verif. Compl. ¶ 26. On August 23, 2021, Mr. Grumbles's legal counsel sent a letter to the Board of Elections' legal counsel explaining that Mr. Grumbles satisfied the qualifications to run for the office of Orange Township Board of Trustees at the November 2, 2021 election, and that nothing in the law precludes an incumbent township trustee from seeking a different term to the same body. Verif. Compl. ¶ 27; August 23, 2021 Letter (Exh. E to Verif. Compl.). Also referenced in and attached to this letter was a copy of Ohio Attorney General Adv. Op. No. 1933-1991 in which the Attorney General advised that because there was no specific prohibition providing otherwise, an incumbent township official could, "prior to the expiration of the term for which he was elected, become a candidate for a different term of that office at a subsequent election therefor without resigning prior to such election from the former office." Verif. Compl. ¶ 28; August 23, 2021 Letter (Exh. E to Verif. Compl.).

The Board of Elections held its reconsideration hearing on August 25, 2021. Verif. Compl. ¶ 30; Draft August 25, 2021 Meeting Minutes (Exh. F to Verif. Compl.). The Board did not have

a court reporter to transcribe the reconsideration hearing, even though the Ohio Secretary of State has directed boards of elections to have court reporters at their hearings.² Verif. Compl. ¶ 31.

At the reconsideration hearing, Mr. Grumbles’s legal counsel presented the argument that because there is no prohibition that would preclude an incumbent township trustee from seeking election to a different term on the office, the Board of Elections had erred in rejecting Mr. Grumbles’s candidacy. *Id.* at ¶ 32; Draft Minutes for August 25, 2021 Meeting (Exh. F to Verif. Compl.). Mr. Grumbles’s legal counsel also noted that the Board had previously allowed an incumbent county commissioner who was in the middle of a four-year term to seek election to a different term on the board of county commissioners. Draft Minutes for August 25, 2021 Meeting (Exh. F to Verif. Compl.) at *2. The Board acknowledged this but sought to distinguish the candidacies. *Id.*

At the reconsideration hearing, none of the Board of Elections Members could identify any specific law, case law, or other legal authority that supported their decision to reject Mr. Grumbles’s candidacy on the basis that he “already holds the office.” *Id.* at ¶ 32. Instead, the Board of Elections Members raised spurious issues, such as questions about how the unexpired term would be filled if Mr. Grumbles wins, how being elected to a new term would affect Mr. Grumbles’s compensation for his service, and even whether Mr. Grumbles would consider immediately resigning from his current term if the Board of Elections would certify his name for placement on the ballot. *Id.* at ¶ 34; Draft August 25, 2021 Meeting Minutes (Exh. F to Verif.

² Instead of having a court reporter, the Board prepared an audio recording of the reconsideration hearing. However, one of the recording devices apparently cut out at about twenty minutes in making it difficult to hear some of the speakers. *See* Clinger Aff. ¶ 3-6 (Rel. Evid. Exh. H). Mr. Grumbles, at his own expense, hired a court reporter to make a transcript based on the audio, but the court reporter was not able to hear (or transcribe) everything. The partial transcript has been included in Mr. Grumbles’s evidence as Relator’s Exhibit G, and a link to the audio files as provided by the Board are contained in the evidence as Relator’s Exhibit H.

Compl.) at *2-3. The Board then voted unanimously to approve a motion to deny the Mr. Grumbles's request that his candidacy be placed on the November 2, 2021 ballot "on the basis that the candidate filed for the same office he currently holds and is not eligible for re-election in 2021." *Id.* at ¶ 35; Draft Minutes for August 25, 2021 Meeting (Exh. F to Verif. Compl.) at *3.

Mr. Grumbles promptly filed this action two days later.

LAW & ARGUMENT

I. Mr. Grumbles is entitled to a writ of mandamus ordering the Board of Elections to certify his name for placement on the November 2, 2021 election ballot as a candidate for the Orange Township Board of Township Trustees.

Mr. Grumbles seeks a writ of mandamus to certify his name for placement on the November 2, 2021 general election ballot as a candidate for a four-year term on the Orange Township Board of Township Trustees that would commence on January 1, 2022. Such a writ will issue where a relator can establish by clear and convincing evidence (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Stevens v. Fairfield Cty. Bd. of Elections*, 152 Ohio St.3d 584, 2018-Ohio-1151, ¶ 6. Mr. Grumbles easily satisfies these requirements.

