Volume 89 | Issue 2 Article 23

January 1987

Public Officials

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PUBLIC OFFICIALS

BRADY v. HECHLER, 346 S.E.2d 546 (W. Va. 1986).

Public Officials

The petitioner, a resident and registered voter of the Ninth Senatorial District, sought a writ of mandamus ordering the Secretary of State of West Virginia and the ballot commissioners of the Ninth District to strike respondent's name from a primary election ballot as democratic candidate for the state senate from that district on the grounds that the candidate failed to timely file his certificate of candidacy for nomination with the Secretary of State as required by West Virginia Code section 3-5-7 (1985). The respondent's certificate was postmarked a day late when delivered to the Secretary of State's office. The West Virginia Supreme Court of Appeals ordered the Secretary of State to withdraw the certificate, and ordered the ballot commissioners to strike respondent's name from the primary election ballot.

In reaching this result, the West Virginia Supreme Court of Appeals discussed the following issue: Whether provisions in election statutes such as West Virginia Code section 3-5-7, requiring a certificate of candidacy to be filed with a certain officer within a specified time, mandate that a potential candidate's name be excluded from the ballot for not comporting with such a provision.

The court held that the provisions requiring timely filing in West Virginia Code section 3-5-7 are mandatory, and an individual's name can not be lawfully placed on any ticket by ballot comissioners when that individual has not been nominated according to the law. Where a certificate for candidacy of nomination is received by the Secretary of State and postmarked a day later than required by statute the potential candidate has failed to comply with West Virginia Code section 3-5-7, and the petitioner who seeks to strike the candidate's name from the primary election ballot is entitled to mandamus relief.

Justice Brotherton dissented, stating that the purpose of West Virginia Code section 3-5-7 is to require all candidates who elect to mail their certificates of candidacy for nomination to do so before midnight on the first Saturday of February. The potential candidate complied with the statute, and through no fault of his the post office did not postmark the letter until the next day. To remove the candidate's name from the ballot is to ignore the concept of "substantial compliance."

FABER v. DOUGLAS, No. 16886, slip op. (W. Va. Dec. 18, 1985).

Disqualification of Prosecutor—False Swearing—Perjury—Public Officials— Writ of Prohibition

A relator sought through a writ of prohibition to prohibit a circuit court judge and prosecuting attorney from taking any action against the relator based

on a two-count false swearing indictment. The relator claimed that the prosecutor acted beyond his jurisdiction by seeking an indictment when he should have disqualified himself. The prosecutor allegedly had a direct interest in the criminal charge against the relator, being a party in an underlying civil action brought by the relator which questioned the propriety of the prosecutor's relocating his law office into a building purchased by the county commission. The false-swearing indictment arose from this civil action.

On appeal, the West Virginia Supreme Court of Appeals addressed the following issues: (1) Whether a public prosecutor is foreclosed from pursuing a criminal prosecution arising out of a civil case where he has a direct interest, and (2) whether the facts surrounding the relator's civil action constitute false swearing on his part as a matter of law.

The court held that prohibition is a proper remedy when a court usurps judicial powers, although, it is not acting in excess of its jurisdiction, and that the prosecutor should have disqualified himself from seeking the criminal (false swearing) indictment against the relator. Furthermore, a prosecutor is disqualified from acting in a criminal proceeding where he has a personal or pecuniary interest in the proceeding that conflicts with his duties as a public prosecutor. Where the prosecutor should have disqualified himself as a matter of law from seeking this indictment, his presence before the grand jury in this matter was unauthorized and vitiated the indictment. The court also found that the indictment had to be dismissed as a matter of law because the facts alleged against the relator did not constitute false swearing. The relator's sworn affidavit filed pursuant to Rule XVII of the Trial Court Rules does not require that the affidavit be sworn before a notary public. Therefore, no false swearing charges could be made under section 61-5-2 of the West Virginia Code against the relator.

GRAF v. FRAME, 352 S.E.2d 31 (W. Va. 1986).

