

FILE COPY

FEB -1 2021

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 21-0051

**STATE OF WEST VIRGINIA, ex rel.
JEFF MAYNARD, Chair of the
WAYNE COUNTY REPUBLICAN
EXECUTIVE COMMITTEE,**

Petitioner

v.

**JAMES C. JUSTICE, II, GOVERNOR OF
THE STATE OF WEST VIRGINIA, and the
WEST VIRGINIA REPUBLICAN PARTY, INC.,**

Respondents.

**DO NOT REMOVE
FROM FILE**

**SUMMARY RESPONSE OF JAMES C. JUSTICE, II,
GOVERNOR OF THE STATE OF WEST VIRGINIA**

**PATRICK MORRISEY
ATTORNEY GENERAL**

**Lindsay S. See
Solicitor General
WV Bar No. 13360
Douglas P. Buffington, II
Chief Deputy Attorney General
WV Bar No. 8157
Curtis R. A. Capehart
Deputy Attorney General
WV Bar No. 9876
Virginia M. Payne
Assistant Solicitor General
WV Bar No. 11514
State Capitol Complex
Building 1, Room 26E
Charleston, West Virginia 25305
Email: Curtis.R.A.Capehart@wvago.gov
Telephone: (304) 558-2021
*Counsel for Respondent James C. Justice, II***

INTRODUCTION

The Petition argues that when appointing an individual to fill a vacancy in the West Virginia House of Delegates, the West Virginia Governor “is mandated” to select from a list of eligible candidates submitted by a county executive committee. The Petition misreads the governing statute: A *district* executive committee is statutorily empowered to provide the list of candidates to fill a House of Delegates vacancy, but a *county* executive committee is not.

This matter relates to the vacancy created by the recent resignation of Delegate Derrick Evans and letters sent to the Governor’s office bearing lists of eligible candidates for appointment as Evans’ replacement. The chronology of events is undisputed. On January 9, 2021, Derrick Evans, a Republican, resigned his seat representing the 19th Delegate District in the House of Delegates. On or about January 14, 2021, the Governor’s office received a letter providing three names for consideration to fill this vacancy from the Wayne County Republican Executive Committee. *See* Pet. App. 1 (the “County Committee Letter”). This letter displayed a signature block for Petitioner Jeff Maynard in his capacity as Chairman of the “Wayne County Republican Committee,” although there appears to be no hand-written signature.

On January 22, 2021, the Governor’s office received a letter providing three names for consideration to fill this vacancy from the West Virginia Republican Party House of Delegates District 19 Vacancy Committee; only one name differed from the County Committee Letter’s list. *See* Resp. App. 1 (the “District 19 Committee Letter”). The West Virginia Republican Party (“Republican Party”) uses the term delegate district “vacancy committee” interchangeably with delegate district “executive committee.” WV Republican Party Bylaws, Article XVI.¹ This letter displayed signature blocks, including hand-written signatures, for Roman Stauffer, Acting

¹ <https://www.wvgop.org/about/laws>.

Chairman, West Virginia Republican Party; Petitioner Jeff Maynard, Chairman, Wayne County Republican Executive Committee; and Janie Moyer, Secretary, Wayne County Republican Executive Committee. On January 27, 2021, the Governor appointed a replacement, selecting the individual listed in the District 19 Committee Letter but not the County Committee Letter.

ARGUMENT

West Virginia Code § 3-10-5 (the “Statute”) establishes the process for filling vacancies in the Legislature. It states in clear terms the Governor’s obligation to appoint new members to vacancies, relevant time frames, the political party that selects the options for the replacement legislator, and—critically—which entity within that party may submit the names for the Governor’s choice:

(a) Any vacancy in the office of state senator or member of the House of Delegates shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred. The list of qualified persons to fill the vacancy shall be submitted to the Governor within 15 days after the vacancy occurs and the Governor shall duly make his or her appointment to fill the vacancy from the list of legally qualified persons within five days after the list is received. If the list is not submitted to the Governor within the 15-day period, the Governor shall appoint within five days thereafter a legally qualified person of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred.

