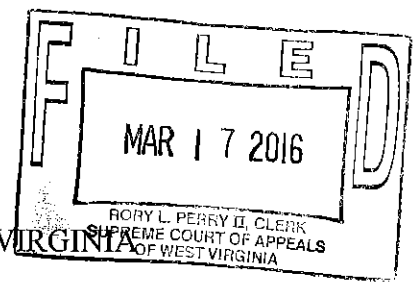


DOCKET NO. 16-0226



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM R. WOOTON,

Petitioner,

v.

ELIZABETH D. WALKER; NATALIE E.
TENNANT, GARY A. COLLIAS, and
VINCENT P. CARDI, Members of the
West Virginia State Election Commission;
GLEN B. GAINER, III, West Virginia State
Auditor; and JOHN D. PERDUE, West
Virginia State Treasurer,

Respondents.

**BRIEF OF RESPONDENTS, NATALIE TENNANT, GARY A. COLLIAS AND
VINCENT P. CARDI, MEMBERS OF THE WEST VIRGINIA STATE ELECTION
COMMISSION**

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CERTIFIED QUESTION PRESENTED

“Was the West Virginia State Election Commission’s certification of Respondent Wooton for public financing of his candidacy for the West Virginia Supreme Court of Appeals under West Virginia Code §§ 3-12-1, *et seq.*, valid?” (JA at 633.)

ASSIGNMENTS OF ERROR

The Circuit Court erred in concluding that: “The West Virginia State Election Commission’s certification of Respondent Wooton for public financing of his candidacy for the West Virginia Supreme Court of Appeals under West Virginia Code §§ 3-12-1, *et seq.*, was not valid.” (JA at 633.)

STATEMENT OF THE CASE

Procedural History

On or about February 5, 2016, the West Virginia State Election Commission (“WVSEC”) certified the campaign of Petitioner, William R. Wooton, (“Wooton”) for public financing of his bid for a seat on The Supreme Court of Appeals of West Virginia pursuant to W. Va. Code §§ 3-12-1, *et seq.* (the “Act”) (JA at 493-503.) Respondent, Elizabeth D. Walker (“Walker” or “Respondent Walker”) challenged the WVSEC’s certification by administrative appeal in the Circuit Court of Kanawha County, West Virginia (Civil Action No. 16-AA-13) under the West Virginia Administrative Procedures Act. W. Va. Code §§ 29A-5-1, *et seq.* (JA at 566-581.) Subsequently, Wooton moved the Circuit Court to certify the above question. The Circuit Court granted Wooton’s motion by order entered March 7, 2016 by the Honorable Judge Charles E. King, Jr. (JA at 633-634.), and the above question was certified to this Court.

Statement of Facts

Wooton is running for a seat on the West Virginia Supreme Court of Appeals. Respondent Walker is also running for a seat on the West Virginia Supreme Court of Appeals.

Wooton declared his intent to participate in public financing under the Act and subsequently became a participating candidate on December 28, 2015. (JA at 1.) Ms. Walker did not declare intent to participate in public financing under in the Act.

Wooton timely submitted records to the West Virginia Secretary of State that demonstrated he had gathered the required number and amount of contributions to qualify for public financing under the Act on February 2, 2016, the second business day following the close of the filing period of January 30th (the last Saturday in January) as required by statute. W. Va. Code § 3-12-3 (15). (JA at 494-496.) Wooton's campaign filed its application for certification for public financing (the "Application") with the WVSEC on February 3, 2016.¹ (JA at 2.) That same day, Walker's campaign lodged an objection on the grounds that the Application was one day late. (JA at 5.)

At the time of Walker's objection, the WVSEC was in the process of addressing not only the Wooton Application, but a similar application by the Honorable Brent Benjamin ("Justice Benjamin") and various challenges by Walker to Justice Benjamin's application, reports and contributions. (the "Benjamin Proceedings") (JA at 4, Walker objections.) In the Benjamin Proceedings, Walker objected to certain of Justice Benjamin's campaign reports as being filed late. *Id.* Additionally, 365 out of more than 500 objections lodged by the Walker Campaign to Justice Benjamin's contribution receipts were filed late under W. Va. CSR § 146-5-6.1. *Id.*

In the Benjamin Proceedings, the WVSEC determined, in the interest of the intent and the spirit of Act, to exercise discretion and consider the campaign reports (JA at 457-458) as well as the Walker objections, even though they were technically submitted late. (JA at 337-338.) In similar fashion, the WVSEC denied Walker's objection in the Wooton matter, finding that there

¹ The statute does not mandate a deadline for filing of applications, however, WVCSR § 146-5-6.1 does provide that applications be filed within two business days after the close of the qualifying period, in this case, February 2, 2016.

was no prejudice in permitting the Application be submitted one day beyond the deadline set forth in WVCSR § 146-5-6.1. (JA at 497-499.)