Attorney's Fees—Constitutional Law—Public Officials—Writ of Mandamus

Petitioners, physicians/faculty members of the West Virginia University Medical Center, sought by writ of mandamus to prevent a member of the West Virginia Board of Regents from acting as attorney for parties with claims against faculty members/employees of West Virginia's higher education institutions who fall under the supervision of the Board of Regents. In addition, petitioner is sought to have the Board of Regents prohibit Board members from representing parties with claims against the Board or institutions and employees which it supervises, because of a conflict of interest between personal gain and public duties. The respondent attorney had represented parties in two malpractice actions against physicians at the Medical Center Hospital. Neither West Virginia University nor the West Virginia Board of Regents were named as defendants in these actions.

The West Virginia Supreme Court of Appeals addressed the following issues: (1) Whether the necessary elements for granting mandamus relief existed, (2)

whether the respondent/attorney was a public official, (3) whether a writ of mandamus may require a public official to refrain from representing clients in actions against the agency of which he is a member, and those it supervises, (4) whether costs and attorney's fees are recoverable against a public official in a mandamus proceeding.

The court held that a writ will not issue unless there is a legal right to relief, a clear legal duty, and absence of another adequate remedy. The court found that one is a public official where: (1) His office is created by law, (2) is designated as an office, (3) with prescribed qualifications and bond, oath, duties, tenure, and salary prescribed or required, and (4) one occupying the position is constituted a representative of the sovereign. A position on the Board of Regents met the criteria of a public office. Furthermore, West Virginia Constitution, article III, section 2 prevents a public officer who is an attorney from representing those who have claims against the public agency of which that attorney/officer is a member. Good faith is irrelevant where private interests conflict with public duties. This applies to all public officials. There is a duty even to avoid the appearance of impropriety. A ruling by a trial court on each conflict of interest is not an equally convenient, beneficial, nor effective remedy so as to replace mandamus. Cost and attorney's fees are usually awarded in mandamus proceedings where the public official willfully fails to obey the law, but where the court has not spoken in detail on the official's duty, and where the official appears to have made good efforts to comply, such costs and attorney's fees will not be awarded. It was unnecessary for the court to reach the question of whether the Board of Regents owed the duty asserted by the petitioners.

MILLER v. PALMER, 336 S.E.2d 213 (W. Va. 1985).

Constitutional Law—Public Officials

A fire service charge was established by a city ordinance and the procedures for protesting its enactment by voters, as outlined in West Virginia Code section 8-13-13, were complied with by the city. Plaintiff's late petition requesting that an ordinance initiative be placed on the ballot which would remove all service fees enacted by the city and prohibit future ones did not comport with West Virginia Code section 8-13-13 requirements, and was denied certification. The circuit court granted plaintiff's writ of mandamus since his petition had met the requirements prescribed in the initiative provisions of the city's charter by containing the required number of signatures.

On appeal by the city, the West Virginia Supreme Court of Appeals addressed the following issues: (1) Whether the city's voters may attack the ordinance by proposing an alternative ordinance under a city's charter guidelines regardless of state statutory restrictions, (2) whether a state statute is a general law, (3) whether a city charter's provisions will prevail over a general law when in conflict.

The court held that *State* ex rel. *Plymale v. City of Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963) controlled, stating that West Virginia Code section

8-13-13 is a general law operating uniformly upon all cities in the State, and therefore limits the exercise of municipal power. Municipalities have no inherent powers except those granted to them by the legislature pursuant to article VI, section 39(a) of the West Virginia Constitution. Consequently, where the municipal charter conflicts with a statute that is a general law the general law will prevail. Because the petition in issue did not have the number of signatures required by state law, the ruling below was reversed.

QUEEN v. MOORE, 340 S.E.2d 838 (W. Va. 1986).

Public Officials

The petitioners, students at West Virginia colleges and universities, sought a writ of mandamus ordering the defendant to deposit with the West Virginia State Board of Investments the interest earned on certain student fees authorized by West Virginia Code sections 18-24-1 through 13. The fees in question were maintained in "special revenue funds" managed by the West Virginia Board of Regents. This money was made available to the Board of Investments for investment, and held in accounts with corresponding interest accounts. An executive order froze the withdrawal of funds by the Board of Regents from these interests accounts which they had previously drawn on freely. The Legislature then caused approximately 1.14 million dollars of the interest in the accounts to be placed in the state's general revenue fund. The balance of the interest posted to the special accounts remained in the accounts held by the Board of Investments.