(b) In the case of a member of the House of Delegates, the list shall be submitted by the party executive committee *of the delegate district* in which the vacating member resided at the time of his or her election or appointment. The appointment to fill a vacancy in the House of Delegates is for the unexpired term.

(c) In the case of a state senator, the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment. The appointment to fill a vacancy in the state Senate is for the unexpired term, unless § 3-10-1 of this code requires a subsequent election to fill the remainder of the term, which shall follow the procedure set forth in said section.

W. Va. Code § 3-10-5 (emphasis added).

Petitioner Jeff Maynard asks this Court to invalidate the Governor's appointment and direct him to select former-Delegate Evans's replacement from the names listed in the County Committee Letter instead. Setting aside the question whether mandamus is an appropriate mechanism to unseat an already-appointed member of the Legislature, Petitioner cannot meet the high bar for mandamus relief for two separate reasons. This Court has repeatedly emphasized that:

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.

Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Petitioner cannot satisfy at least the first two prongs of this demanding test. *First*, the County Committee Letter was not issued by the correct entity under the Statute and thus the Governor was not required to select from the names it includes. *Second*, the Governor has already fulfilled his legal duty by choosing from the second, correct letter.²

I. The County Committee Letter Does Not Satisfy The Statute's Requirements.

Recently, this Court applied the Statute to direct that a vacancy in the West Virginia Senate "be filled according to the explicit provisions of the statute, from a list of three candidates to be selected by the respondent West Virginia Republican Executive Committee for the Ninth Senatorial District." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 537, 782 S.E.2d 232, 232

² This Court has recognized that "[w]hen a writ of mandamus has been invoked to preserve the right to vote or to run for political office . . . this Court has eased the requirements for strict compliance for the writ's preconditions, especially those relating to the availability of another remedy." Syl. pt. 5, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 232 (2016) (quoting Syl. pt. 3, *State ex rel. Sowards v. Cty. Comm'n of Lincoln Co.*, 196 W. Va. 739, 474 S.E.2d 919 (1996)). Even when viewed through the lens of this relaxed standard, however, Petitioner remains ineligible for relief in mandamus because, as discussed *infra*, he fails to demonstrate (1) that he is entitled to the relief requested and (2) that the Governor has a legal duty to act in the manner requested.

(2016). Although the specific issue in *Biafore* was which political party could submit a list of names, the Court emphasized that the Statute is “clear and unambiguous” as written. *Id.* at 533, 782 S.E.2d at 228. This Court observed that the Statute “succinctly states the requirements for filling a vacancy in the West Virginia Legislature,” and that “[c]ourts are obliged to ‘presume that a legislature says in a statute what it means and means in a statute what it says there.’” *Id.* at 533, 782 S.E.2d at 228 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The same straightforward approach to the statutory text applies here.

Subsection (b) of the Statute states that it is the executive committee of the “delegate district”—not the executive committee of a county—that shall submit the list of three names for the Governor’s consideration. This geographic distinction is key and is consistent across the Code’s process to fill vacancies in the House of Delegates and in the Senate. Just as the Statute’s “subsection (c) provides instruction as to which geographic entity within the party is to submit the list of qualified candidates” for vacant Senate seats, *Biafore*, 236 W. Va. at 534, 782 S.E.2d at 229, subsection (b) dictates which geographic entity within the Republican Party may properly submit the list of qualified candidates to fill the seat vacated by former-Delegate Evans. As a result, Petition’s assertion—repeated in different forms—that the Statute “vests the exclusive power, responsibility and obligation of supplying the list to the Governor in the Chair of the *Wayne County* Republican Executive Committee following the deliberation and vote of those committee members residing in the 19th Delegate District,” Pet. 3 (emphasis added), has no support in the Statute. *Biafore* is clear that the statute’s plain meaning controls. The relevant geographic entity is the Republican Party 19th Delegate District Executive Committee, not the Wayne County Executive Committee.

