

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.	:	Case No. 2015-1297
ROBERT L. RICHARDS, ET AL.,	:	
	:	
Relators,	:	<u>ORIGINAL ACTION IN PROHIBITION</u>
	:	
v.	:	
	:	
STARK COUNTY BOARD OF ELECTIONS,	:	
ET AL.,	:	
	:	
Respondents.	:	

MERIT BRIEF OF RELATORS

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STATEMENT OF FACTS

On May 4, 2015, Francis H. Cicchinelli, Jr., filed with the respondent Stark County Board of Elections a nominating petition and statement of candidacy in an effort to be placed on the November General Election ballot as an independent candidate for the office of Mayor of Massillon, Ohio.

Respondent Stark County Board of Elections is the statutory body established by R.C. 3501.06 to administer the election laws within Stark County, Ohio. Respondent Board of Elections consists of Chairman Samuel J. Ferruccio, Jr., and members Frank C. Braden, William S. Cline, and William V. Sherer, II. Jeffrey Matthews is the Director of Respondent.

On May 5, 2015 – the day of the primary and the day after filing his petition and statement of candidacy – Cicchinelli first claimed to be an independent. (Transcript p. 14.) (Exhibit 1.)

On June 16, 2015, Relators Robert L. Richards and Melvin T. Schartiger, as qualified electors, timely filed a protest with Respondent Board of Elections against Cicchinelli's nominating petition and candidacy in accordance with R.C. 3513.262.¹ (Exhibit 2.) The protest challenged Cicchinelli's ability to run as an independent candidate on the ground that Cicchinelli was not actually independent and that Cicchinelli's claim of being independent was not made in good faith. Therefore, Relators asserted that the nominating petition filed by Cicchinelli was in violation of law and Respondent Board of Elections should invalidate the petition and disqualify Cicchinelli from running as an independent.

¹ The protest originally included two other qualified Massillon electors. They withdrew as protestors on July 10, 2015.

On July 13, 2015, Respondent Board of Elections conducted a hearing on the protest.

Relators called the candidate Cicchinelli as the first witness. At the beginning of his testimony²,

Cicchinelli testified as follows:

Q. Mr. Cicchinelli, could you please tell this Board of Elections, what is the date that you claim you were first an Independent?

A. Technically, it would be the May primary, when I voted non-issues -- or nonpartisan ballot.

Q. That would have been -- the May primary would have been, I believe, May 5th --

A. The 5th.

Q. -- Tuesday, May 5th, sir?

A. Yes.

(Tr. p. 14.)

Cicchinelli's testimony was corroborated by his wife, who was deeply involved in Cicchinelli's candidacy by circulating his petitions and gathering signatures. Mrs. Cicchinelli expressly stated that Cicchinelli was a Democrat until the day after he filed his petitions:

Q. Did you have an understanding of when it was that your husband was an Independent?

[Colloquy between counsel and Chairman Ferruccio.]

A. My husband was an Independent when he, the day of the primary, became an Independent.

Q. May 5th, 2015?

A. Uh-huh.

² In their position statement to the Ohio Secretary of State, Respondent Board of Elections members Braden and Cline falsely stated that this testimony came "after very lengthy direct and cross examination."

Q. Is that a yes, ma'am?

A. Yes.

Q. Okay. Before that, he was a Democrat?

A. Yes.

(Tr. pp. 36-38.)

The above testimony of the candidate Cicchinelli and his wife was unrebutted, as Cicchinelli failed to offer any testimony to the contrary or any other evidence to refute his own testimony.

At the conclusion of the protest hearing, Respondent Board of Elections members William S. Cline and Frank C. Braden voted to deny the protest and allow Cicchinelli's name to be placed on the ballot as an independent candidate. Respondent Board of Elections Chairman Samuel J. Ferruccio, Jr., and member William V. Sherer, II, voted to uphold the protest and disqualify Cicchinelli's name from being placed on the ballot.

On July 27, 2015, the tie vote of the Respondent Board of Elections was submitted to Respondent Ohio Secretary of State Jon Husted for a decision pursuant to R.C. 3501.11(X). Respondent is the chief election officer of the State of Ohio pursuant to R.C. 3501.04.

On July 31, 2015, Respondent Husted issued a letter decision breaking the tie vote in favor of certifying Cicchinelli as an independent candidate on the November 3, 2015, General Election ballot. (Exhibit 3.)

