

CIVIL ORDER  
BOOK

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# ARGUMENT DOCKET

## IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA:

State *ex rel*, Gregory Smith,

PLAINTIFF.

v.

Civil Action No. 08-C-198

Mingo County Commission,  
Jim Hatfield, Mingo County Clerk, and  
Lonnie Hannah, in his official capacity  
as Mingo County Sheriff.

DEFENDANTS.

FILED  
CIRCUIT COURT  
MINGO COUNTY, WV  
2010 MAR 24 P 4: 21  
MARGARET E. RECORD  
SPRING FIELDS  
MINGO COUNTY CLERK

### FINAL ORDER IN MANDAMUS PROCEEDING

#### Procedural Posture

On this the 22nd day of March, 2010, this matter came on *sua sponte* before the Court, subsequent to the submission of all requested materials by the Court for the Court's review and consideration of said materials from the respective parties, within the context of the requested relief by the Plaintiff in this proceeding previously entertained by the three-judge court in Mingo County, West Virginia.

WHEREUPON, the Court notes that the original *Mandamus* proceeding was brought in the Circuit Court of Mingo County, West Virginia, by the Plaintiff, Gregory Smith, against the Defendants, the Mingo County Commission; Jim Hatfield, the Clerk of

the Mingo County Commission; Lonnie Hannah, the Sheriff of Mingo County, wherein the Plaintiff requested payment of certain attorneys fees and costs resulting from the litigation associated with his statutory removal proceeding, previously entertained by the three-judge court in Mingo County, West Virginia.

THEREUPON, the Court further takes judicial notice of the proceedings and the particular final Order Denying Petition for Removal generated therefrom in that removal proceeding, in accordance with the applicable provisions of Rules 2.01 and 2.02 of the West Virginia Rules of Evidence.

WHEREUPON, the Court has determined that as a result of the submission and consideration of all of which, the matter is now mature  
f o r a d e c i s i o n .

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the pleadings, the legal arguments and the proposed relief from all of the parties, in light of the entire record generated thusfar, the Court hereby makes the following findings of fact and conclusions of law:

[1] That this Court has statutory and Rule-based jurisdiction and venue over the subject matter as well as the respective parties hereto, in accordance with the applicable provisions of West Virginia Code §53-1-2, together with Rule 71B of the West Virginia Rules of Civil Procedure; and,

[2] That this proceeding was filed within the parameters of the statutory provisions of West Virginia Code §53-1-3, *et seq*, wherein the Plaintiff seeks his attorneys fees and

court costs expended in the defense of the matters alleged in the "Removal" proceeding, which was brought within the scope of West Virginia Code S6-6-7(c), to which the Court takes judicial notice, but only for those matters relevant for these purposes, in accordance with the applicable provisions of Rules 2.01 and 2.02 of the West Virginia Rules of Evidence; correspondingly, the Court does hereby direct the Clerk of this Court to file with this Order a certified copy of the final Order Denying Petition for Removal from Mingo County Civil Action No. 06-C-566, which was entered on or about October 2, 2007; and,

[3] That the Plaintiff petitions the Court for an award of \$51,943.00 in attorneys fees, and \$1,605.81 in costs, for a total of \$53, 548.81, in regard to his defense of the Petition for Removal in that matter of Mingo County Civil Action No. 06-C-566; and,

[4] That in regard to the Court's consideration of the requested relief, together with the points and authorities cited in support of said requested relief as well as that opposed to said requested relief, the Court expressly determines that it is not this Court's function to retry, dispute or reaffirm the determinations made by the statutory "three-judge court" {see West Virginia Code s6-6-7(c) } in its Order entered October 2, 2007, in that said Order speaks for itself; and,

[5] That in respect to said Order's relevance in this proceeding, the Court notes that the Order Denying Petition for Removal entered October 2, 2007, determined at Finding/Conclusion No. 16 (Page 6, *op cit*) that there appeared to be "...technical violations of the requirements of W. Va. Code s7-3-3..." ;and determined at Finding/Conclusion No. 23 (Page 7, *op cit*) that there was a "...technical violation of the statute... (e.g. W. Va. Code s7-5-4)"; and,

[6] That the three-judge court went on, however, to determine that any such evidence of the violations of the referenced statutory provisions, and the respective duties denoted thereon, "...does not rise to a level sufficient to justify the removal of the Respondent Smith" (e.g. the Petitioner herein); and,

[7] That in the final Finding/Conclusion of said Order (No. 90, Page 22, *op cit*), the three (3) Judge Panel determined as follows:

90. In conclusion, the Court finds from the entirety of the testimony and the evidence at the March 26-27, 2007, hearing of this matter that the Petitioners have failed to prove by "clear and convincing evidence" that Respondent Smith committed official misconduct, malfeasance in office, incompetence, neglect of duty, gross immorality, or waste that would warrant his removal from office.

[8] That the legal principles establishing the appropriate standard for review on the issue of whether or not to grant such an extraordinary writ as a *Mandamus* are outlined by the recent case of State ex rel Billings v. Point Pleasant, 194 W. Va. 301 (1995), which sets out the traditional test as follows from Syllabus Point 1 :

1. "A writ of mandamus will not issue unless three elements coexist—
  - (1) a clear legal right in the petitioner to the relief sought;
  - (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and
  - (3) the absence of another adequate remedy."Syllabus Point 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969).

