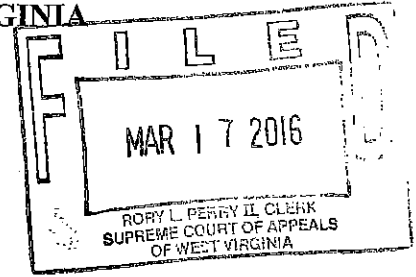


**IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

WILLIAM R. WOOTON,
Petitioner,

v.

No. 16-0226
(Circuit Court of Kanawha County
Civil Action No. 16-AA-13)



ELIZABETH D. WALKER, NATALIE E. TENANT,
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 PETITIONER WILLIAM R. WOOTON

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ELIZABETH D. WALKER, NATALIE E. TENANT,
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and JOHN D. PERDUE, West Virginia State Treasurer,

Respondents.

BRIEF OF PETITIONER WILLIAM R. WOOTON

I. 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 under West Virginia Code §§ 3-12-1, *et seq.*, was not valid.

II. STATEMENT OF THE CASE

Procedural History

On February 5, 2016, the West Virginia State Elections Commission certified the campaign of Petitioner William Wooton for funding to finance his run for a seat on this Court pursuant to West Virginia Code §§ 3-12-1, *et seq.* Respondent Walker challenged that decision in an action filed under the West Virginia Administrative Procedures Act, W. Va. Code §§ 29A-5-1, *et seq.* Mr. Wooton moved the Circuit Court to certify to this Court the following question:

Whether the West Virginia State Election Commission's certification of Respondent Wooton for public financing of his candidacy for the West Virginia Supreme Court under West Virginia Code §§ 3-12-1, *et seq.*, was valid.

The circuit court granted that motion. The above question is therefore before this Court on the basis

of the pleadings and the administrative record.

Statement of Facts

Petitioner Wooton and Respondent Walker are candidates for a seat on the West Virginia Supreme Court of Appeals. Each filed their announcements of candidacy during the period specified by West Virginia Code § 3-5-7. Mr. Wooton also filed a declaration of intent to participate in and qualify for public financing of his campaign under the West Virginia Supreme Court of Appeals Public Financing Program (“the Act”) in West Virginia Code §§ 3-12-1, *et seq.* Appendix (“App.”) at 1. Ms. Walker opted not to participate in the program. In compliance with that statute, on February 2, 2016 (the second business day following the close of the filing period) Mr. Wooton submitted records to the Secretary of State indicating that by the statutory deadline of January 30th (the last Saturday in January, see W. Va. Code § 3-12-3(15)) he had gathered the requisite number and amount of contributions to qualify for public financing under the statute. The only remaining statutory requirement that he needed to complete was to file his application with the State Elections Commission to be certified for funding, and a sworn statement that he had complied with the Act’s requirements.

The Code does not impose a deadline for when the application must be submitted, but W.V.C.S.R. § 146-5-6 provides that it be filed within two business days after the close of the qualifying period, which in this year was February 2. Mr. Wooton filed his application and sworn statement on February 3. App. at 2. Also on February 3, Respondent Walker filed a challenge giving notice to the Secretary of State that Mr. Wooton was not in compliance with C.S.R. § 146-5-6.1. App. at 5. In addition, Ms. Walker filed on that day challenges to the entirety of the contributions submitted by Justice Brent Benjamin, another candidate for the Court who was applying for public financing. App. at 291-93. The deadline for filing objections under the regulations was February 2. C.S.R. § 146-5-7.3.

Meeting on three consecutive days, the Commission first decided to permit Justice Benjamin’s campaign committee to file its final exploratory report on February 8 because it was

prevented from doing so by the February 3 deadline due to technical reasons in the Secretary of State's office. The Commission then also accepted 365 objections from Ms. Walker that were filed a day late. App. at 292, 308, 327-35, 478-88. The Commission then decided that the morning-after filing of Mr. Wooton's application for funding should not be a disqualifying fact and certified him for the public financing. App. at 497-503.