A. Mr. Grumbles has a clear legal right to the requested relief, and the Board of Elections has a clear legal duty to provide it, because Mr. Grumbles satisfies the requirements to be a candidate for township trustee.

When reviewing the decision of a county board of elections, the standard is whether the board engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions. *See Stevens*, ¶ 6. Here, the Board of Elections abused its discretion and/or acted

in clear disregard of applicable law because it rejected Mr. Grumbles's candidacy based on an entirely contrived prohibition that does not exist in the law.³

1. Mr. Grumbles met the qualifications to run for the Board of Township Trustees.

To be a candidate for a board of township trustees, a person must be a qualified elector and a resident of the township. Ohio Const., Art. XV, Sec. 4 (“No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.”); R.C. 3.15(A)(3) (“Each person holding an elective office of a political subdivision shall be a resident of that political subdivision.”); *see also* R.C. 3503.01 (defining qualifications of electors). A candidate must also timely file a nominating petition and statement of candidacy containing at least 25 valid signatures (R.C. 3513.253).

The boards of elections, in turn, have a duty to determine whether candidates for township offices located in the boards' respective counties satisfy the ballot access requirements set forth by Ohio law. This is set forth in R.C. 3501.11(K)(1), R.C. 3501.39, and the statutes cited above. If a candidate for township office satisfies the requirements to run for the office, then the candidate has a clear legal right to have their name placed on the ballot, and the respective board of elections has a corresponding clear legal duty to place the candidate's name on the ballot.

Mr. Grumbles met the statutory requirements to run for the Orange Township Board of Township Trustees, and the Board of Elections never claimed otherwise. He is a qualified elector and resident of Orange Township, Delaware County, and he timely filed a valid and sufficient petition to run for the Board of Trustees at the November 2, 2021 election. *See* Verif. Compl. ¶ 8, 10, 43. Based on these undisputed facts, the Board of Elections was required by law to certify Mr.

³ And as set forth more fully in Section II of the Law & Argument in this Brief, the Board of Elections also acted in bad faith in rejecting Mr. Grumbles's candidacy. *See* Verif. Compl. ¶ 6, 57.

Grumbles's name for placement on the November 2, 2021 general election ballot, but the Board failed to do so.

2. The Board of Elections abused its discretion or acted in clear disregard of Ohio law by applying an entirely contrived qualification to Mr. Grumbles.

Rather than certify Mr. Grumbles's name for placement on the ballot, the Board of Elections contrived a prohibition to keep him off the ballot. Citing no statute, case law, or other legal authority, the Board of Elections decided that because Mr. Grumbles is currently serving a different four-year term on the Board of Trustees that commenced on January 1, 2020, he cannot run for a different four-year that would commence on January 1, 2022. Nothing in the law supports this rationale for keeping Mr. Grumbles off the ballot.

The well-settled rule in Ohio is that any elector is eligible to be a candidate for public office unless there are specific qualifications or prohibitions that provide otherwise. *See, e.g., State ex rel. Fisher v. Brown*, 32 Ohio St.2d 23, 289 N.E.2d 349 (1972) (“Our conclusion is in conformity with the overwhelming majority rule that if the constitutional language does not specify that certain enumerated disqualifications for office extend to a candidacy for that office, a court will not so extend them by construction.”); Ohio Atty. Gen. Op. No. 1933-1991 at *1910 (“Anyone who is an elector is eligible to hold public office in the absence of constitutional or statutory qualifications or inhibitions.”). Such a rule is consistent with another well-settled principle that words limiting the right of a person to hold office must be liberally construed so that “the public may have the benefit of choice from all those who are in fact and in law qualified.” *State ex rel. Chance v. Mahoning Cty. Bd. of Elections*, 75 Ohio St.3d 42, 43, 661 N.E.2d 697 (1996) quoting *State ex rel. Schenck v. Shattuck*, 1 Ohio St.3d 272, 274 439 N.E.2d 891 (1982).