[9] That in the application of the facts of this matter to the legal principles outlined heretofore, the Court notes that the three-judge court made no findings or conclusions which expressly address an award of attorney's fees and costs, but which clearly could have been done, since the three-judge court is statutorily {e.g. Code 6-6-7©} empowered and mandated to issue a final order containing "...such findings of fact and conclusions

of law as the three-judge court shall deem sufficient to support its decision of all issues presented to it in the matter.” (emphasis supplied); and,

[10] That given this standard required for the granting of the writ of *Mandamus*, the Court has determined that the first element of the test has not been met, with said element requiring a “clear legal right in the petitioner to the relief sought”, in that:

- A. That given the matters submitted by the respective parties hereto for review by this Court, there is no explicit statutory bases for the granting of attorney’s fees and costs under these facts and circumstances, as such is requested by the Petitioner; and,
- B. That there is no explicit award of attorney’s fees and costs made in the three-judge court’s Order findings or conclusions, or in its summary relief granted.
- C. That State Road Commission v. Professional Realty, 144 W. Va. 652 (1950), and, Powers v. Goodwin, 170 W. Va. 151 (1982), has been cited as applicable authority in reviewing and considering this requested relief, whether for the granting of such or the denial of such relief. In this context, however, these cases present certain problems in their persuasive use in these facts and circumstances. First, these cases, especially the Powers case, were considered by our Supreme Court under the old law authorizing the use of a single-judge proceeding involved in a removal proceeding, and prior to the 1985 amendments to West Virginia Code §6-6-7C, which codified changes authorizing the three-judge court to preside over such removal cases, as presently outlined in the statute.

Second, the present statutory language authorizes the three-judge court to decide "...all issues presented to it in the matter.", and that the three-judge court made no determinations on this issue, as noted above. Third, the Professional Realty case was rendered by our Supreme Court within the peculiar context of an "eminent domain" proceeding brought by the State of West Virginia, and therefore, not directly applicable to this case or to these circumstances.

[11] That while this Court does not address at length the two (2) remaining elements of the standard of "a legal duty on the part of respondent to do the thing which the petitioner seeks to compel"; and "the absence of another adequate remedy.", it appears to this Court that, from the matters submitted for this Court's consideration of the requested relief, the Petitioner has failed to establish these two (2) elements as well. In that respect, the Court notes that the second element, "a legal duty on the part of the Respondents to pay mandatorily these attorney's fees and costs in this matter", does not appear to have been properly established by the Petitioner by reference to, and reliance upon a specific statute, rule or case law. Without such a clear legal duty there is no imposition of a "ministerial" duty upon one or more of the Respondents, as exemplified in our Supreme Court's holding in State ex rel Archer v. County Court, 150 W. Va. 260 (1965). Moreover, the third element of the "absence of another adequate remedy" was not fully addressed by the parties: however, as noted above, the three-judge court could have awarded attorneys fees and costs in this matter (e.g. . the statutory ability to determine "...all issues presented to it..."), but did not do so; and,

[12] That in light of all of the above, the Court has expressly determined that the Petitioner has not met the first element of the test for the granting of such extraordinary relief, and as a result, there is no need to go further in determining whether there is a "...legal duty on the part of the respondent(s) to do the thing which the petitioner seeks to compel"; and, whether there is an "...absence of another adequate remedy." (see State ex rel Billings v. Point Pleasant, 194 W. Va. 301 (1995)), beyond that which is set forth above; and,

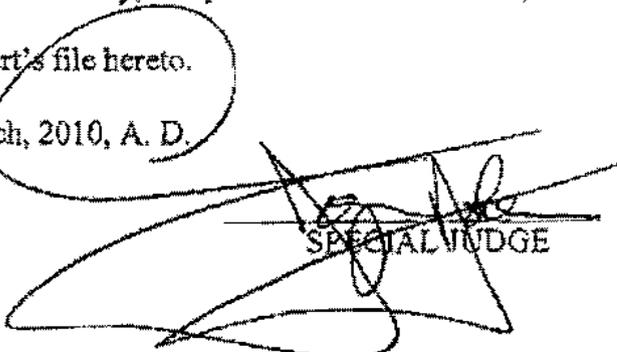
[13] That as a result of all of the above, the Court has determined that the grounds for the granting of a *Writ of Mandamus* have not been sufficiently established, and correspondingly, the Court has determined that the relief as requested herein should be, and hereby is, **DENIED**, based upon the Court's determinations herein; and,

[14] That the OBJECTIONS AND EXCEPTIONS of all of the respective parties hereto are hereby noted for the record.

All of which is hereby ORDERED, ADJUDGED AND DECREED.

It is further hereby ORDERED, ADJUDGED AND DECREED that the Clerk of this Court shall provide notice of the entry of this Final Order following its issuance by forwarding a certified copy hereof upon all of the respective parties hereto, through counsel as appropriate, in accordance with the applicable provisions of rules 10.01-12.06, as well as 24.01, of the West Virginia Trial Court Rules, by USPS First Class Mail, Certified Return Receipt Requested; by hand delivery; or by facsimile transmission, to the addresses or numbers set out in the Court's file hereto.

ISSUED on this the 31 day of March, 2010, A. D.

  
SPECIAL JUDGE