In an original proceeding in mandamus the West Virginia Supreme Court of Appeals determined: (1) Whether such fees authorized by statute are special revenue funds or general revenues of the state, (2) whether in the absence of lawful separation, interest is presumed to be an accretion to the fund earning it, (3) whether the practice of free access to interest on special funds is a violation of constitutional and statutory mandate that no state funds be spent except by legislative appropriation.

The court held that West Virginia Code sections 18-24-1 through 13 dedicates fees collected to specific purposes, creating "special revenue funds." The court adopted the common law principal that the interest amounts earned by these funds are accretions to those principal funds in the absence of a lawful separation intended by the legislature. The legislature properly separated and appropriated approximately 1.14 million dollars of the interest amounts from their principal funds. However, the accrued interest amounts not otherwise separated or appropriated by the Legislature and specifically earmarked for the purposes specified in the statutes creating the fees and their special funds are not available as general revenues of the State.

RICHARDSON v. TOWN OF KIMBALL, 340 S.E.2d 582 (W. Va. 1986).

Attorney's Fees—Public Officials

An out-of-state visitor to a West Virginia town received a traffic citation which was paid. Counsel was later retained by the visitor to investigate the possibility of discriminatory treatment because of his nonresident status. Counsel sought to inspect the town's municipal court records of traffic violations for a two year period, and was denied access. Petitioner then filed a petition for an injunction against the town and others requesting the right to inspect such records, and seeking attorney's fees. The circuit court dismissed the petition.

On appeal, the West Virginia Supreme Court of Appeals addressed: (1) Whether the records and papers of every court can be inspected by any person, and (2) whether the government should pay a citizen's attorney's fees for maintaining an action to force public officials to perform non-discretionary duties.

The court held that the legislature intended in West Virginia Code section 51-4-2 (1981) to require every court to open to the inspection of any person the records and papers of that court, and furnish copies thereof except in cases where specifically provided exceptions apply. Traffic records do not fit into any exception. Inquiry into the purpose behind the inspection is irrelevant and *Payne v. Staunton*, 55 W. Va. 202, 46 S.E. 927 (1904), was overruled to the extent that it holds otherwise. Furthermore, where public officials' actions are in deliberate disregard of and a willful refusal to obey the law, the citizen forced to bring action to force the officials' performance of a non-discretionary legal duty is entitled to recover costs and reasonable attorney's fees. Reversed and remanded for determination of reasonable attorney's fees.

STURM v. HENDERSON, 342 S.E.2d 287 (W. Va. 1986).

Constitutional Law—Public Officials

Appellant was elected to the Upshur County Board of Education as a resident of a magisterial district different from that in which he resided. Appellees, residents, taxpayers, and registered voters of Upshur County sought his removal. Appellant was removed from office as a member of the Board by an order of the circuit court on the grounds that the appellant and another member of the Board, in conflict with statutory requirement, resided in the same magisterial district. This conflict had resulted from the county commission's redistricting of the county prior to the election.

On appeal, the West Virginia Supreme Court of Appeals determined: (1) Whether it is constitutional to require that no more than two members of a county board of education shall be elected from the same magisterial district as established in West Virginia Code section 18-5-1, and West Virginia Code section 3-5-6, and (2) whether the Constitution of West Virginia gives the legislature the power to prescribe qualifications for holding a public office.

The court held West Virginia Code section 18-5-1, and West Virginia Code section 3-5-6 are unconstitutional to the extent that they provide a qualification

that only a certain number of members of a county board of education can be elected from the same magisterial district. West Virginia Constitution article IV, section 4 is the only authority for establishing qualifications for public office, and West Virginia Constitution article IV, section 8 only gives the legislature the power to prescribe terms, powers, duties, compensation, and means for election of public officials. Constitutional qualifications regarding magisterial restrictions with respect to county commissioners (*see* W. Va. Const., art. IX, 10), and state senators (*see* W. Va. Const., art. IV, 4), are distinguishable from a like statutory qualification concerning board of education members.

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See also,

CIVIL PROCEDURE:

Pauley v. Gainer, No. CC956, slip op. (W. Va. Mar. 13, 1986).

LABOR AND EMPLOYMENT:

In re *Garby*, 339 S.E.2d 702 (W. Va. 1985).