The vast majority of Respondent Husted's letter of July 31, 2015, relates to another protest in Stark County. The entirety of Respondent Husted's analysis of the Cicchinelli matter is found at the end of the letter in the following three sentences:

Engaging in a similar analysis of the record in Mr. Cicchinelli, Jr.'s case, I arrive at the same conclusion. Once again

unlike Mr. Jolivette, Mr. Cicchinelli, Jr. did not seek to run in a party primary election before filing a nominating petition as an independent candidate for the general election, and a recitation of past political activity does not impart a firm belief or conviction that Mr. Cicchinelli, Jr.'s motivation was insincere.

Without clear and convincing evidence that his disaffiliation from the Democratic Party was not in good faith, I also break this tie in favor of certifying Mr. Cicchinelli, Jr.'s independent candidacy for Mayor of Massillon to the November 3, 2015 General Election ballot.

On August 7, 2015, five business days after Respondent Husted's decision, Relators filed this Original Action in Prohibition with the Ohio Supreme Court, pursuant to the Court's original jurisdiction under Article IV, Section 2(B)(1)(d) of the Ohio Constitution. Relators requested a Writ of Prohibition to prevent acts in violation of law by Respondent Board of Elections, taken by and through the acts of Respondent Husted. Specifically, Relators sought to prohibit Respondents from placing Cicchinelli on the ballot as an independent candidate for the office of Mayor of Massillon, Ohio, in the November 2015 General Election.

Cicchinelli filed a motion to intervene, which was granted, and has filed an answer as intervenor. Respondent Husted filed an answer on August 14, 2015. Respondent Board of Elections filed an answer on August 17, 2015. Relators have filed this Merit Brief for Relators within three days of the filing of the last answer, whereby this matter is now before the Court.

ARGUMENT

Relators are entitled to a writ of prohibition because (a) Respondents have exercised quasi-judicial power, (b) the exercise of that power is unauthorized by law, and (c) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶¶18, 23; *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶12.

Relators contend that Respondent Husted engaged in an abuse of discretion or acted in clear disregard of applicable law. *State ex rel. Lucas Cty. Republican Party Executive Comm. v. Brunner*, 125 Ohio St.3d 427, 2010-Ohio-1873, 928 N.E.2d 1072, ¶9; *State ex rel. Balas-Bratton v. Husted*, 138 Ohio St.3d 527, 530-531, 2014-Ohio-1406, 8 N.E.3d 933, 936-937, ¶¶15-16.

Respondents have engaged in an abuse of discretion and acted in clear disregard of applicable law by not applying and enforcing the “independent candidate” requirements of R.C. 3501.01(I) and 3513.257, as interpreted and applied by *Morrison v. Cholley*, 467 F.3d 503 (6th Cir. 2006); *Jolivette v. Husted*, 694 F.3d 760 (6th Cir. 2012); and *State ex rel. Davis v. Summit County Bd. of Elections*, 137 Ohio St.3d 222, 2013-Ohio-4616, 998 N.E.2d 1093.

Specifically, Respondent Husted abused his discretion and acted in clear disregard of applicable law in two ways, as discussed below in two separate Propositions of Law. First, Respondent Husted fundamentally applied the wrong legal standard. Second, Respondent Husted completely and inexplicably ignored the un rebutted evidence presented at the hearing, and disregarded the legal requirement that a candidate must be independent at the time the candidate’s petitions are filed, and no later than the day before the primary.

Proposition of Law No. I:

A protestor who challenges the independence of a candidate under R.C. 3513.262 must prove that the candidate's declaration of lack of affiliation was not in good faith. The protestor is not required to prove that the candidate failed to disaffiliate in good faith from a political party.

Respondent Husted stated in his decision of July 30, 2015: "Without clear and convincing evidence that his disaffiliation from the Democratic Party was not in good faith, I also break this tie in favor of certifying Mr. Cicchinelli, Jr.'s independent candidacy ***."

The correct legal standard was established by the Ohio Supreme Court in *State ex rel. Davis v. Summit County Bd. of Elections*. As this Court held, the issue is not whether there is a lack of good faith in disaffiliating from a party: "In addition, the board abused its discretion because it fundamentally misconstrued the relevant inquiry. Based on her past voting record, the board informs the court, 'the Board determined that Relator did not make a good faith attempt to disaffiliate from the Democratic Party.' But the requirement imposed by R.C. 3513.257 and *Morrison v. Colley* is that a candidate must declare her lack of affiliation in good faith, not that she take affirmative action to disaffiliate in order to prove her good faith." *State ex rel. Davis v. Summit County Bd. of Elections*, 137 Ohio St.3d 222, 227, 2013-Ohio-4616, ¶28, 998 N.E.2d 1093, 1098.