SUMMARY OF ARGUMENT

The Act is reform legislation that is to be liberally construed and carries a substantial compliance standard. The WVSEC properly exercised its discretion to certify Wooton for public financing under the Act notwithstanding the filing of the Application one day beyond the deadline under W. Va. CSR § 146-5-6.1. Alternatively, if the Court disagrees, this matter should be remanded to the WVSEC to determine, in its discretion whether a violation should incur a fine or decertification.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has already has scheduled oral argument for March 23, 2016 and Wooton believes such argument will be helpful to the Court and this Court should issue a formal opinion pursuant to Rule 20(g)(2) of the West Virginia Rules of Appellate Procedure.

ARGUMENT

Introduction

First and foremost, an understanding of the context of the proceedings before the WVSEC involving both the Wooton and Benjamin matters currently under review is necessary for a reasoned review by this Court of the merits.² All proceedings involving both the Wooton and Justice Benjamin campaigns were conducted on an expedited, emergency basis while being presented to the WVSEC with facts and circumstances never before presented under the recently enacted statutory and regulatory scheme for public financing of judicial campaigns.

² This Court is simultaneously addressing matters in a related proceeding, *Brent D. Benjamin, Petitioner v. Elizabeth D. Walker, Respondent*. Docket No. 16-0228.

As is evidenced from the lengthy transcripts of the hearings below, involving both the Wooton and Justice Benjamin campaigns, the WVSEC undertook not only an effort to fulfill the spirit, intent and substance of the Act designed to reduce the overarching presence of large private donations from the judicial election process, but also attempted to exercise discretion to be fair not only to the candidates seeking public financing as well as the challenging candidate.

As for the expedited nature of the proceedings, the WVSEC spent considerable time and effort in reacting to all requests and challenges, most of which were brought and required to be considered by the WVSEC within a span of two days, inclusive of internal analysis and public hearing. As is established below, the WVSEC was faced with arguments that (i) there was a late filing by the Wooton campaign; (ii) a late filing by the Justice Benjamin campaign; and (iii) 365 late challenges the Walker campaign asserted against Justice Benjamin. The WVSEC exercised discretion that is implied from the statute (*See* W. Va. Code §3-12-10(d); 3-12-16(h)), in granting both petitioning applicants and the challenger relief from arbitrary deadlines. Accordingly, the WVSEC attempted to balance any potential prejudice that could result from strict compliance with criteria under the statutory and regulatory scheme, with the express language of the statute that appears to create a substantial compliance standard.

The Act expressly gives the WVSEC discretion to determine whether a violation of the technical requirements for certification warrants imposition of a penalty or complete decertification. (*See* W. Va. Code §§ 3-12-10(d); 3-12-16(h)). This discretion logically creates a substantial compliance standard to be exclusively administered by the WVSEC. Otherwise, the discretion expressly granted in the statute is illusory and any technical mis-step would result in immediate disqualification for public financing – a result belied by the statute itself.

The WVSEC asserts that it properly determined, under a substantial compliance standard, that Wooton had satisfied all criteria required under the Act for public financing, notwithstanding the filing of the application for certification one day beyond the regulatory deadline. Accordingly, the WVSEC respectfully urges the Court to uphold its decision to allow Wooton to receive public financing in order to foster a liberal construction of a statute intended to protect the integrity of the judiciary.

Alternatively, in the event this Court determines that a strict compliance standard applies, thus making the application filing delay a violation under the Act, the WVSEC respectfully requests (i) consistency in finding all timeliness matters to be violations under the Acts in both proceedings currently before the Court on this matter; and (ii) remand of this matter to the WVSEC to permit it to exercise the statutory discretion exclusively granted it in order to assess the gravity of such violation and to determine whether such violation warrants a \$100 fine under W. Va. Code § 3-12-16(d) or full decertification under W. Va. Code § 3-12-10(h).

Pertinent Statutory Provisions

In 2009, then-Governor Joe Manchin created an Independent Commission on Judicial Reform to “evaluate and recommend proposals for judicial reform in West Virginia.” *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 633, 732 S.E.2d 507, 510 (2012). Additionally:

The Commission identified three “troubling trends” that led to its creation and which it sought to address: (1) the erosion of the public’s confidence in the State’s judicial system; (2) the voluminous caseload before the West Virginia Supreme Court of Appeals; and (3) the surge in judicial campaign expenditures. The Commission noted that “[a]s campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process.

Id.

The West Virginia Legislature passed the Judicial Campaign Finance Act (W. Va. Code §3-12-1 *et seq.*) and set forth the intent in §3-12-2(10):

As demonstrated by the 2012 West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Act, an alternative public campaign financing option for candidates running for a seat on the Supreme Court of Appeals will ensure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.