Standard of Review

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

In an administrative appeal under West Virginia Code § 29A-5 *et seq.* and Rule 2 of the West Virginia Rules of Procedure for Administrative Appeal, the Circuit Court is to reverse, vacate, or modify the agency's decision if:

[T]he substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dept. v. State ex rel. State of West Virginia Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *Curry v. W. Va. Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 778 S.E.2d 637, 638 (2015). "A reviewing court must evaluate the record of an administrative agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact,

regardless of whether the court would have reached a different conclusion on the same set of facts.” Syl. Pt. 1, *Walker v. W. Va. Ethics Comm’n*, 201 W. Va. 108, 109, 492 S.E.2d 167, 168-69 (1997).

III. SUMMARY OF ARGUMENT

The Legislature’s enactment of the Judicial Campaign Finance Act was prompted by serious concerns about the public’s perceptions concerning the integrity of Supreme Court races, and of our judicial system concerning the ever-increasing spending of privately raised funds in Court campaigns. The Act aspires to purposes that this Court has found to be “compelling.” *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 732 S.E.2d 507 (2012). Because the law is a significant reform measure, this Court must therefore “construe the statute liberally so as to furnish and accomplish all the purposes intended.” *See Barr v. NCB Mgmt. Servs. Inc.*, 227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011).

To obtain judicial review of an agency action under the APA, a party must be “adversely affected,” W. Va. Code § 29A-5-4(a), and to secure reversal or modification of an agency decision, a litigant must show that her “substantial rights . . . have been prejudiced” by the agency’s error. W. Va. Code § 29A-5-4(g). Ms. Walker cannot make the threshold demonstration that she has been adversely affected or that her substantial rights have been prejudiced by the action of the SEC in certifying Mr. Wooton’s campaign for funding. Ms. Walker remains free to continue her campaign for the Supreme Court unencumbered by any ruling that the SEC has made regarding Mr. Wooton’s certification for funding.

Nor is Respondent Walker’s challenge to Mr. Wooton’s application for funding allowed by the Judicial Campaign Finance Act. Section 3-12-10(g) provides that “[a]ny person may challenge the validity of any contribution listed by a participating candidate by filing a written challenge with the State Election Commission[,]” but nothing in the statute confers on anyone the ability to challenge the validity of a candidate’s application for funding.

The state election commission had discretion to accept Respondent Wooton’s application and

to certify him for public financing, and it appropriately exercised that discretion. According to West Virginia Code § 3-12-10(h), “[a] candidate’s certification and receipt of public campaign financing *may* be revoked by the State Election Commission, if the candidate violates this article,” clearly communicating that the Commission has discretion with regard to enforcement of the Act’s provisions. The Commission had compelling reasons for accepting Mr. Wooton’s application and certifying him for public funding. They included:

- The statute does not impose a deadline for filing the application. Section 3-12-10 merely states that “to be certified, a participating candidate shall apply to the [SEC].” The two business days requirement was added by the Commission in the rules as an administrative guide and imposes no obligation on the Commission to reject applications that are filed after the two days.
- The application is a *pro forma* step in the process; it comes after the candidate has filed his candidacy papers, his periodical reporting forms, and his supporting signatures and qualifying contributions. This Court has repeatedly held that noncompliance with technical provisions of the election laws does not constitute grounds for disqualifying a candidate. *E.g.*, *State v. Bd. of Canvassers*, 87 W. Va. 472, 105 S.E. 695 (1921) (excusing candidate’s late filing of financial statements); *State ex rel. Hall v. Gilmer County Court*, 87 W. Va. 437, 105 S.E. 693, 694-95 (1921) (candidate not disqualified for late filing of a financial statement).
- The late filing caused no harm and prejudiced no one – other than Mr. Wooton – and no other consequences resulted from it. The “general rule” is that “it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules for the orderly transaction business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.” *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970).

- Denying public funding for a tardy filing of an application would impose a penalty far out of proportion to the lapse and would, at the same time, defeat the important reform goals of the statute. Nowhere does the Act require such a Draconian measure. Refusing to certify a candidate for funding solely because he or she failed to meet any one of the Act's many procedural requirements would thwart the statute's election reform purposes.
- The Commission decision to accept Wooton's application for funds allowed the SEC to provide equal treatment to the candidates because it had previously applied its rules flexibly to allow Justice Benjamin's request for funding to proceed and to consider Respondent Walker's objections that were filed after the regulatory deadline.
- Respondent Wooton was in substantial compliance.