Furthermore, the Ohio Attorney General has specifically advised that an elected public official may seek a different term on the same body on which the official serves without first

resigning unless there is a specific prohibition stating otherwise. Ohio Atty. Gen. Op. No. 1933-1991. In explaining that a township Justice of the Peace who was in the middle of a four-year term that began in 1932 could be elected to a newly created four-year term of the same office set to begin in 1934, the Attorney General advised that “[a]nyone who is an elector is eligible to hold public office in the absence of constitutional or statutory qualifications or inhibitions.” *Id.* at *1911. The Attorney General explained further that he could “find no constitutional or statutory provision which would prevent an incumbent of an office from being a candidate for a different term of that office.” *Id.* The Attorney General also explained that the Justice of the Peace could not simultaneously hold both terms, but that acceptance of an incompatible office, i.e., the new four-year term, would constitute an “abandonment” of the initial four-year term. *Id.* at *1912. Based on this analysis, the Attorney General concluded as follows:

I am of the opinion therefore that an incumbent of an office may, prior to the expiration of the term for which he was elected, become a candidate for a different term of that office at a subsequent election therefor without resigning prior to such election from the former office, and that his election and qualification for the latter would operate as a resignation or vacation of the former.

Id. This opinion has not been overruled or rescinded by subsequent Attorneys General since it was announced in 1933. See Ohio Attorney General, “Overruled Opinions,” available at <https://www.ohioattorneygeneral.gov/About-AG/Service-Divisions/Opinions/Overruled-Opinions> (last accessed August 30, 2021).

Importantly, there is nothing in Ohio law that prohibits an incumbent township trustee from being a candidate for a different term of office on the same board of township trustees. If the General Assembly had intended to create such a prohibition, it would have so specified somewhere in the Revised Code. See, e.g., *State ex rel. Kelly v. Cuyahoga Cty. Bd. of Elections*, 70 Ohio St.3d 413, 415, 639 N.E.2d 78 (1994) (explaining that if the General Assembly had intended a particular

requirement to run for a public, “it would have so specified” in the relevant statute.); *State ex rel. Hawkins v. Pickaway Cty. Bd. of Elections*, 75 Ohio St.3d 275, 662 N.E.2d 17 (1996) (same).

For comparison, the General Assembly has created other candidacy prohibitions. This includes the “sore loser” law, which generally prevents persons who have unsuccessfully sought a party nomination at a primary election from running for the same or a different office at the following general election unless they want to run for certain boards of education, a board of an education service center, or township trustee. *See* R.C. 3513.04. There are also several related prohibitions, including one applicable to candidates for township office, against running for more than one office at the same election. *See* R.C. 3513.253 (concerning township officers);⁴ R.C. 3513.251 (concerning municipal officers); R.C. 3513.254 (concerning boards of education).

However, there is nothing in Ohio law that prohibits a township trustee from being a candidate for a different term of office on the same board. And in the absence of such a prohibition, one cannot be added in by the Board of Elections or by courts. *See State ex rel. Columbia Reserve, Ltd. v. Lorain Cty. Bd. of Elections*, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815, ¶ 32 (“We will not add a requirement that does not exist in the statute.”)

The Board of Elections did not—and could not—identify any specific prohibition that would prohibit Mr. Grumbles from running for a new term on the Board of Township Trustees at the November 2, 2021 election. Because there is no such prohibition, it was an abuse of the Board’s

⁴ R.C. 3513.253 provides in relevant part: “A board of elections shall not accept for filing a nominating petition of a person if that person, for the same election, has already filed a declaration of candidacy, a declaration of intent to be a write-in candidate, or a nominating petition, or has become a candidate through party nomination at a primary election or by the filling of a vacancy under section 3513.30 or 3513.31 of the Revised Code for any other township office, or for a municipal office, for member of a city, local, or exempted village board of education, or for member of a governing board of an educational service center.”

discretion and/or in clear disregard of Ohio law for the Board to contrive a prohibition that does not exist in the law in order to reject Mr. Grumbles's candidacy.

B. Mr. Grumbles lacks an adequate remedy in the ordinary course of the law.

Mr. Grumbles lacks an adequate remedy in the ordinary course of the law due to the proximity of the November 2, 2021 election. *See State ex rel. Bender v. Franklin Cty. Bd. of Elections*, 157 Ohio St.3d 120, 2019-Ohio-2854, ¶ 7 (“Given the proximity of the November 2019 election, [the relator] does not have an adequate remedy in the ordinary course of the law.”)

