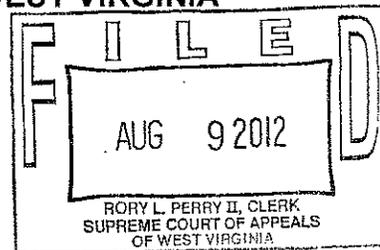


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0899



STATE OF WEST VIRGINIA, ex rel, ALLEN LOUGHRY II,
Candidate for the Supreme Court of Appeals of West Virginia,

Petitioner,

v.

**NATALIE E. TENNANT, in her official capacity as West Virginia
Secretary of State; NATALIE E. TENNANT, GARY COLLIAS,
WILLIAM N. RENZELLI, and ROBERT RUPP, in their official
Capacities as members of the West Virginia State Election
Commission; GLEN B. GAINER III, in his official capacity as
West Virginia State Auditor; and JOHN PERDUE, in his
Official capacity as West Virginia State Treasurer,**

Respondents.

**BRIEF OF RESPONDENT
GLEN B. GAINER III
WEST VIRGINIA STATE AUDITOR**

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**Counsel for Respondent Glen B. Gainer III
West Virginia State Auditor**

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**BRIEF OF RESPONDENT
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NOW COMES the Respondent, Auditor Glen B. Gainer III ("Auditor"), by counsel, and files his Response to Petitioner's Petition for Writ of Mandamus as required by this Court's Order dated July 31, 2012.

QUESTION PRESENTED

The Petitioner asks the Court to determine whether the West Virginia State

Election Commission ("Commission") is required to requisition state funds on his behalf.

STATEMENT OF CASE

Although Petitioner seeks a determination regarding the Commission's duties, his Petition is directed more broadly to include the Auditor who has not played a role in the decisions at issue, and does not maintain a duty in the process about which Petitioner complains.

As Petitioner admits, the Commission made the decision not to disburse funds to him, and therefore, a requisition for payment was not sent to the Auditor. Petitioner's *Appendix* at 162. Without a requisition for payment, the Auditor has no duty or authority to issue payments. Without a clear legal duty, a writ of mandamus is not an appropriate remedy against him.

SUMMARY ARGUMENT

Mandamus will not lie against the Auditor because he has not violated any legal duty.

STATEMENT REGARDING ORAL ARGUMENT

The Auditor does not believe that oral argument is necessary for the Court to resolve the issues against him.

ARGUMENT

I. THE ELEMENTS FOR A WRIT OF MANDAMUS ARE NOT MET AGAINST THE AUDITOR AS HE HAS NO LEGAL DUTY.

Mandamus only lies against a public officer in order to compel him to perform a nondiscretionary duty. As the Court stated in *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 303, 460 S.E. 2d 436, 438 (1995), it is a limited remedy to be used only in the "most extraordinary of situations". It will issue only when three elements coexist: 1) a clear right to the relief requested; 2) a legal duty in the respondent; and 3) absence of another remedy. Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E. 2d 367 (1969).

The Auditor plays no role in, and has no responsibility for, the decision about which Petitioner complains. Only when an agency makes a decision to authorize payment and submits a claim to him, does a duty arise. Under state law the Auditor is charged with passing upon claims submitted to him for payment and issuing warrants thereon when appropriate.

The West Virginia State Constitution Article X, Section 3 states:

No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the auditor...

State statutes elaborate upon the payment process. West Virginia Code § 12-3-1 provides in pertinent part:

Every person claiming to receive money from the Treasury of the State shall apply to the Auditor for a warrant for same. The Auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, and for so much thereof as he or she finds to be justly due from the

State, if payment thereof is authorized by law, and if there is an appropriation not exhausted or expired out of which it is properly payable, the Auditor shall issue his or her warrant on the Treasurer specifying to whom and on what account the money mentioned therein is to be paid and to what appropriation it is to be charged. (emphasis added)

Obviously, the duty to examine a claim and issue a warrant only arises when a claim is presented to the Auditor. Absent a claim for payment there is no duty. The Commission in this case, exercising its authority under West Virginia Code § 3-12-1 *et seq.*, made the decision not to pay Petitioner and therefore no requisition was sent to the Auditor for his consideration.

Case law recognizes the Auditor's duty to examine claims presented to him and pay only where appropriate based on the evidence provided. In *Pryor v. Gainer*, 177 W. Va. 218, 351 S.E.2d 404 (1986), the Court stated:

This section requires the Auditor to 'examine the claim' and to pay only 'so much thereof as he shall find to be justly due,' and to pay only 'if payment thereof be authorized by law'. *Pryor*, 351 SE 2d at 407. See also, *State ex. Rel. Board of Governors v Sims*, 140 W. Va. 64, 82 S.E.2d 321 (1954); *Foster v. Gainer*, 166 W.Va. 88, 272 S.E.2d 666 (1980).

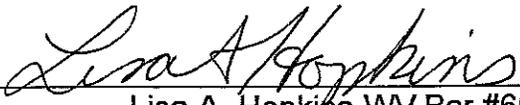
The Auditor's duty to pay clearly rests upon the receipt of a proper claim presented to him with the necessary evidence provided in support thereof. The Auditor does not, and cannot, randomly disburse funds without a proper requisition. Since no request has been presented to the Auditor for which a duty of payment could arise, one of the elements required for issuance of a writ have not been met and mandamus will not lie against him.¹

¹ In the event the Auditor did receive a claim, he would rely on the guidance of this Court concerning the legality of the Financing Pilot Program of West Virginia before issuing payment, as the Petitioner has raised significant questions concerning its legality.

CONCLUSION

A legal duty is one of the three essential elements that must coexist for a writ of mandamus to be granted. Petitioner cannot prove any duty required of the Auditor. Therefore, his request for a writ of mandamus against the Auditor should be denied as should his request for attorney fees and costs.²

Glen B. Gainer III
West Virginia State Auditor

By: 
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West Virginia State Auditor**

² An award of attorney fees is only appropriate where a clear legal duty has been breached. *State ex rel. West Virginia Highlands Conservancy, Inc. v W. Va. Division of Environmental Protection*, 193 W. Va. 650, 458 S. E. 2d (1955); 263 *Towing, Inc. v. Marcum Trucking Co.* 222 W. Va. 80, 662 S.E. 2d 522 (2008). Since no duty has even arisen, such an award would be inappropriate.

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Official capacity as West Virginia State Treasurer,

Respondents.

CERTIFICATE OF SERVICE

I, Lisa A. Hopkins, General Counsel of the West Virginia State Auditor's Office,
do hereby certify that a true copy of the foregoing "**BRIEF OF RESPONDENT GLEN B.
GAINER III, WEST VIRGINIA STATE AUDITOR**" was served upon the following by
United States mail, a true copy thereof, on the 9th day of August 2012, addressed as
follows:

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