Additionally, W. Va. Code § 3-12-10(a) states that “[t]o be certified, a participating candidate shall apply to the State Election Commission for public campaign financing from the fund and file a sworn statement that he or she has complied and will comply with all requirements of this article throughout the applicable campaign.” The statute contains no deadline for such filing.

WVCSR § 146-5-6.1. Certification of Candidates, states that: “After collecting sufficient numbers and amounts of qualifying contributions, and no later than two business days after the close of the qualifying period, a candidate who desires to apply for public financing funds shall file an Application For Certification with the West Virginia Secretary.” *Id.* However, neither the Act nor the accompanying regulations indicate that the failure to file the Application within two days *compels* a refusal to certify.³

Significantly, two interrelated provisions in the Act establish that the WVSEC has discretion to permit certification to stand, even if the WVSEC finds that a candidate has violated the Act. W. Va. Code § 3-12-10(h) states that: “A candidate's certification and receipt of public campaign financing may be revoked by the State Election Commission, if the candidate violates

³ Again, had the WVSEC found the filing of the application one day beyond the period set forth in WVCSR 146-5-6.1 a violation, then the WVSEC could weigh that violation and assess a \$100.00 penalty without compelling decertification. W. Va. Code §3-12-16(d).

this article. A certified candidate who violates this article shall repay all moneys received from the fund to the State Election Commission.”

Correspondingly, W. Va. Code § 3-12-16(d) authorizes the imposition of a civil penalty in the event of a violation of the Act: “In addition to any other penalties imposed by law, the State Election Commission may impose a civil penalty for a violation by or on behalf of any candidate of any reporting requirement imposed by this article in the amount of \$100 a day.”

Standard of Review

The West Virginia Supreme Court of Appeals evaluates and reviews questions of law answered and certified by a circuit court *de novo*. See *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W. Va. 243, 245, 617 S.E.2d 790, 792 (2005)(citing Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172(1996); *Wilson v. Bernet*, 218 W. Va. 628, 631, 625 S.E.2d 706, 709 (2005)(citations omitted).

Argument

A. The Act Is A Reform Statute That Requires Only Substantial Compliance.

The Act is reform legislation designed allow public financing of judicial elections to curb the harmful effects of large private donations and to protect the impartiality and integrity of the judiciary, and as a result, should be liberally construed to that end. See *e.g. Repass v. Workers' Comp. Div.*, 212 W. Va. 86, 569 S.E.2d 162, Syl. Pt. 1 (2002) (“The Workmen’s Compensation Law is remedial in its nature, and must be given a liberal construction to accomplish the purpose intended.” Citing Syl. pt. 3, *McVey v. Chesapeake & Potomac Telephone Co.*, 103 W. Va. 519, 138 S.E. 97 (1927).

Furthermore, the substantial compliance standard is reflected in the two corresponding provisions referenced above regarding the WVSEC’s discretion to address violations through a

penalty (W. Va. Code §3-12-16(d)) or through complete decertification (W. Va. Code §3-12-10(h)). Importantly, W. Va. Code § 3-12-10(h) states that certification “may” be revoked for a violation. By necessity, this means that a candidate could nominally violate the Act and still be certified. The Act cannot require strict compliance if the discretion afforded the WVSEC to weigh the impact of a violation is to be given any meaning. As set forth below, the WVSEC found that Wooton otherwise met all criteria for certification and that the Wooton Campaign was in substantial compliance with the Act even with the filing of the Application one day beyond the date set forth in WVCSR.

Moreover, in the sole reported decision issued by this Court regarding the Act, *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 732 S.E.2d 507 (2012), this Court overlooked a technical, strict compliance requirement under the Act in order to accomplish a fair and just result. There, Allen Loughry (now Justice Loughry), petitioned the WVSEC for matching funds under the Pilot Act, the first version of the Act.⁴ Under that scheme, a petitioning creditor could receive \$350,000 in initial public funding and, if a competing candidate spent beyond a specified threshold, the petitioning candidate could receive additional “matching funds.” This Court determined that such a scheme was unconstitutional. *Id.*

However, this Court also acknowledged that §3-12-12 “prohibits a participating candidate from raising private contributions.” *Id.* at 520, 643. This Court determined to overlook the technical application of this prohibition under the circumstances because it would have worked an unwarranted and unnecessary injustice: “Considering these unique circumstances and as a matter of fundamental fairness to Petitioner Loughry, who relied in good faith on the terms of the Pilot Act, we find that Petitioner Loughry may now seek campaign contributions in support of his candidacy.” *Id.*

⁴ The matching funds concept under the Pilot Act was amended to create the current version of the Act.