A legislative rule may be set aside if "the agency has exceeded its statutory authority or is arbitrary or capricious," *Grim v. Eastern Electric, LLC*, 234 W. Va. 557, 565, 767 S.E.2d 267, 275 (2014); *Griffith v. Frontier West Virginia, Inc.*, 228 W. Va. 277, 289, 719 S.E.2d 747, 759 (2010), or is inconsistent with "the legislative intent expressed in the controlling or substantive statute which the rule is promulgated to implement. *Harrison*, 226 W. Va. at 31, 697 S.E.2d at 67. In this case, W.V.C.S.R. § 146-5-6.1 crosses the line. The two-day requirement serves no purpose; it creates an extremely abbreviated time period that operates as a substantial obstacle to fulfilling the Act's compelling purposes without a reason. That is arbitrary. See *Thorne v. Roush*, 164 W. Va. 165, 261 S.E.2d 72 (1979); *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977).

Legislative rule C.S.R. § 146-5-6.1, the rule upon which Ms. Walker relies to challenge Mr. Wooton's day-after filing of his application, also provides that all challenges "must be filed with, and received by, the Secretary within two business days after the close of the qualifying period." W.V.C.S.R. § 146-5-7.3 Ms. Walker filed her challenges to both Mr. Wooton and Justice Benjamin on February 3, which was *three* business days after the qualifying period closed. Respondent Walker

cannot have it both ways. Either the deadlines in the regulation control, in which case her challenge was filed out of time and is barred, or the Commission appropriately ruled to give primacy to the statute's goals and to apply its rules flexibly in accepting the submissions of Justice Benjamin, Ms. Walker, and the petitioner.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Court has previously scheduled this case for Oral Argument on March 23, 2016.

V. ARGUMENT

A. THE WEST VIRGINIA JUDICIAL CAMPAIGN FINANCE ACT, WEST VIRGINIA CODE §§ 3-12-1, *et seq.*, IS A REFORM LAW THAT CALLS FOR A LIBERAL APPLICATION.

After finding that fund raising and spending in State Supreme Court elections has been steadily escalating and causing systemic problems, the West Virginia Legislature enacted the Judicial Campaign Finance Act, W. Va. Code §§ 3-12-1, *et seq.*, to “ensure 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[.]” W. Va. Code § 3-12-2(10). According to § 3-12-2:

(8) As spending by candidates and independent parties increases, so does the perception that contributors and interested third parties hold too much influence over the judicial process;

(9) The detrimental effects of spending large amounts by candidates and independent parties are especially problematic in judicial elections because impartiality is uniquely important to the integrity and credibility of courts;

(10) As demonstrated by the 2012 West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, 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; and

(11) Funding the "West Virginia Supreme Court of Appeals Public Campaign Financing Program" from a wide range of revenue sources furthers important state interests in protecting the integrity of judicial elections and serves to protect the public interest.

Undoubtedly, the Legislature was reacting to developments in past West Virginia Supreme Court races that cast a pall on the public's perceptions about the impartiality of the Court and threatened to undermine the Court's legitimacy. *See, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

The statute takes aim at critically important and lofty goals. Such reform efforts call for a liberal construction of the Act to accomplish its intended purposes. *E.g., Peyton v. Rowe*, 392 U.S. 54, 65 (1968); *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 92, 569 S.E.2d 162, 168 (2002); *Plummer v. Workers' Compensation Division*, 209 W. Va. 710, 551 S.E.2d 46 (2001). "Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended." *See Barr v. NCB Mgmt. Servs. Inc.*, 227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011) (quotation marks and citations omitted). The Judicial Campaign Finance Act is clearly such a measure.

B. RESPONDENT WALKER CANNOT STATE A CLAIM UNDER EITHER THE WEST VIRGINIA ADMINISTRATIVE PROCEDURES ACT OR THE JUDICIAL CAMPAIGN FINANCING ACT.

Respondent Walker attempts to invoke the provisions of the West Virginia Administrative Procedures Act ("APA"), W. Va. Code §§ 29A-5-1, *et seq.*, to challenge the decision of the State Elections Commission ("SEC") to grant public financing for Petitioner Wooton's campaign for Justice of the Supreme Court pursuant to West Virginia Code § 3-12-10. Neither the APA nor the Campaign Financing Act provide her with a claim.