Davis is entirely consistent with the definition of "independent candidate" as found in R.C. 3501.01(I), which states in pertinent part: "'Independent candidate' means any candidate who claims not to be affiliated with a political party ***." The statutory definition refers to a candidate who is not affiliated with a political party. The statute says nothing about a candidate who has disaffiliated from a party.

Lack of affiliation is very different from disaffiliation. Lack of affiliation is determined by the candidate's subjective intent and by the connections the candidate may have to a party.

Disaffiliation requires a completely different inquiry into actions that a candidate may have taken to sever connections to a party.

Based on *Davis*, *Morrison* and the Revised Code, Relators had to show that Cicchinelli's declaration of lack of affiliation was not in good faith. Relators were not required to somehow prove a failure to disaffiliate in good faith, which is the erroneous standard applied by the respondent Husted. As in *Davis*, Respondent Husted abused his discretion because he fundamentally misconstrued the relevant inquiry.

Proposition of Law No. II:

Under R.C. 3513.257, candidates who seek to appear on the ballot as an independent must make a good faith claim that they are not affiliated with a political party at the time they submit their petitions for independent candidacy, and no later than the day before the primary.

Respondent Husted also abused his discretion and acted in clear disregard of applicable law by completely and inexplicably ignoring the unrebutted evidence presented at the hearing, and by disregarding the legal requirement that a candidate must be independent at the time the candidate's petitions are filed, and no later than the day before the primary

At the hearing before Respondent Board of Elections, clear, convincing and unrebutted evidence proved that Cicchinelli fails to meet the "independent candidate" requirements of R.C. 3501.01(I) and 3513.257.

Ohio law is clear that a candidate must claim to be an independent as of the time that the candidate's petitions are filed. This claim of independence can be made no later than the day before the primary. The day of the primary was May 5, 2015, making May 4 the deadline for a candidate to claim in good faith to be an independent.

R.C. 3513.257 states: “Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election *** shall file no later than four p.m. of the day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 of the Revised Code.”

As discussed above, the term “independent candidate” is defined by R.C. 3501.01(I) as follows: “‘Independent candidate’ means any candidate who claims not to be affiliated with a political party, and whose name has been certified on the office-type ballot at a general or special election through the filing of a statement of candidacy and nominating petition, as prescribed in section 3513.257 of the Revised Code.”

In *Morrison v. Cholley*, the Sixth Circuit U.S. Court of Appeals stated: “The election regulation at issue [R.C. 3513.257] is merely a reasonable, nondiscriminatory regulation to require would-be independent candidates to claim, no later than 4:00 p.m. of the day before the primary elections, that they are free of affiliation with any political party.” The Constitution “do[es] not prohibit the Ohio General Assembly from requiring independent candidates to claim on the day before the primary that they are not affiliated with any political party.” *Morrison v. Cholley*, 467 F.3d 503, 508 (6th Cir. 2006). (Emphasis added.)

In *Jolivette v. Husted*, the Sixth Circuit U.S. Court of Appeals stated: “Instead, §3513.257 is a means of restricting the candidates who may appear on the ballot, and does so by requiring that independent candidates make a good-faith claim that they are free of affiliation with a political party at the time they submit their petitions for independent candidacy.” “By requiring independent candidates to make a good-faith claim of non-affiliation by the day before the primary, Ohio seeks to

maintain the integrity of its different routes to the ballot ***.” *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012). (Emphasis added.)

Thus, the law clearly requires that a candidate seeking to be on the ballot as an independent must make a good faith claim of independence no later than the day before the primary. Indeed, the day before the primary is the last possible date on which a candidate’s independent status can be established for the general election.

It is significant that at the hearing, Cicchinelli was asked when he claims he was “first” an independent. This required Cicchinelli to identify the initial time when he claimed to be independent. Cicchinelli could have provided any number of answers – two months before he filed his petition, or two weeks, or even at the filing deadline the day before the primary. But Cicchinelli chose the day after he filed his petition to be the time he was first an independent.

Ohio law does not permit a candidate to remain affiliated with a political party up through and including the filing of petitions, yet still run as an “independent.” This is exactly what Cicchinelli is trying to do.

A candidate’s “intent is of great import.” *State ex rel. Stine v. Brown County Bd. of Elections*, 101 Ohio St. 3d 252, 254, 2004-Ohio-771, 804 N.E.2d 415, 417, ¶15. The unrebutted evidence leaves no doubt regarding Cicchinelli’s subjective intent about when he was first an independent. The candidate himself, a Democrat for 42 years who continued to sign numerous petitions as a Democrat in 2015, did not consider himself to be an independent when he filed his petitions on May 4, 2015. It was not until the next day, the day of the primary, that Cicchinelli claims he was first an independent.

