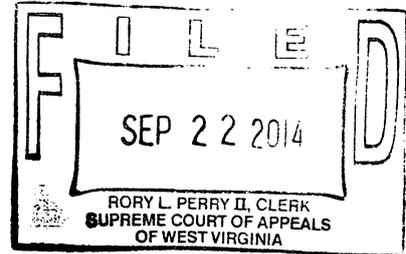


THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
MARIE MCDAVID, and KANAWHA
COUNTY REPUBLICAN EXECUTIVE
COMMITTEE,

Petitioners/Relators,



v.

APPEAL NO. 14-0939

NATALIE TENNANT, as Secretary of State
and as a Member of the State Election Commission;
DR. ROBERT RUPP, GARY COLLIAS, TAYLOR
DOWNS, and VINCENT CARDI, as Members
of the State Election Commission, and the STATE
ELECTION COMMISSION,

Respondents.

**PETITION FOR WRIT OF MANDAMUS
AND SUPPORTING MEMORANDUM OF LAW**

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QUESTION PRESENTED

Must the Respondents Grant the Request of the KCREC to Fill The Vacancy of Del. Suzette Raines for the November 2014 Ballot for The General Election?

I. STATEMENT OF THE CASE

On or about August 11, 2014, the Honorable Suzette Raines (“Del. Raines”), a Delegate in the 35th District of the West Virginia House of Delegates, requested permission to withdraw as a nominee of her party in the general election of 2014. [Ex. 1] On or before August 12, 2014, the Kanawha County Republican Executive Committee (“KCREC”) by its Chairman requested that the KCREC be permitted to fill the vacancy of Del. Raines, anticipating that her withdrawal would be granted. [Ex. 1]. On August 13, 2014, the State Election Commission (“SEC”) convened and confirmed the withdrawal of Del. Raines and denied the request of the KCREC concluding that Del. Raines had not evidenced extenuating personal circumstances justifying the grant of the KCREC request. [Ex. 2] On or about August 29, 2014, the SEC issued “minutes” memorializing this determination. [Ex. 3]

II. SUMMARY OF ARGUMENT

The State Election Commission (“SEC”) was clearly wrong in denying the request of the KCREC to fill the vacancy of Del. Raines for the November 2014 ballot. As the withdrawal request of Del. Raines was confirmed for plainly compelling personal extenuating circumstances the SEC had, and has, a duty to permit the KCREC to fill the vacancy of Del. Raines on the November 2014 ballot. W. Va. Code §3-5-19(a)(6) and *State ex rel. Cravotta, et*

al. v. Hechler, et al., 187 W. Va. 790 (1992). Further, the SEC applied an impermissible standard in interpreting the “extenuating circumstances” burden of the KCREC. [*Id.*]

III. **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The petitioners represent that oral argument is unnecessary upon this Petition for a Writ and that relief should be awarded as soon as possible as the dispositive issues have been authoritatively decided and the facts and arguments are adequately presented by brief. W. Va. R. App. Pro 18(a)(3).

IV. **ARGUMENT**

On or about August 11, 2014, Del. Raines filed a Notice of Withdrawal of Candidacy with the Respondents to “**request**” that her name be officially removed from the ballot for the election in which she was previously a candidate. [Ex. 1] The Petitioners ask this Court to take judicial notice of the fact that Del. Raines currently serves as a Member of the House of Delegates within the 35th District. The Notice represents that Del. Raines was a nominee in the 35th District. [Ex. 1]

Del. Raines supplemented her Notice of Withdrawal with a statement regarding her “request to withdraw.” [*Id.*] In the statement, she wrote that she needed to withdraw from the race for a seat in the 35th Delegate District because of personal issues arising from the death of her mother in March 2014. She stated she also had ended an engagement after a 7-8 year relationship. She stated that the deterioration of nearly every aspect of her life had taken a significant toll on her emotional well-being, career and ability to provide for increased financial demands with immense grief. She stated that upon the advice of medical professionals she chose

to eliminate the pressures and distractions in her life that do not allow her to address this grief. She acknowledged her inability to serve to her full potential if elected and concluded that she “would be unable to serve if elected.” As such, she sought “permission to withdraw from the 2014 election.” [*Id.*]

On or before August 12, 2014, the KCREC filed with the SEC its request to authorize the Executive Committee to appoint a replacement whose name would appear on the ballot for the General Election in November 2014. [*Id.*] The request expressly cited and relied upon West Virginia Code § 3-5-19(a)(6) where the statute states, in part:

If the commission finds the circumstances warrant the withdrawal of the candidate, the commission shall authorize appointment by the executive committee to fill the vacancy.