Accordingly, Mr. Grumbles has established the required elements for a writ of mandamus to issue compelling the Board of Elections to certify his name for placement on the November 2, 2021 general election ballot for the office of Orange Township Board of Township Trustees.

II. Mr. Grumbles is entitled to an award of reasonable attorneys' fees because the Board of Elections acted in bad faith in refusing to certify his candidacy.

The Board of Elections acted in bad faith in refusing to certify Mr. Grumbles's candidacy, and as a result, Mr. Grumbles is entitled to an award of his reasonable attorneys' fees as part of the costs of this matter. *See Verif. Compl.* ¶ 6, 57.

Although attorneys' fees are ordinarily not recoverable in mandamus actions against county boards of elections,⁵ there is an exception when the board acted in bad faith. *See, e.g., State ex rel. Maloney v. Sherlock*, 100 Ohio St.3d 77, 2003-Ohio-5058, 796 N.E.2d 897, ¶ 55 (“In Ohio, the general rule is that absent a statute allowing attorney fees as costs, the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed acted in bad

⁵ The Court has previously held that mandamus actions cannot be brought as a county taxpayer suit (Chapter 309 of the Revised code), which otherwise authorize the recovery of attorneys' fees. *State ex rel. Whitehead v. Sandusky Cty. Bd. of Comm'rs*, 133 Ohio St. 3d 561, 2012-Ohio-4837, 979 N.E.2d 1193, ¶ 45 citing *State ex rel. Stamps v. Automatic Data Processing Bd. of Montgomery Cty.*, 42 Ohio St.3d 164, 538 N.E.2d 105 (1989).

faith.”). This Court has explained that bad faith “imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.” *State ex rel. McDougald v. Greene*, 161 Ohio St.3d 130, 2020-Ohio-3686, 161 N.E.3d 575, ¶ 26 quoting *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 81. Stated differently, bad faith is “dishonesty of belief or purpose.” *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Comm’rs*, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274, ¶ 8 quoting Black’s Law Dictionary (9th Ed.2009) 159.

A. The Board’s justification for keeping Mr. Grumbles off the ballot was so unreasonable that the Court can find bad faith.

The Board’s refusal to certify Mr. Grumbles’s candidacy for placement on the November 2, 2021 general election ballot was ripe with pretext and dishonesty of belief or purpose. For one, the justification given for keeping Mr. Grumbles off the ballot—that he “already holds the office”—was so unreasonable and devoid of any basis in the law that the Court can ascribe bad faith to the Board’s conduct. When repeatedly pressed, the Board Members could not identify anything in the law that prohibits Mr. Grumbles’s candidacy for a different term on the Orange Township Board of Township Trustees, yet the Board still (twice) voted to reject Mr. Grumbles’s candidacy on this basis. *See* Tr. 15:23-16:7 (Rel. Evid. Exh. G).

Board Member Peg Watkins, for instance, conceded that she did not know of any such prohibition. *See* Tr. 15:14-15 (Rel. Evid. Exh. G). Nevertheless, she still insisted that there must be “some sort of prohibition against it” because she personally did not know of any other township trustees who had run for a different term on their board of township trustees. *See* Tr. 15:1-9 (Rel. Evid. Exh. G). This exchange was particularly telling because it shows the Board Member’s willingness to knowingly enforce a prohibition she could not identify in the law.

Board Chair Helvey and one of the Board’s attorneys tried to bootstrap the justification by dwelling on the appointment process for the unexpired term on the Board of Township Trustees that would follow if Mr. Grumbles won election to a different term. *See* Draft August 16, 2021 Meeting Minutes at *6 (Exh. B to Verif. Compl.); Draft August 25, 2021 Meeting Minutes at *1-2 (Exh. F to Verif. Compl.); Tr. 6:13-8:6, 13:11-14:16 (Rel. Exh. Evid. G). But they were unable to explain how the appointment process had any bearing on Mr. Grumbles’s qualification to run for the office, or how regulating the appointment process was even within the scope of the Board of Elections’ powers or duties. *See* Draft August 16, 2021 Meeting Minutes at *6 (Exh. B to Verif. Compl.); Draft August 25, 2021 Meeting Minutes at *1-2 (Exh. F to Verif. Compl.); Tr. 6:13-8:6, 13:11-14:16 (Rel. Exh. Evid. G). Indeed, the appointment process is entirely up to the General Assembly (*see* R.C. 503.24), and the heavy focus on this particular issue shows that the Board was motivated by something other than a good-faith application of the law.

