

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**A. Gene Buckner,
Respondent Below, Petitioner**

vs) No. 11-0707 (Mercer County 11-C-20)

**Mike Vinciguerra Jr.,
Petitioner Below, Respondent**

FILED

May 25, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner A. Gene Buckner appeals the Circuit Court of Mercer County’s March 21, 2011, “Order” affirming the January 25, 2011, “Final Order” of the Mercer County Commission in an election contest. Petitioner is represented by counsel Arthur J. Park and William P. Stafford II. Respondent Mike Vinciguerra Jr. is represented by counsel Brian K. Cochran.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

For the November 2, 2010, general election, petitioner and respondent were opposing candidates for the office of Mercer County Commissioner. Petitioner received the highest number of votes in the general election, while respondent received the second highest number of votes.

Previously, when they filed their respective certificates of announcement of candidacy, both petitioner and respondent resided in Mercer County Magisterial District I. However, after the filing deadline, but before the general election, petitioner moved his residence to Mercer County Magisterial District II. The Mercer County Commission already had an elected member who resided in District II and who was not up for election in 2010. Article IX, Section 10 of the West Virginia Constitution mandates that “no two of said commissioners shall be elected from the same magisterial district.”

Pursuant to West Virginia Code § 3-7-6 and § 3-7-7, respondent filed an election contest with the Mercer County Commission asserting that petitioner was ineligible to be elected to the Commission because he was not a resident of an open district on the date of the general election.

Petitioner opposed the election contest by relying upon West Virginia Code § 7-1-1b [2009], which provides, in part:

(b) A candidate for the office of county commissioner shall be a resident from the magisterial district for which he or she is seeking election:

(1) by the last day to file a certificate of announcement pursuant to section seven, article five, chapter three of this code; or

Petitioner argued that he was eligible to hold office because he resided in an open district (District I) on the last date to file a certificate of announcement.

In the election contest, the Mercer County Commission ruled that petitioner was ineligible because he was not a resident of an open district on the date of the general election. The Commission declared that respondent was entitled to assume the position of the Commission's District I representative. Petitioner appealed to the circuit court, which affirmed.

Petitioner now appeals to this Court. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review." Syl. Pt. 2, *Walker v. WV Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

In *Burkhart v. Sine*, 200 W.Va. 328, 489 S.E.2d 485 (1997), which was decided prior to the enactment of West Virginia Code § 7-1-1b, we addressed the constitutional mandate in Article IX, Section 10 that no two commissioners shall be elected from the same magisterial district. We explained that "[t]he wording of this constitutional mandate is simple, plain, and easy to understand; therefore, we will apply it to mean just what it says." *Id.*, 200 W.Va. at 332, 489 S.E.2d at 489. Applying this constitutional provision, we held that "a member of the County Commission is deemed to be elected from the magisterial district in which that person resides on the day that person is elected to serve on the County Commission, that is, the date of the general election." Syl. Pt. 3, in part, *Id.*

Petitioner argues that with the 2009 enactment of West Virginia Code § 7-1-1b, the Legislature intended to supercede our decision in *Burkhart* and change the criterion for residency from the date of the general election to the last date to file a certificate of announcement. The Commission and circuit court rejected this argument. The Commission and circuit court concluded that with the enactment of West Virginia Code § 7-1-1b(b)(1), the Legislature specified a residency requirement that is *in addition to* the requirement in Article IX, Section 10 of the West Virginia Constitution that was applied in *Burkhart*. Support for this conclusion was found in West Virginia Code § 3-5-4(b)(1) [2009], which was amended at the same time West Virginia Code § 7-1-1b was enacted. West Virginia Code § 3-5-4(b)(1) provides that "[c]andidates for the office of commissioner of the county commission shall be nominated and elected in accordance with the provisions of

section ten, article nine of the Constitution of the state of West Virginia and the requirements of section one-b, article one, chapter seven[.]”

After a careful review of the law and the parties’ arguments, we affirm. Petitioner’s sole reliance on West Virginia Code § 7-1-1b(b)(1) ignores the plain requirement of Article IX, Section 10 of the West Virginia Constitution, and a candidate must always meet the requirements of the Constitution. The Constitution provides that no two commissioners shall be elected from the same magisterial district. When a new county commissioner was being elected on November 2, 2010, it is undisputed that petitioner resided in a district in which a sitting commissioner already resided. Accordingly, under Article IX, Section 10, petitioner was not eligible to be elected.¹

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

¹ It is unnecessary for us to address whether the residency provision in West Virginia Code § 7-1-1b(b)(1) comports with Article IX, Section 10 of the West Virginia Constitution.