[*Id.*], see also, W. Va. Code § 3-5-19(a)(6).

On August 13, 2014, the SEC met in an emergency meeting to consider the request of the KCREC.¹[Ex. 2] In the meeting, all of the Respondents were present personally except for Vincent Cardi, who participated by telephone. While the Respondents confirmed the withdrawal notice of Del. Raines, they concluded that the KCREC had failed to establish “extenuating personal circumstances” qualifying a grant of the request of the KCREC to permit it to nominate and fill the vacancy of Del. Raines on the November 2014 ballot. Upon information and belief, the determinations of the SEC are not reflected in “Orders” but rather in “Minutes”

¹ A videotape of the proceeding has been available at:

<http://www.sos.wv.gov/secretary-desk/Pages/StateElectionCommission.aspx>. Further, the Petitioners offer as an exhibit a transcript of the meeting prepared from a review of that video. [Ex. 2]

reflecting their decisions. The Petitioners have transcribed the meeting and offer the transcript – taken from a review of a video of the meeting posted by the Secretary of State – as a provisional exhibit. [Ex. 2] The minutes were issued on or about August 29, 2014. [Ex. 3]

In the SEC meeting to consider the instant issues, the SEC members discussed the appropriate issue to be resolved and standards to apply. Member Cardi stated:

... I suppose I'd like a review of what the consequences might be. So, if she [Del. Raines] can withdraw, then the party committee can appoint their own candidate without going through the voters. Isn't that – is that correct?"

[Ex. 2, p. 9, ll. 18-21]. Chairman Rupp responded immediately:

She has already withdrawn. So now the question is ... has the extenuating circumstances, are they enough to trigger the substitution process ...

[Ex. 2, p. 9, ll. 22-25]

Later in the meeting, Member Collias requested Tim Leach, counsel for the SEC, to identify the precise issue the SEC was charged with resolving. [Ex. 2, p. 26, ll. 18-24] Counsel responded by quoting a portion of West Virginia Code § 3-5-19(a)(6). In two remarks Chairman Rupp summarized his assessment of the issue before the SEC and the standard of review:

Well, I think it was pointed out in the remarks so far that the law allows the substitution in terms of happening, but the committee determines if it is extenuating circumstances ... And in this case you know, to what would inhibit the carrying out of the duties. In the past, we had a heart attack and a death and other things that have been very obvious to ... that definition. [Ex. 2, p. 29, ll. 10-18] ...

And again, I want to come back to my perspective is that a law allows the substitution, but it gives the Commission to determine the definition, so it gives them a lead-way on that. **And in the past, we have set a rather high standard and make this substitution not easy and it needs to be a strong case** and I just wonder if the case has been presented with these documents

[Ex. 2, p. 44 ll. 4-10] (emphasis added).

The Chairman then solicited a motion to grant the request of the KCREC and hearing none, determined the SEC “will take no action” and the meeting was adjourned. [Ex. 2, pp. 44-45]

On August 16, 2014, the KCREC convened a meeting to identify a nominee to fill the vacancy of Del. Raines in the 35th District. The KCREC selected Petitioner, Marie McDavid (“Petitioner McDavid”). [Ex. 4] Petitioner McDavid filed a Certificate of Announcement and tendered a filing fee to the West Virginia Secretary of State on August 18, 2014. [Ex. 5] The Secretary of State’s Office declined to process that certification on August 19, 2014 and advised that it was returning the certificate and filing fee to Petitioner McDavid. [Ex. 6] On August 22, 2014 Petitioners provided notice to the Respondents pursuant to W. Va. Code § 55-17-3(a)(1). [Ex. 7] Pursuant to W. Va. Code § 55-17-3(a)(1) and (2), Notice was served by certified mail return receipt requested upon the chief officers of the affected government agencies [Secretary of State Natalie Tennant, Chairman Robert Rupp of the SEC and Attorney General Patrick Morrissey]. *Id.* Notice is effective on the date of the mailing - August 22, 2014. W. Va. Code § 55-17-3(a)(2). Thirty days have now passed since the mailing of the notice.

Petitioners [or “Relators”] seek a Writ of Mandamus pursuant to West Virginia Code § 53-1-1, *et seq.* and Art. 8 § 3 of the West Virginia Constitution. A Petition for a Writ of Mandamus may be filed in the West Virginia Supreme Court of Appeals with original jurisdiction pursuant to the West Virginia Constitution and pursuant to West Virginia jurisprudence by the aggrieved Petitioners as against the respondents. W. Va. R. App. Pro. 16, Art. 8 § 3 of the West Virginia Constitution, and *State ex rel. Cravotta et al. v. Hechler, et. al.*, 187 W. Va. 790, 421 S.E.2d 698 (1992).