Providing a possible indication of the Board Members’ true motive, Board Member Shawn Stevens went as far as to ask if Mr. Grumbles would consider resigning from his current term: “Would your client considering resigning his current position so that would make our decision easier to put him on the ballot?” Tr. 21:3-6 (Rel. Evid. Exh. G); *see also* Draft August 25, 2021 Meeting Minutes at *3 (Exh. F to Verif. Compl). Despite being unable to identify any prohibition in the law—and despite being presented with an opinion from the Ohio Attorney General indicating that Mr. Grumbles could run for a new term without resigning first from office—Board Member Stevens still asked Mr. Grumbles to resign from office.

It is apparent from these examples and the rest of the record that the Board Members do not personally or politically approve of Mr. Grumbles’s effort to seek a different term on the Board of Township Trustees—and Board Member Stevens, at least, may not even approve of Mr.

Grumbles's *current* term on the Board of Township Trustees. But the question of whether Mr. Grumbles should be elected to a new term is not for the Board to decide. It is for the voters of Orange Township. And it was bad faith for the Board Members to let their personal opinions of Mr. Grumbles and his campaign drive their decision instead of the law.

B. The Board's bad faith is further demonstrated by its treatment of Mr. Grumbles compared to another official the Board previously allowed to do the same thing.

In addition to the patently unreasonable justification given by the Board for keeping Mr. Grumbles off the ballot, the Board's bad faith is further demonstrated by the Board differential treatment of Mr. Grumbles's candidacy compared to another candidate it previously allowed to do the same thing. At the reconsideration hearing, Mr. Grumbles's counsel raised the point that the Board, in 2014, certified the candidacy of an incumbent county commissioner for a new four-year term on the board of county commissioners despite the fact that the county commissioner was in the middle of a four-year term he had just been elected to in 2012; the county commissioner was named Ken O'Brien. Tr. 5:1-3, 8:7-13:10 (Rel. Evid. Exh. G). When presented with this fact, Chair Helvey indicated that he had considered Mr. O'Brien's candidacy. Tr. 8:7-20 (Rel. Evid. Exh. G). Chair Helvey explained that the Board felt the candidacy of Mr. O'Brien was different because in that race, multiple candidates vied for one seat, whereas in the case of Mr. Grumbles, multiple candidates would vie for two seats. Tr. 8:7-20 (Rel. Evid. Exh. G). Chair Helvey did not elaborate any further on how this made any difference, especially given that either race, the incumbent official was seeking a *different* term of office on the same body. *See id.* Further, if the number of terms up for election is truly the distinguishing factor, then it would necessarily lead to the absurd result of an incumbent township trustee being able to seek a different term of office on the board of township trustees in the years when only trustee term is up for election but not when there are two terms up for election.

The Board's handling of Mr. O'Brien's candidacy in 2014 casts a long shadow over the spurious issues subsequently raised by the Board Members. Nearly all of the purported concerns raised by the Board Members with respect to Mr. Grumbles's candidacy would have been equally applicable to Mr. O'Brien's candidacy in 2014, yet the Board did not reject Mr. O'Brien's candidacy like rejected Mr. Grumbles's. For instance, Chair Helvey asked if there was anything in the law that explicitly contemplates and authorizes incumbent township officials to seek a different term on the same public body. *See* Tr. 9:7-8 (Rel. Evid. Exh. G). However, there is also nothing in the Revised Code that expressly contemplates and authorizes county commissioners to do the same, yet the Board still (correctly) allowed Mr. O'Brien to seek a different term to the same office in 2014. But the same logic that permitted Mr. O'Brien to do so in 2014 permits Mr. Grumbles to do so in 2021: he met the qualifications to run for the office, and nothing prohibited from seeking a different term to the same office.