By asking this Court to conclude that the Statute mandates the selection of an appointee from a list of candidates furnished by the Wayne County Executive Committee rather than the Republican Party 19th Delegate District Executive Committee, Petitioner seeks to have this Court rewrite the Statute, not apply it. This Court has previously acknowledged that “we are obliged not to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). If the Legislature wished for a county executive committee, rather than a district executive committee, to furnish the list of prospective candidates to fill a vacancy in the West Virginia House of Delegates or the West Virginia Senate, it would have said so. Petitioner cannot get around the Legislature’s failure to include such limiting language when crafting the Statute. And because the County Committee Letter did not issue from the correct geographic entity, Petitioner does not have a clear right to the remedy he seeks, nor did the Governor have a non-discretionary duty to choose from the names on that letter’s list.

II. The Governor’s Appointment Satisfies His Statutory Duty.

Far from being legally bound to choose a replacement from the County Committee Letter, the Governor has already fulfilled his statutory duty by choosing a legally qualified individual listed in the second, valid letter.

At this juncture, the composition of the Republican Party 19th Delegate District Executive Committee should be addressed. District 19 is a single-county district; it includes most, but not all, of Wayne County. And while the Code provides for the election of delegate district executive committee members for multicounty delegate districts, *see* W. Va. Code §3-1-9(b),³ the

³ “At the primary election, 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.*” (emphases added)

composition of a party executive committee for a delegate district lying within a single county is not specified. In other words, how to assemble an executive committee for a delegate district fully within the bounds of one county was left to the political parties themselves.

The bylaws of the Republican Party provide that specific guidance in an article titled “State Senate & Delegate District Committees.” To begin, this article clarifies that the State Senate District Committee or House of Delegates District Committee may also be referred to as a “Vacancy Committee.” WV Republican Party Bylaws, Article XVI. Further, Article XVI, Section 4—titled “Vacancies in the State Legislature”—states that, “[i]n any case where there is no Senate Vacancy Committee or Delegate Vacancy Committee due to the district being wholly within one county, the County Chair shall appoint a subcommittee which shall act as the vacancy committee and the process of such committee be facilitated by the County Chair and State Chair.” WV Republican Party Bylaws, Article XVI, Section 4(d)a.v. Furthermore, these bylaws detail particular individuals to certify the results of this process, stating that “[i]n such case, the names of the three (3) nominated candidates shall be certified by the County Chair, County Secretary, and State Chair.” *Id.*

Considering the foregoing, the only proper submission of candidates for the vacant 19th Delegate District seat was the District 19 Committee Letter. The bylaws are clear that the vacancy committee is a specially appointed *subcommittee* appointed by the County Chair—which means the Republic Party intended for the vacancy committee to be distinct from the county executive committee in some way. The District 19 Committee Letter bears the signatures of the three party officials required to certify the names of candidates nominated to the vacant 19th Delegate District seat: County Chair Maynard (Petitioner), County Secretary Moyer, and Acting-State Chair Stauffer. *See* Resp. App. 1. This letter also satisfies Section 3-10-5(a)’s requirement that the list

of nominated candidates be submitted within 15 days of the vacancy. By contrast, the County Committee Letter was not a proper submission on its face as it was from the Wayne County Executive Committee, and it was signed by only Petitioner—not the other two individuals required by the Republican Party’s own bylaws to certify a list of nominated candidates to replace Evans.

The Governor has thus already acted within and as required by the Statute in appointing an individual nominated by the District 19 Committee Letter. As such, Petitioner cannot show that the Governor has a legal duty to render the contrary relief he seeks using the improper County Committee Letter. The Statute requires that, after receiving a properly submitted list of candidates from the delegate district executive committee, the Governor shall appoint one of those candidates “within five days after the list is received.” *See* W. Va. Code §3-10-5(a). The District 19 Committee Letter was received on January 22; as a submission by the proper geographic party entity of the Republican Party required by the Statute, its receipt initiated the 5-day post-receipt appointment window. Consequently, the Governor was under an affirmative duty to select one of the candidates identified therein by January 27, 2021. The Governor’s appointment to fill the vacancy in the 19th Delegate District on January 27 fulfilled that statutory responsibility. Now, nothing remains to be done but for the newly appointed Delegate to assume his rightly-appointed seat in the West Virginia House of Delegates.