To obtain judicial review of an agency action under the APA, a party must be "adversely affected," W. Va. Code § 29A-5-4(a), and to secure reversal or modification of an agency decision, a litigant must show that her "substantial rights . . . have been prejudiced" by the agency's error. W. Va. Code § 29A-5-4(g); *accord, e.g., Webb v. West Virginia Board of Medicine*, 212 W. Va. 149, 154, 569 S.E.2d 225, 230 (2002); Syl. Pt. 2, *Shepherdstown Volunteer Fire Dept. v. State ex rel.*

State of West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983). Ms. Walker cannot make the threshold demonstration that she has been adversely affected or that her substantial rights have been prejudiced by the action of the SEC in certifying Mr. Wooton's campaign for funding.

The decision of the State Election Commission ("SEC" or "Commission") to certify Petitioner Wooton for public funding of his campaign for a seat on the West Virginia Supreme Court of Appeals does not impair any legally cognizable "right" of the Respondent. Ms. Walker remains as free to pursue her own candidacy for the Court as if certification had been denied. The certification creates no obstacle and imposes no impediment on Respondent to educate the public about her campaign.

To be sure, the certification in no way infringes on Ms. Walker's free speech rights, as claimed in her petition in the lower Court. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" The Amendment has been construed to prohibit, through the Fourteenth Amendment, all levels and manner of government from "abridging" the freedom of speech. "Abridge" means to "diminish, curtail, . . . deprive, cut off." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 6 (unabridged 2nd ed. 1987). The Commission's actions have in no way diminished or curtailed Respondent's opportunity to promote her candidacy. When government sponsors speech or engages in its own speech, it does not "abridge" the speech of anyone. *E.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring); *Men and Women Against Discrimination v. The Family Services Protection Board*, 229 W. Va. 55, 725 S.E.2d 756 (2011).

That the certification of Mr. Wooton for funding might lessen Ms. Walker's prospects for winning the election is simply not a legally cognizable injury. There is a right to run for office, *e.g.*, *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 460 S.E.2d 436 (1995), but there is no right to run without opposition. That denying Mr. Wooton public funding would in fact lessen

petitioner's prospects is also completely speculative. Denial would simply force him to raise private funds to support his candidacy, which would have the effect of impairing the salutary purposes that the Legislature had in providing for public financing of judicial election campaigns would be thwarted. *See* Part III, *supra*.

Nor is Respondent Walker's challenge to Mr. Wooton's application for funding allowed by the Judicial Campaign Finance Act. Section 3-12-10(g) provides that "[a]ny person may challenge the validity of any contribution listed by a participating candidate by filing a written challenge with the State Election Commission[.]" but nothing in the statute confers on anyone the ability to challenge the validity of a candidate's application for funding. The Legislature clearly deemed the mechanical step of merely requesting public financing to be one that does not call for allowing an opportunity for protest. The statute simply does not make a lapse in filing the application the basis for challenging an SEC decision to certify a candidate for funding.

C. THE STATE ELECTION COMMISSION HAD DISCRETION TO ACCEPT PETITIONER WOOTON'S APPLICATION AND TO CERTIFY HIM FOR PUBLIC FINANCING, AND IT APPROPRIATELY EXERCISED THAT DISCRETION.

While W. Va. C.S.R. § 146-5-6.1 does state that "a candidate who desires to apply for public funding shall file an Application for Certification with the Secretary" after collecting qualifying signatures and contributions and "no later than two business days after the close of the qualifying period," nowhere in the Code or the regulations is there any provision that states that the failure to meet that deadline requires disqualification from public funding. What the Code does say is that "[a] candidate's certification and receipt of public campaign financing *may* be revoked by the State Election Commission, if the candidate violates this article," W. Va. Code § 3-12-10(h) (emphasis added), clearly communicating that the Commission has discretion with regard to enforcement of the Act's provisions. If the Commission may revoke certification for serious violations and decide not to revoke for noncompliance with ministerial provisions, then it can exercise that same discretion with regard to the initial decision on certification.