As another example, Chair Helvey purported to be concerned that Mr. Grumbles could be eligible for a pay increase if elected to a new term, but Mr. O'Brien would have been in the same situation. *See* Tr. 22:9-22 (Rel. Evid. Exh. G). Yet, Chair Helvey and the other Board Members did not use this issue to reject his candidacy. Furthermore, how much a candidate would be compensated if elected has absolutely no bearing on their qualifications to run for the office—something a board of elections member should reasonably be expected to understand.

Another example of the bad faith treatment of Mr. Grumbles's candidacy comes from Board Member Steve Cuckler. At both the August 16, 2021 meeting and the August 25, 2021 reconsideration hearing, he stated his "belief" that Mr. Grumbles's candidacy presents a matter of township law, and that township law provides that if something is not expressly allowed in the Revised Code, then it is not allowed to occur. Draft August 16, 2021 Meeting Minutes at *6 (Exh.

B to Verif. Compl.); Draft August 25, 2021 Meeting Minutes at *3 (Exh. F to Verif. Compl.); Tr. 20:9-21:2 (Rel. Evid. Exh. G). Such statements were presumably references to the principle in Ohio law that township offices are creatures of statute and have only those powers expressly provided by statute or as may be implied therefrom. *See, e.g., Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875).

Board Member Cuckler's invocation of this principle to justify keeping Mr. Grumbles off the ballot was clearly pretextual. For one, in matters of candidacy for elective office, Ohio's ballot access laws in Title 35 of the Revised Code control, not township law. Next, Board Member Cuckler's point ignores that Mr. Grumbles satisfied the Revised Code's requirements to run for a new term: he is a qualified elector and resident of the township, and he timely filed a valid and sufficient candidacy petition. Finally, Board Member Cuckler's point ignores that the same "creatures of statute" principle applies with equal force to boards of county commissioners, yet this particular Board still allowed Mr. O'Brien to seek a different term on the Delaware County Board of County Commissioners in 2014. Thus, it is apparent that in raising this principle of township law, Board Member Cuckler—like the other Board Members—was desperately hunting for a reason to keep Mr. Grumbles off the ballot.

C. The Board's bad faith is further demonstrated by the Board Chair's comment that it was fine to reject Mr. Grumbles's candidacy because Mr. Grumbles could file a legal challenge against the Board's decision.

A final indication of the Board's bad faith is Chair Helvey's remark captured in the August 16, 2021 meeting minutes that he was apparently satisfied with the decision to keep Mr. Grumbles off the ballot because Mr. Grumbles could challenge the Board's decision in court. Draft August 16, 2021 Meeting Minutes at *6 (Exh. B to Verif. Compl.). Though perhaps an acknowledgement

of the frequency at which this particular Board's decisions are overturned in court,⁶ a citizen should not have to file a mandamus action in Court when the law is clear.

For all these reasons, the Court should find that the Board acted in bad faith in rejecting Mr. Grumbles's candidacy and grant an award of Mr. Grumbles's reasonable attorneys' fees as part of the costs of this action. If granted, Mr. Grumbles would file an itemized application and independent evidence supporting the reasonableness of the hourly rates charged and the hours billed.

CONCLUSION

In sum, Mr. Grumbles met the qualifications to run for the Orange Township Board of Township Trustees at the November 2, 2021 election, and the Court, therefore, should grant a writ of mandamus ordering the Board of Elections to certify Mr. Grumbles's name for placement on