In order for this Court to properly issue a writ of mandamus, three elements must coexist:

- (1) the existence of a clear right in the petitioner to the relief sought;
- (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and
- (3) the absence of another adequate remedy at law.

Perry v. Barker, 169 W. Va. 531, 538 (1982) (citations omitted).

In the present matter, the first element under *Perry* has been met. The Petitioner KCREC is a county political party existing under West Virginia Code § 3-1-1, *et seq.*, including West Virginia Code § 3-1-9. The Petitioner KCREC has been aggrieved as the Respondents have failed to permit and recognize its timely selection and designation of Petitioner McDavid as a candidate for the 35th House District in the November 2014 election. Petitioner McDavid is the timely selected and designated candidate of the 35th House District selected by the Petitioner KCREC. Petitioner McDavid is aggrieved as the Respondent Secretary of State has failed to recognize and certify her candidacy.

As for the second element set forth in the *Perry* decision, the Respondents SEC and its members are a “body advisory” to the Secretary of State, who is also a member of said

SEC. West Virginia Code § 3-1A-5(b) and West Virginia Code § 3-1A-6(a). The Respondent Natalie Tennant is the Secretary of State of West Virginia and a member of the SEC. The Respondents, Robert Rupp, Gary Collias, Taylor Downs and Vincent Cardi are members of the SEC. All individual Respondents have been made subject to this Petition in their official capacities with the Secretary of State's Office and/or SEC. Under West Virginia Code § 3-1A-5(a)(6), the Respondents possess the statutory duty to authorize the appointment by the KCREC to fill the vacancy on the ballot and certify Petitioner McDavid as a candidate. Accordingly, the second element under *Perry* has been met.

Finally, the third element of *Perry* is met because this Court has original jurisdiction to hear this Petition for a Writ of Mandamus pursuant to *State ex rel. Cravotta v. Hechler, et al.*, 187 W. Va. 790 (1992). As stated in *Cravotta*:

Mandamus is the proper remedy in this State to compel any officer or person to perform any duty which he is required to perform under the election laws of this State.

Id. at Syl. Pt. 4 (citations omitted). Furthermore, all parties are resident in the State of West Virginia.

The case at bar presents a factual scenario which is nearly identical to *State ex rel. Cravotta*. In *Cravotta*, the relators initiated a petition for writ of mandamus to compel the State Election Commission, its members, and the Secretary of State to permit Mr. Cravotta to appear on the November 1992 ballot for the 2nd District U.S. House of Representatives. In 1992, the winner of the Republican nomination in the primary was Ron Foster. On June 30, 1992, Mr. Foster advised the Secretary of State that he desired to withdraw as a candidate. He wrote:

Due to personal family commitments [sic] it would be impossible for me to serve in the U.S. House of Representatives in the event that I am elected. I cannot serve the people and fulfill [sic] my obligations to my children at the same time.

I ask that you withdraw my name from November 3rd ballot due to my inability to serve in the 2nd District office.

Id., 187 W. Va. at 791.

Subsequently on July 22, 1992, Mr. Foster advised the State Election Commission that he wanted the Republican Executive Committee for the Second Congressional District, and its chairman, to select a candidate to fill the vacancy pursuant to West Virginia Code 3-5-19(a)(5).² *Id.*, 187 W. Va. at 792.

The SEC met on July 24, 1992 to consider Mr. Foster's request. The SEC determined that Mr. Foster should be permitted to withdraw, but refused to authorize the Executive Committee to appoint a successor because Mr. Foster had not shown "extenuating personal circumstances" as required by West Virginia Code 3-5-19(a)(5). *Id.*

Thereafter on August 11, 1992, the Executive Committee met and selected Mr. Cravotta to fill the vacancy and the appointment was filed with the Secretary of State. The Secretary of State took no action on the filing in the belief that Mr. Foster had not shown sufficient extenuating personal circumstances. *Id.*

These facts are nearly identical to those alleged in this verified petition. Here, Del. Raines tendered her request to withdraw her candidacy citing more compelling personal

² The substantive text of West Virginia Code 3-5-19(a)(5) is now located at West Virginia Code 3-5-19(a)(6).

circumstances than those offered by Mr. Foster in *Cravotta*. She recited a grievous emotional, medical and financial hardship resulting from her mother's passing. In *Cravotta*, the SEC found Mr. Foster's circumstances sufficient to warrant his withdrawal as a candidate. Similarly, Del. Raines' tendered request to withdraw was accepted and confirmed.³ However, and as in *Cravotta*, the Executive Committee's request to be permitted to offer a nominee to fill the vacancy was denied.⁴ Both requests were denied because while the withdrawing candidate had recited personal circumstances which warranted their withdrawal as nominees, in the view of the SEC, neither candidate's personal circumstances warranted their vacancies to be filled.