Consistent with this Court's prior treatment and liberal interpretation of the Act, this Court should repeat the framework and analysis of the Act, as in *Loughry, supra*, by beginning with the proposition that it calls for liberal interpretation and carries a substantial compliance standard.

B. The WVSEC Correctly Found That Wooton Substantially Complied

The only challenge ultimately advanced by the Walker Campaign to Mr. Wooton's Certification under W. Va. Code §§ 3-12-1 *et. seq.*,⁵ was an objection to the filing of Mr. Wooton's Application for Certification that was filed on February 3, 2016.

As set forth above, W. Va. Code § 3-12-10(a) states "applicant shall file an application." There is no deadline otherwise set forth in the Act. W. Va. CSR § 146-5-6.1 does contain a two business day filing deadline (which would have made the Application due by February 2, 2016). However, the regulation does not contain any consequence for the filing of an application one day beyond the stated deadline.

This distinction was addressed by the WVSEC on February 5, 2016 in using a liberal interpretation of the Act to permit the Wooton application:

MR. COLLIAS:⁶ Yeah, I have a question. This is Gary Collias. Tim, isn't this the same issue that we had talked about where the regulations provided a time limit but the statute didn't, and we were basically giving people the benefit of the doubt and liberally interpreting the regulation because it conflicted with the statute?

MR. LEACH:⁷ Yes. It's the same argument I made in regard to the Walker campaign being denied the right to file challenges because they missed the two-day deadline, but there is no two-day deadline for the filing of challenges or for the filing of the request for certification in the statute. They were added by regulation and further restricted the rights of the individuals.

MR. COLLIAS: Right. So I mean if we're going to be consistent, let's just say we're being consistent with our earlier decision, then we would have to let the

⁵ Additional challenges were withdrawn by the Walker Campaign.

⁶ Member of the WVSEC.

⁷ Assistant Counsel for the Secretary of State.

Wooton campaign file this one day late.

Thus, the WVSEC did not find a violation. (JA at 497-498.)

Also as set forth above, the Act provides that *if* the WVSEC finds a violation of the Act, it may determine to impose a penalty or decertify. W. Va. Code §§ 3-12-16(d); 3-12-10(h). Because these subsections, working in concert, necessarily place discretion in the hands of the WVSEC, the WVSEC could have found that all reports and filings by Wooton, including the Application were in “substantial compliance” under the Act. Additionally, the WVSEC *could* have determined that the late filing of the Application constituted a violation of the Act, and imposed a penalty without disqualifying Wooton over the late filing. It is this ability to penalize a violation and yet still certify a petitioning candidate that necessarily makes the Act a substantial compliance standard. Given the intent of the statute, the remedial nature of the legislation, the prior timely announcement to become a “participating candidate” under the Act, and the timely filing of all required reports, the WVSEC properly found substantial compliance with the Act in determining to approve Wooton’s Application.

This result is consistent with this Court’s result in the *Loughry* case, *supra*. There, the Court overlooked a strict compliance interpretation of the subsection prohibiting private fundraising by a participating candidate. Strict construction of the statute would have forbidden such a result. Here, a liberal interpretation of the Act, coupled with the discretion afforded to the WVSEC to weigh the penalty for any violation of the Act, establishes that the WVSEC was correct in applying a substantial compliance standard notwithstanding the filing of the Application one day beyond the WVCSR deadline.

C. In The Event The Court Determines That The Filing of the Application One Day After The Guidelines Set Forth In The Code of State Regulations, Then The Consequences of Such Violation Should Be Remanded To The WVSEC For Exercise of The WVSEC's Discretion To Determine Whether Such Violation Warrants a Fine Or Decertification.

If the Court finds there was, in fact, a violation, this matter should be remanded back to the WVSEC to review the violation, as determined by this Court, and determine whether such violation warrants a fine or outright disqualification for public financing. Under the West Virginia Administrative Procedures Act: "The court may affirm the order or decision of the agency or remand the case for further proceedings." W. Va. Code § 29A-5-4(g); *see also In re Sommerville*, 178 W. Va. 694, 364 S.E.2d 20, Syl. Pt. 4 (1987) (When we are confronted with an inadequate record from an administrative agency subject to the supervision of this Court, such that we are unable to make a proper determination of the merits of the case, we will remand the case for additional factual development.).

CONCLUSION

WHEREFORE, the WVSEC respectfully requests that the Court (i) affirm the WVSEC certification of Mr. Wooton under the Act, (ii) if the Court finds a violation of the Act, remand the matter to the WVSEC in order to permit the WVSEC to exercise its statutory discretion to assess the weigh and penalty for such violation, and (iii) grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have on this the 17th day of March served the foregoing Brief electronically (as indicated) and via U.S. mail, postage prepaid as follows:

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A handwritten signature in cursive script, appearing to read "Richard L. Gottlieb".

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