⁶ Since 2011, nine other election-related actions have been filed against the Board in this Court, and of those nine, this Court granted writs of mandamus or prohibition against the Board in seven of them. See *State ex rel. Edwards Lands Co., Ltd. v. Delaware Cty. Bd. of Elections*, 129 Ohio St.3d 580, 2011-Ohio-4397 (granting writ of prohibition to prevent the Board from certifying a referendum for placement on the ballot); *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36 (granting writ of mandamus to compel the Board to place a tax levy on the ballot); *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections* ("Ebersole II"), Case No. 2014-1758, October 10, 2014 Entry (granting writ of mandamus ordering the Board to place a proposed charter amendment on the ballot); *State ex rel. Mann v. Delaware Cty. Bd. of Elections*, 143 Ohio St.3d 45, 2015-Ohio-718 (granting writ of mandamus ordering the Board to place a referendum petition on the ballot); *State ex rel. Crowl v. Delaware Cty. Bd. of Elections*, 144 Ohio St.3d 346, 2015-Ohio-4097 (granting writ of mandamus to compel the Board to certify a candidate's name for placement on the ballot); *State ex rel. Quinn v. Delaware Cty. Bd. of Elections*, 152 Ohio St.3d 568, 2018-Ohio-966 (granting writ of mandamus to compel the Board to place a referendum petition on the ballot); *State ex rel. McCann v. Delaware Cty. Bd. of Elections*, 155 Ohio St.3d 14, 2018-Ohio-3342 (granting writ of prohibition to prevent the Board from placing a referendum petition on the ballot). The two cases from the last decade where the Court denied the relief sought against the Board were *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections* ("Ebersole I"), 140 Ohio St.3d 487, 2014-Ohio-4077 (denying writ of mandamus to compel the Board to place a referendum petition on the ballot) but see *Ebersole II* and *State ex rel. Donaldson v. Delaware Cty. Bd. of Elections*, Slip Opinion No. 2021-Ohio-2943.

the ballot. Additionally, because the Board of Elections acted in bad faith in rejecting Mr. Grumbles's candidacy, the Court should grant Mr. Grumbles an award of his reasonable attorneys' fees as part of the costs of the action.

Respectfully submitted,

/s/ Derek S. Clinger

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via email on September 1, 2021 upon the following:

Mark Fowler, MFolwer@co.delaware.oh.us

Vince Villio, VVillio@co.delaware.oh.us

Counsel for Respondent Board of Elections

/s/ Derek S. Clinger

Derek S. Clinger (0092075)

In the
Supreme Court of Ohio

STATE EX REL. ROBERT “BEN” GRUMBLES,
Relator,

v.

DELAWARE COUNTY BOARD OF ELECTIONS,
Respondent.

Original Action in Mandamus

Expedited Election Matter Under S.Ct.Prac.R. 12.08

APPENDIX OF CITED AUTHORITY

COLUMBUS, OHIO, December 11, 1933.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Department of Education, and the L. M. Leonard Company, of Columbus, Ohio. This contract covers the construction and completion of Contract for General Work for a project known as Wings to Dormitory (Boys' and Girls' Dormitories) State School for the Blind, Columbus, Ohio, in accordance with Item 1, Item 6 (Alt G-1), Item 7 (Alt G-2), Item 11 (Alt G-5a), Item 12 (Alt G-5b), Item 14 (Alt G-7), including substitutions for Cleveland sandstone and all steel equipment metal wardrobes, of the form of proposal dated November 14, 1933. Said contract calls for an expenditure of one hundred and thirty-two thousand, four hundred and fifty-seven dollars (\$132,457.00).

You have submitted the certificate of the Director of Finance, to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate of the Controlling Board, showing that said board has released funds for this project in accordance with Section 8 of House Bill No. 699, of the 90th General Assembly, Regular Session.

In addition, you have submitted a contract bond upon which the Maryland Casualty Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law, and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1991.

PUBLIC OFFICE—INCUMBENT MAY BECOME CANDIDATE FOR DIFFERENT TERM OF SAME OFFICE PRIOR TO EXPIRATION OF ELECTED TERM—ELECTION OPERATES AS RESIGNATION OF UNEXPIRED TERM.

SYLLABUS:

An incumbent of an office may, prior to the expiration of the term for which he was elected, become a candidate for a different term of that office at a subsequent election therefor without resigning prior to such election from the former office, and his election and qualification for the latter term would operate as a resignation or vacation of the former.

COLUMBUS, OHIO, December 11, 1933.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

"I will appreciate it very much if you will give us your opinion upon the question as to whether or not a person elected to a four year term of office as Justice of the Peace, while serving such term of office, would be permitted to become a candidate at the next general election for such office, for a four year term beginning January 1st following such election, even though such Justice of the Peace has two years yet to serve of the term to which he was originally elected.

The circumstances are as follows:

'A' was elected Justice of the Peace in 1931 for a term of four years beginning with January 1, 1932. At the election of this November, an additional Justice of the Peace was to be elected in 'A's' township. There were no names of candidates printed upon the ballot, but the electors wrote in the name of 'A' among others, and 'A' received the highest number of votes.