In both cases, under the mandatory law of this State, the SEC was plainly wrong. In his opinion issuing the mandamus writ, Justice Thomas Miller initially informed the SEC that it was employing the wrong standard. Citing the strong policy in our State to afford voters as

³ Del. Raines wrote expressly: "The most responsible course of action is to seek permission to withdraw from the 2014 election." [Ex. 1] (emphasis added). Both Chairman Rupp and Secretary Tennant announced clearly that Del. Raines' withdrawal was effective. [Ex. 2, p. 9, l. 22; p. 10, ll. 11-12]

⁴ The Court should not distinguish between the request of the KCREC *vis-à-vis* another executive committee. See, *State ex rel. Tennant v. Ballot Commissioners of Mingo County, et al.*, No. 14-0877 (W. Va. September 17, 2014) (J. Benjamin, concurring). In *Ballot Commissioners of Mingo County*, Justice Benjamin observed that a county executive committee does not have the legal ability to fill a ballot vacancy for a judicial election. *Id.* Justice Benjamin explained that judicial elections are accomplished by "circuit" and "most such circuits are multiple-county circuits." *Id.* As such, the language of W.Va. Code 3-5-19 is particularly important as it states that "in cases of ballot vacancies after a primary election, the position may be filled by the 'executive committee of the political party for the political division in which the vacancy occurs.'" *Id.* In *Ballot Commissioners*, relying upon other precedent involving a multi-county district, Justice Benjamin observed that an effort by both counties' chairmen to nominate a candidate for an open seat on a ballot was inappropriate. Here, however, the 35th House District lies exclusively in Kanawha County, unlike any opinion relied upon by Justice Benjamin, and as such, the actions of the KCREC were accomplished by the executive committee of the political party for the political division in which the vacancy occurred as required by W. Va. Code § 3-5-19. Anticipating such a scenario, the legislature exempted political party committees in single county districts from the creation of delegate district executive committees writing: "...The voters of each political party in each county shall elect one male and one female member of the party's executive committee of the congressional district, of the state senatorial district and of the delegate district in which the county is situated, **if the county is situated in a multicounty state senatorial or delegate district.**" W. Va. Code § 3-1-9(b) (emphasis added). As the legislature does not require the creation of a 35th House District executive committee, if indeed it permits one, it is axiomatic that the KCREC is the appropriate executive committee to request that its duly selected nominee fill a vacancy on the ballot for the general election.

full a ballot as possible, this Court directed that a vacancy statute should be “liberally construed.”

Id., 187 W. Va. at 792. This Court thereafter concluded that:

. . . our statutes relating to vacancies on an election ballot ordinarily should be liberally construed in order to serve the legislative policy of providing a full selection of candidates for the voters.

Id., 187 W. Va. at 793, see also, *Tillis v. Wright, et al.*, 217 W. Va. 722, 728-729 (2005) (citing *Cravotta* for the proposition that statutes relating to vacancies on a ballot merit liberal construction).

This direction was not followed by the SEC in the present matter. In the instant case, the SEC Chairman identified that the extenuating circumstances standard required events akin to “death” or a “heart attack” and that the standard was a “rather high standard,” that it was “not easy and it needs to be a strong case.” [Ex. 2, pp. 29 & 44] The Respondents set an impermissibly high bar for establishing extenuating circumstances in considering the KCREC’s request, but the SEC did not question Del. Raines’ recitation of personal circumstances to meet the same standard for her withdrawal as it did in fact permit her withdrawal.

If the Commission finds that circumstances warrant the withdrawal of the candidate, the Commission should permit the withdrawal and ‘authorize appointment [of a replacement candidate] by the party’s executive committee[.]’

State ex rel. Cravotta, et al. v. Hechler, et al., 187 W. Va. 790, 793 (1992).

