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IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA *EX REL.*
DONALD HICKS, CLERK OF THE
MCDOWELL COUNTY COMMISSION,

Petitioner,

v.

CIVIL ACTION NO.: 08-C-307
Honorable William J. Sadler, Special Judge

A. RAY BAILEY, and
THE MCDOWELL COUNTY COMMISSION,

Respondents.

**ORDER GRANTING RESPONDENT'S MOTION
FOR PAYMENT OF ATTORNEY'S FEES AND COSTS**

This matter comes before the court on the respondent's Motion for An Order Directing the McDowell County Commission to Pay the Attorney Fees and Costs of Respondent A. Ray Bailey, which Mr. Bailey filed on October 13, 2009, to recover the money he expended on attorney's fees in defense of his election to the McDowell County Commission in November 2008. The Petitioner filed his Objection to Motion for Order Directing Payment of Attorney's Fees and Costs on October 16, 2009. After carefully considering the motions and legal memoranda, exhibits, and pertinent legal authorities, the court grants the respondent's motion.

In November of 2008, the people of McDowell County, West Virginia elected A. Ray Bailey to the McDowell County Commission. Carl Urps, the defeated candidate, filed an election contest on November 25, 2008, alleging that Mr. Bailey was constitutionally disqualified from serving on the County Commission. Petitioner Donald Hicks, in his capacity as Clerk of McDowell County, filed a Writ of Mandamus

essentially arguing that a trial before the McDowell County Commission would be futile. Both circuit court judges serving McDowell County recused themselves from hearing the mandamus action, and the West Virginia Supreme Court of Appeals (“our Court”) appointed the undersigned to act as special judge in the matter. By agreement of the parties, the election contest and the mandamus action were consolidated and heard by this court on January 20, 2009. On February 3, 2009, the court entered an Order Denying the Petition for Writ of Mandamus in which the court found that Mr. Bailey was not constitutionally disqualified from serving on the McDowell County Commission and ordered that he be seated as a member thereof. Thereafter, the petitioners attempted to attack the validity of the court’s February 3, 2009, Order based on a clerical error. The court, by Order dated February 11, 2009, rejected this attack and simply corrected its clerical mistake.

Before the court entered the February 11, 2009, Order amending the original order, the petitioners preemptively filed a motion to reconsider, correct, or vacate the court’s final corrected order. By Order dated March 26, 2009, the court affirmed its previous ruling and denied the motion to reconsider. Hence, the court declared that Mr. Bailey was not disqualified from serving on the McDowell County Commission on three separate occasions in three separate Orders. Nonetheless, the petitioners filed and Expedited Petition for Appeal of Election Mandamus Action with the West Virginia Supreme Court of Appeals. On June 3, 2009, our Court voted unanimously to decline to hear the appeal. As a result, Mr. Bailey prevailed in every aspect of the underlying election mandamus action.

Mr. Bailey incurred substantial attorney's fees and costs in defending his right to take office. He has unsuccessfully attempted to obtain reimbursement for these fees from the McDowell County Commission. At two separate Commission meetings, Commissioner Judy Cortelesi moved for a vote to reimburse Mr. Bailey. However, Commissioner Gordon Lambert would not second the motion, thereby preventing the three-member Commission from authorizing the reimbursement of Mr. Bailey's attorney's fees and costs. Mr. Bailey now seeks an Order directing the McDowell County Commission to reimburse him for the attorney's fees and costs he incurred defending the election mandamus action.

West Virginia jurisprudence supports Mr. Bailey's Motion, and the court concludes that Mr. Bailey is entitled to indemnification for the attorney's fees incurred while defending his right to hold the office of County Commissioner to which he was duly elected. In the seminal case of *Powers v. Goodwin*, 170 W.Va. 151, 291 S.E.2d 466 (1982), our Court addressed the issue of attorney's fees incurred in litigation arising from the performance of official duties. In *Powers*, a county commissioner, James Goodwin, incurred attorney's fees in defense of preliminary criminal proceedings before a Boone County grand jury arising from his alleged misuse of a county commission credit card. The members of the Boone County Commission, with defendant James Goodwin abstaining, voted to pay \$14,547.64 to James Goodwin to reimburse him for those expenses. The plaintiffs sought to hold the county commissioners personally liable for the misappropriated funds (the attorney's fees) and to remove all three county commissioners for official misconduct.