By virtue of Cicchinelli’s subjective intent and understanding, he clearly fails to meet the definition of “independent candidate” within the clear time requirements of R.C. 3513.257.

Therefore, Cicchinelli's claim of independence is not in good faith. Applying the clear law of Ohio, the unrefuted facts are dispositive of Cicchinelli's attempt to appear on the ballot as an independent candidate for the upcoming General Election.

Relators are not asking this Court to substitute its judgment for that of Respondent Husted or Respondent Board of Elections. "We will not substitute our judgment for that of a board of elections if there is conflicting evidence on an issue." *State ex rel. Commt. for the Referendum of Lorain Ord. 77-01*, 96 Ohio St.3d 308, 2002-Ohio-4194, 774 N.E.2d 239, ¶47, quoting *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 185, 2000-Ohio-294, 724 N.E.2d 771; *State ex rel. Stine v. Brown County Bd. of Elections*, 101 Ohio St.3d 252, 255, 2004-Ohio-771, 804 N.E.2d 415, 418, ¶21. However, in this case, there is no conflicting evidence. The only evidence is that Cicchinelli does not claim to be independent within the time frame required by Ohio law.

As a matter of law, a candidate's status as an "independent" must be established no later than the day before the primary. By his own sworn, un rebutted testimony, Cicchinelli did not claim to be independent until the day after this deadline. Therefore, Cicchinelli's purported independence is not in good faith and his attempted independent candidacy cannot proceed. Respondents' failure to uphold the protest and disqualify Cicchinelli's name from being placed on the ballot is unauthorized by law, and was an abuse of discretion and in clear disregard of Ohio law.

CONCLUSION

For the reasons stated above, Cicchinelli's nominating petition is in violation of law and is invalid, thereby making Cicchinelli disqualified from running as an independent. Respondents' failure to uphold the protest and disqualify Cicchinelli's name from being placed on the ballot is unauthorized by law, and was an abuse of discretion and in clear disregard of Ohio law.

Relators respectfully submit that they are entitled to a writ of prohibition because (a) Respondents have exercised quasi-judicial power, (b) the exercise of that power is unauthorized by law, an abuse of discretion and in clear disregard of applicable law, and (c) given the approaching General Election on November 3, 2015, denying the writ of prohibition would result in injury to Relators for which no other adequate remedy exists in the ordinary course of law.

Relators Robert L. Richards and Melvin T. Schartiger respectfully request that this Court issue a peremptory writ of prohibition, or in the alternative, an alternate writ against Respondents Stark County Board of Elections and Ohio Secretary of State Jon Husted, prohibiting Respondents from placing Francis H. Cicchinelli, Jr., on the ballot as an independent candidate for the office of Mayor of Massillon, Ohio, in the November 2015 General Election.

Respectfully submitted,

/s "Steven P. Okey"

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Pursuant to S.Ct.Prac.R. 3.11, a copy of the preceding document was served by:

- Personal Service
- Delivery Service
- United States Mail
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on August 20, 2015, to:

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APPENDIX



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July 31, 2015

Director Jeffrey Matthews
Deputy Director Jeanette Mullane
Stark County Board of Elections
3525 Regent Ave N.E.
Canton, OH 44705

Re: Tie Votes on the Independent Candidacies of Mr. Thomas M. Bernabei and
Mr. Francis H. Cicchinelli, Jr.

Dear Director Matthews and Deputy Director Mullane:

At the Stark County Board of Elections meeting on July 6, 2015, the board held a protest hearing concerning the independent candidacy and residency of Mr. Thomas M. Bernabei for Mayor of Canton. At the close of the hearing, Chairperson Ferruccio and Board Member Sherer voted to grant the protest and keep Mr. Bernabei off the ballot. Board Members Braden and Cline voted to deny the protest and allow Mr. Bernabei to appear on the ballot.

Additionally, at the Stark County Board of Elections meeting on July 13, 2015, the board held a protest hearing concerning the independent candidacy of Mr. Francis H. Cicchinelli, Jr. for Mayor of Massillon. At the close of the hearing, Chairperson Ferruccio and Board Member Sherer voted to grant the protest and keep Mr. Cicchinelli, Jr. off the ballot. Board Members Braden and Cline voted to deny the protest and allow Mr. Cicchinelli to appear on the ballot.

The board members submitted both tie votes to the Secretary of State for a decision pursuant to R.C. 3501.11(X).