Should the Board of Elections issue a certificate of election to 'A' and would 'A' be permitted to resign from the term of office he is now filling to accept the longer term to which he seems to have been elected?

The question naturally arises with reference to certain other offices, 'Can an incumbent in office, if he sees an opportunity to be elected to a longer term of the same office as that to which he was elected, become a candidate for such long term without resigning from the term of office which he is now filling, such resignation effective prior to the election at which he seeks the longer term?'

Anyone who is an elector is eligible to hold public office in the absence of constitutional or statutory qualifications or inhibitions. As stated in the case of *State, ex rel. vs. Wagar*, 19 C. C. 149:

"One who is an elector is entitled to hold office to which he is elected, unless the statute forbids. There must be a provision of the statute forbidding his holding the office."

Likewise, the court said in the case of *Napier vs. Roberts*, 172 Ky. 227:

"The individual voter should not be deprived of the opportunity of choosing a public servant from among those who may seek the place unless the plain or manifest purpose of the law demands it."

I find no constitutional or statutory provision which would prevent an incumbent of an office from being a candidate for a different term of that office. In the case you present, the name of the person receiving the highest number of votes was not on the ballot as a candidate but his name was written in by the voters. Even if there were a statute prohibiting him from being a candidate, it is very doubtful if such statute would be construed to deny to the voters the right to write his name on the ballot and elect him. It has been held that the inhibition placed on the candidacy at the general election of one who has been defeated at a primary does not prevent the voters from voting for the candidate defeated in the primary. The following was held in the case of *LaCombe vs. LaBorde*, 132 La. 435:

"The law allows to the voter the right to vote for whom he chooses, and this right cannot be denied him merely because the one for whom he

votes is prohibited from being an avowed or official candidate. The intent of the law is to allow the voter the greatest freedom in the expressing of his will, and this freedom is not to be interfered with by the court, in the absence of a clear and unambiguous expression by the law-making power of an intent to limit or restrict within certain bounds, the exercise by the voters of this freedom of choice."

See also *State, ex rel., vs. Moore*, 87 Minn. 308.

There being no constitutional or statutory inhibition against such a candidacy, I am of the view that it makes no difference whether the person's name appeared on the ballot as a candidate or whether his name was written in by the voters.

You ask whether such a person would not have to resign from the office of which he is an incumbent before the election at which he seeks the other term. It is clear, of course, that he would not be eligible to hold both offices at the same time. Where there are statutory or constitutional requirements relative to eligibility of public officers, whether or not such requirements refer to the time of election or the time of taking office, is generally determined by the language used in such provision. However, where the disqualification is the holding of an incompatible office or some like obstacle which may readily be removed, the requirements are generally considered as referring to the date of taking office. 9 R. C. L. 1124, 1125.

I am of the view that the law relating to the eligibility of a person to hold an incompatible office will apply to the situation which you present. The successful candidate could not hold both offices but he could elect which one he desires to hold. He could not retain the former after assuming the latter, and the acceptance of the latter would be an abandonment of the former. *Eddy vs. County Commissioners*, 15 Ill. 375. The acceptance of an incompatible office by the incumbent of another office operates as a resignation or vacation of the first office. 46 C. J. 947; *State, ex rel., vs. Mason*, 61 O. S. 513. In the case of *People vs. Carrique*, 2 Hill 93, a law of 1822 provided for the appointment of three justices of the peace of the City of Hudson; and in April, 1836, Carrique was appointed one of them. A law of 1830 provided for the appointment of two additional justices of the peace of the City of Hudson. In January, 1838, Carrique was appointed a justice under this law and qualified. The tenure under both laws was four years. The court held that Carrique was properly in office under the last appointment, and that the first was ipso facto vacated by his acceptance of the new appointment.

I am of the opinion therefore that an incumbent of an office may, prior to the expiration of the term for which he was elected, become a candidate for a different term of that office at a subsequent election therefor without resigning prior to such election from the former office, and that his election and qualification for the latter term would operate as a resignation or vacation of the former.

Respectfully,

JOHN W. BRICKER,

Attorney General.