Our Court thoroughly discussed the rules governing when a public official is entitled to indemnification for attorney's fees and held that when a county official incurs a loss in the discharge of his official duty in a matter in which the county has an interest, and in the discharge of a duty imposed or authorized by law and in good faith, the county has the power to appropriate funds to reimburse him unless expressly forbidden. Syllabus point 2, *Powers v. Goodwin*, 70 W.Va. at 153, 291 S.E.2d at 468. Further, the public as a whole has an interest in seeing duly elected officials continue in office and where members of a county commission are made defendants in a removal action as a result of actions taken or omitted in the good faith discharge of their official duties, they are entitled to reimbursement for their attorneys' fees. Syllabus point 5, *Id.* at 153, 291 S.E.2d at 468. As observed by the *Powers* Court,

...the voters have a legitimate interest in protecting their duly elected officials from being hectorred out of office through the constant charge of bankrupting attorneys' fees on their own personal resources. One of the obligations of a duly elected public official is to continue to discharge the office to which he was elected since it can reasonably be assumed that he was elected because of his public stand on issues of concern to the voters. Consequently, continued service in an elected position is not a question in which only the officeholder has a personal concern; in a democratic government predicated upon the competition of policies and ideas through different candidates for elected office, the public itself has an interest in seeing persons elected by a majority continue in office.

Id. at 161, 291 S.E.2d at 476. Thus, if the public has an interest in seeing persons elected by a majority continue in office, it follows that the public has an interest in seeing such persons take office in the first place.

As stated above, Commissioner Bailey incurred attorney's fees during a civil action challenging his right to hold the seat to which he was elected so that he could

begin carrying out the duties of that position.¹ The people of McDowell County have an interest in ensuring that the person whom they elected to serve them actually takes office and fulfills his duties associated therewith. Moreover, there is no suggestion, much less evidence, that A. Ray Bailey defended his election with anything other than good faith. Lastly, as stated in *Powers*, a county has the power to appropriate funds to reimburse Mr. Bailey. See, *Id* at 157, 291 S.E.2d at 472. Accordingly, McDowell County Commission shall repay Mr. Bailey his attorney's fees.

To the extent that Mr. Bailey insinuates that Commissioner Lambert is to blame for the need to bring this Motion before the court, the court points out that the *Powers* case deals with the potential legal ramifications connected with county commissioners deciding to indemnify a fellow county commissioner for attorney's fees without first obtaining the opinion of a court or attorney general. The *Powers* Court specifically states that when a county commission is in doubt about whether it is appropriate to expend county funds to indemnify itself for legal fees incurred as a result of good faith discharge of its duties, it can bring a mandamus action against the appropriate ministerial officer to require him to issue the check for that purpose. *Id.* at 160, 291 S.E.2d at 476. As this case is an election contest in which the Respondent has done no wrong, the pending case is an instance where indemnification of attorney's fees is "clearly the order of the day;" but even if it were not, the underlying principal is nonetheless applicable: if a commissioner is unsure whether attorneys' fees can be reimbursed, it's safer to let a court

¹ Though the pending case is distinguishable from *Powers* because Mr. Bailey is defending his right to serve as a duly elected county commissioner for McDowell County rather than defending himself from criminal charges as in *Powers*, the legal distinction is negligible. The *Powers* court specified that the rules governing whether a public official is entitled to indemnification for attorney's fees are the same in both the civil and the criminal context. Syllabus point 3, *Id.* at 153, 291 S.E.2d at 468.

resolve the issue than to guess and end up in a situation like that in *Powers*. See, *Id.* at 160-161, 291 S.E.2d 474-475. Thus, Commissioner Lambert's refusal to vote on the issue at bar was not improper, though this court will not address any motives underlying Mr. Lambert's actions.

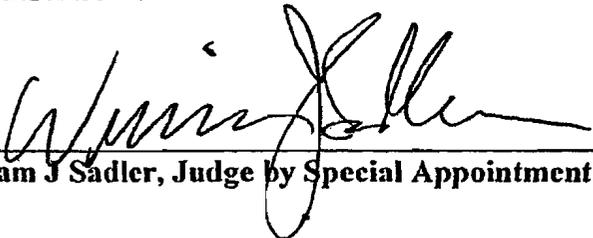
Lastly, the court agrees with the Commission's argument that Carl Urps is responsible for any costs other than attorney's fees. W.Va. Code §3-7-9 states that "[t]he cost of every contested election shall include only the expenses of serving notices, taking depositions and the allowances to witnesses; and shall be noted at the foot of every deposition or set of depositions, by the person taking the same. If the contestant fails in setting aside the election, there shall be awarded against him the amount of such costs incurred or expended by the person who was returned or declared elected. Otherwise, each party shall pay his own costs." Because Carl Urps was the election contestant, the Commission is not responsible for Mr. Bailey's costs.

Therefore, the court grants Mr. Bailey's motion for attorney's fees and directs payment thereof in accordance with this order.

RULING

1. The McDowell County Commission is directed to reimburse Mr. Bailey for his attorney's fees.
2. The Circuit Clerk is directed to remove this case from the docket and to forward of copy this Order to all counsel of record.

ENTERED the 9th day of November 2009.



William J Sadler, Judge by Special Appointment