Under Ohio law, an independent candidate is "any candidate who claims not to be affiliated with a political party."¹ The Sixth Circuit Court of Appeals explained that an independent candidate must actually be unaffiliated or disaffiliated from any political party, and that the claim of unaffiliation or disaffiliation must be made in good faith.²

¹ R.C. 3501.01(I).

² *Morrison v. Colley*, 467 F. 3d 503 (6th Cir. 2006).

MR. BERNABEI

There is little doubt Mr. Bernabei took calculated efforts to disaffiliate from the Democratic Party. Thus, in breaking this tie vote, the determination must be whether Mr. Bernabei's disaffiliation from the Democratic Party was made in good faith. Chairman Ferruccio and Board Member Sherer claim that Mr. Bernabei failed to disaffiliate from the Democratic Party in good faith. I acknowledge that evidence highlighted by Members Ferruccio and Sherer reflects Mr. Bernabei's long-standing affiliation with the Democratic Party. However, the Ohio Supreme Court has noted that "disaffiliation by definition presumes a history of support for or membership in a political party," and if evidence of affiliation "standing alone, could trump a declaration of disaffiliation, then disaffiliation would never be possible."³ Thus, proving that Mr. Bernabei failed to disaffiliate from the Democratic Party in good faith requires more than a recitation of his past political activity. It requires clear and convincing evidence that Mr. Bernabei's declaration was motivated by something other than a sincere change of ideology.

"Clear and convincing" evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction of the allegations sought to be established.⁴ No evidence in the record before me imparts a firm belief or conviction that Mr. Bernabei's disaffiliation from the Democratic Party was not made in good faith. Instead, the record reflects that Mr. Bernabei expressed a change in ideology leading to his disaffiliation from the Democratic Party, and his actions in furtherance of that change are clear.

His situation is factually distinguishable from Mr. Jolivette's in an important way.⁵ Unlike Mr. Jolivette, Mr. Bernabei did not file a declaration of candidacy and petition for the partisan primary election, and then file a nominating petition for the general election, claiming to be independent, only after becoming aware that his first petition was insufficient and he would not qualify for the ballot. Instead, Mr. Bernabei did not decide to run for office until well after the primary election, and appears to have taken every reasonable step he could have taken to disaffiliate from the Democratic Party before filing his independent candidate nominating petition for the general election. Ohio law provides him no other avenue for disaffiliation than the one he chose.

Protestors also allege that Mr. Bernabei does not have a qualifying voting residence in the city of Canton. However, the record does not support this assertion either. Mr. Bernabei submitted a voter registration update form, signed a lease for the University Avenue apartment, moved belongings into the apartment, and slept there. The fact that he would later move into a home at another address in Canton, that was not available when he signed the apartment lease, is of little significance. The Ohio Supreme Court has noted that a "person's intent is of great import,"⁶ and no evidence in the record before me imparts a firm belief or conviction that Mr. Bernabei's actions exhibited anything but an intent to reside in the city of Canton.

³ *State ex rel. Davis v. Summit Cty. Bd. Of Elections*, 137 Ohio St. 3d 222 (2013).

⁴ *Cross v. Ledford*, 161 Ohio St. 469 (1954).

⁵ *Jolivette v. Husted*, 694 F. 3d 760 (6th Cir. 2012).

⁶ *Stine v. Brown Cty. Bd. Of Elections*, 101 Ohio St.3d 252 (2004).

Without clear and convincing evidence that Mr. Bernabei's disaffiliation from the Democratic Party was not in good faith or that Mr. Bernabei did not intend to reside in Canton, I break the tie in favor of certifying Mr. Bernabei's independent candidacy for Mayor of Canton to the November 3, 2015 General Election ballot.

MR. CICCHINELLI, JR.

Engaging in a similar analysis of the record in Mr. Cicchinelli, Jr.'s case, I arrive at the same conclusion. Once again unlike Mr. Jolivette, Mr. Cicchinelli, Jr. did not seek to run in a party primary election before filing a nominating petition as an independent candidate for the general election, and a recitation of past political activity does not impart a firm belief or conviction that Mr. Cicchinelli, Jr.'s motivation was insincere.

Without clear and convincing evidence that his disaffiliation from the Democratic Party was not in good faith, I also break this tie in favor of certifying Mr. Cicchinelli, Jr.'s independent candidacy for Mayor of Massillon to the November 3, 2015 General Election ballot.

Sincerely,

A handwritten signature in black ink that reads "Jon Husted". The signature is written in a cursive, flowing style with a large initial "J".

Jon Husted

cc: Members of the Stark County Board of Elections