This Court used the following language before explaining the interrelationship of these two determinations to the SEC:

[The Code] allows a withdrawal if the ‘[1(a)] commission finds the circumstances warrant the withdrawal.’ If the Commission felt Mr. Foster’s reasons were not sufficient to constitute ‘extenuating personal circumstances,’ it should have refused his attempted

withdrawal. However, we do not believe that the Commission can accept a candidate's withdrawal and then refuse to authorize the Executive Committee to fill the vacancy created.

Id., 187 W. Va. at 793-794.

However, that is precisely what the SEC did in the instant case. This Court has forbidden this practice and it has been repeated. As noted by this Court “(t)he Commission has frustrated the legislative procedure by refusing to authorize the Executive Committee to make the appointment.” [*Id.*]

This Court remedied the actions of the SEC in 1992 by compelling the Secretary of State and the SEC to accept the appointment of Samuel Cravotta as Republican Candidate for the United States House of Representatives for the Second Congressional District. This Court should grant the same relief to Petitioners and permit the KCREC to fill the vacancy for the 35th District of the West Virginia House of Delegates and compel the Respondents to insure that Petitioner McDavid's name appears on the ballot in November 2014.

The impact of the SEC's action is that the voters of the 35th District will be unable to select the duly selected nominee of the Republican Party without this Court's action. The Respondent Secretary of State has published a “2014 Election Calendar.” [Ex. 7] That calendar reflects that between August 19 and August 25, 2014 the Secretary of State certified the names to each county clerk of each political party's nominees entitled to be placed on the general election ballot. [*Id.*, at p. 28] Further, those ballots, upon being printed, have been or will be mailed to absentee voters. To protect the integrity of the ballots, these Petitioners also request that this Court Order the Secretary of State to certify the name of Petitioner McDavid as a nominee from the Republican party of the 35th House District and to direct the County Clerk of Kanawha

County to mail the valid ballot to all absentee voters with instructions that the invalid ballot will be void.

V.
CONCLUSION

As the SEC has ignored its obligations under West Virginia Code 3-5-19(a)(6) as interpreted by this Court, the Respondents should be compelled by the jurisprudence of this Court to comply with a Mandamus Writ compelling them to permit the KCREC to fill the vacancy of the nomination of Del. Suzette Raines with Petitioner McDavid. The Petitioners further request that this Court order the Secretary of State to certify Petitioner McDavid to the Kanawha County Clerk for the 35th House District and to instruct the County Clerk to mail valid ballots to all absentee voters with instructions that the invalid ballot that is incomplete shall be void.

Respectfully submitted,

MARIE MCDAVID and KANAWHA COUNTY
REPUBLICAN EXECUTIVE COMMITTEE



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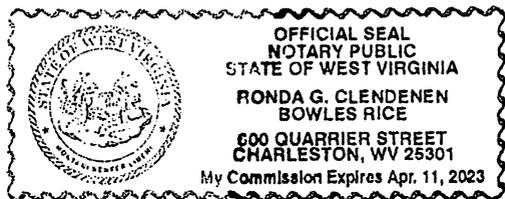
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VERIFICATION

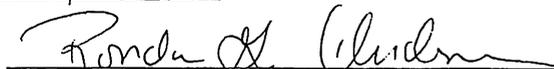
I, Fred Joseph, Chairman for Petitioner/Relator Kanawha County Republican Executive Committee, having been first duly sworn, say that I have read the "Petition for Writ of Mandamus and Supporting Memorandum of Law," and further say that the facts and allegations contained therein are true, except insofar as they are upon information, and insofar as they are stated to be upon information, I believe them to be true.




Fred Joseph, Chairman of the Kanawha County Republican Executive Committee

Taken, subscribed and sworn to before me this 21 day of August, 2014.

My commission expires: April 11, 2023.


Notary Public

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CERTIFICATE OF SERVICE

I, Mark A. Carter, do hereby certify that the foregoing **PETITION FOR WRIT OF MANDAMUS AND SUPPORTING MEMORANDUM OF LAW, APPENDIX, MOTION TO INCLUDE PROVISIONAL EXHIBITS IN APPENDIX and MOTION FOR EXPEDITED RELIEF** were served upon Respondents per agreement with counsel for Respondents by hand upon their counsel Katherine A. Schultz and Jennifer Greenlief at the Office of the Attorney General.

Further, counsel represents that the Certificate of Service includes a listing of all persons and entities upon whom a rule to show cause should be served if the Petition is granted, and that those Respondents are being provided a copy of the petition and the appendix by United States mail postage prepaid at the following addresses:

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this 22nd day of September 2014.



Mark A. Carter (WVSB #4316)