Finally, even if the Court were to question the validity of the second letter—which to be clear, there is no reason to do—Petitioner would still fail to meet the high bar for mandamus relief. Petitioner asks the Court to require the Governor to choose from the individuals on the County Committee Letter, but there is no mechanism in the Statute to force the Governor to choose from an earlier, improper list simply because of potential doubt around a second letter.

To the contrary, the Statute expressly contemplates situations where the Governor does not receive any valid list of candidates. The Statute provides that:

If the list is not submitted to the Governor within the 15-day period, the Governor shall appoint within five days thereafter a legally qualified person of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred.

See W. Va. Code §3-10-5(a). There are no extensions of this period and no exceptions to this duty under the Statute. The fifteen-day period has expired, which means that in the event the second letter were defective, the only proper remedy would be for the Governor to fulfill his obligations set forth under the Statute by appointing a “qualified person of the same political party” to fill the vacancy within the requisite timeframe. The Governor has done exactly that: There is no dispute the individual the Governor appointed is a “legally qualified person of the same political party with which the person holding the office immediately preceding the vacancy was affiliated.” When evaluating Petitioner’s eligibility for mandamus relief, it is therefore irrelevant whether the list submitted by the Republican Party 19th Delegate District Executive Committee is itself a proper submission.

In short, the *only* way Petitioner can prevail is to show that the County Committee Letter met the statutory criteria. It did not. And now that the statutory timeframe has expired, there is no ability to “cure” its defects even if there were legitimate concerns surrounding the second letter. As long as the first list is invalid, Petitioner is not clearly entitled to the remedy he seeks and cannot satisfy the high bar for relief in mandamus.

CONCLUSION

The January 21, 2021, letter from the West Virginia Republican Party House of Delegates District 19 Vacancy Committee was the proper submission of nominations to fill the vacancy in Delegate District 19. The Governor has already taken actions acquitting himself of his obligations

under Section 3-10-5 consistent with its requirements. For the foregoing reasons, there is no cause to issue the writ of mandamus requested by Petitioner.

Respectfully submitted,

JAMES C. JUSTICE, II, GOVERNOR OF THE STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

A handwritten signature in blue ink, reading "Curtis R. A. Capehart", is written over a horizontal line.

Lindsay S. See
Solicitor General
Douglas P. Buffington, II
Chief Deputy Attorney General
Curtis R. A. Capehart
Deputy Attorney General
Virginia M. Payne
Assistant Solicitor General
State Capitol Complex
Building 1, Room 26E
Charleston, West Virginia 25305
Email: Curtis.R.A.Capehart@wvago.gov
Telephone: (304) 558-2021

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0051

**STATE OF WEST VIRGINIA, ex rel.
JEFF MAYNARD, Chair of the
WAYNE COUNTY REPUBLICAN
EXECUTIVE COMMITTEE,**

Petitioner

**Emergency Petition for
Mandamus**

v.

**JAMES C. JUSTICE, II, GOVERNOR OF
THE STATE OF WEST VIRGINIA, and the
WEST VIRGINIA REPUBLICAN PARTY, INC.,**

Respondents.

CERTIFICATE OF SERVICE

I, Curtis R. A. Capehart, counsel for Respondent James C. Justice, II, do hereby certify that on this 1st day of February 1, 2021, I have served a true copy of the foregoing *SUMMARY RESPONSE* to the Court, and served the same on the parties by electronic mail and by U.S. Mail, postage-prepaid, first-class, addressed as indicated below:

John H. Bryan
JOHN H. BRYAN,
ATTORNEY AT LAW
411 Main Street
P.O. Box 366
Union, WV 24983
Facsimile: (304) 772-4998
Counsel for Petitioner

J. Zak Ritchie
HISSAM FORMAN DONOVAN
RITCHIE PLLC
707 Virginia Street East, Suite 260
Charleston, WV 25301
*Counsel for Respondent,
West Virginia Republican Party, Inc.*


Curtis R. A. Capehart

February 1, 2021
Date