The Commission had compelling reasons for accepting Mr. Wooton's application and

certifying him for public funding. They included:

- The statute does not impose a deadline for filing the application. Section 3-12-10 merely states that “to be certified, a participating candidate shall apply to the [SEC].” The two business days requirement was added by the Commission in the rules as an administrative guide, and imposes no obligation on the Commission to reject applications that are filed after the two days. The failure to file the application within two business days creates no adverse consequences for anyone, other than the candidate himself. Nothing rides on the application for funding, other than it is a mechanical prerequisite for the issuance of a check.
- The application is a *pro forma* step in the process; it comes after the candidate has filed his candidacy papers, his periodical reporting forms, and his supporting signatures and qualifying contributions. The form merely asks for the public funding and states that the candidate has complied with the requirements of the Act. No public interests were implicated by the morning-after filing. Unlike with candidacy filing deadlines, where notice to the public of a candidacy is important, no such concerns applied to filing the application for funds. This Court has repeatedly held that noncompliance with technical provisions of the election laws does not constitute grounds for disqualifying a candidate. *E.g.*, *State v. Bd. of Canvassers*, 87 W. Va. 472, 105 S.E. 695 (1921) (excusing candidate’s late filing of financial statements); *State ex rel. Hall v. Gilmer County Court*, 87 W. Va. 437, 105 S.E. 693, 694-95 (1921) (candidate not disqualified for late filing of a financial statement); *see also State ex rel. Bumgardner v. Mills*, 132 W. Va. 580, 595, 53 S.E.2d 416, 427-8 (1949) (“the failure of a candidate who receives the highest number of votes in an election to file [the statement of financial transactions] does not relieve the board of its plain statutory duty to issue to him a certificate of the result of the election”); *State ex rel. Zickefoose v. West*, 145 W. Va. 498, 533-34, 116 S.E.2d 398, 417 (1960) (noting that

argument that nominee could be disqualified based on failure to file required financial statements has been expressly disapproved by decisions of this Court); *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1985).

- The late filing caused no harm, prejudiced no one – other than Mr. Wooton – and no other consequences resulted from it. The “general rule” is that “it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules for the orderly transaction business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.” *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970), *quoting NLRB v. Monsanto Chemical Company*, 205 F.2d 763, 764 (8th Cir. 1953); *accord, Presley v. Bell South Communications, Inc.*, 1998 U.S. App. Lexis 21630 at 6 (4th Cir. 1998); *Moon v. United States of America*, 1996 U.S. App. Lexis 14955 at 9-10 (4th Cir. 1998).
- Denying public funding for a tardy filing of an application would impose a penalty far out of proportion to the lapse and would, at the same time, defeat the important reform goals of the statute. Nowhere does the Act require such a Draconian measure, and the Commission would exercise poor judgment to read one into the Act. Refusing to certify a candidate for funding solely because he or she failed to meet anyone of the Act’s many procedural requirements would thwart the statute’s election reform purposes. The Commission was justified in concluding that candidate participation in the public funding program is to be preferred over an interpretation of the Act that would undercut its goals.
- The Commission decision to accept Wooton’s application allowed the SEC to provide equal treatment to the candidates. By the time that the Commission made the decision on Wooton, it had already allowed Justice Benjamin’s campaign committee to file its final exploratory report beyond the deadline because of technical

problems in the Secretary's system, and further accepted 365 objections from Ms. Walker that were filed a day late. App. at 292, 308, 327-35, 478-88. Having treated the deadlines in those cases as subject to waiver, the Commission could not equitably treat Mr. Wooton's application differently, at least not without a very good reason. App. at 497-503.

- Respondent Wooton was, in any event, in substantial compliance. The deadline, extremely short to begin with, was February 2nd, and Wooton filed his application the next morning, just hours past the deadline. App. at 501. The West Virginia Supreme Court has permitted "substantial compliance" with deadlines and other requirements to be sufficient compliance where the equities justify it. *E.g., State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996); *State ex rel. Smith v. Kelly*, 149 W. Va. 381, 141 S.E.2d 142 (1965); *Morgan v. O'Brien*, 134 W. Va. 1, 60 S.E.2d 722 (1948).

D. THE TWO-BUSINESS DAY DEADLINE IN W. VA. C.S.R. § 146-5-6.1 EXCEEDED THE COMMISSION'S AUTHORITY, IS ARBITRARY AND CAPRICIOUS, AND IS THEREFORE INVALID.

As a legislative rule, W. Va. C.S.R. § 146-5-6.1 is entitled to substantial deference, but "that deference has bounds." *Harrison v. Commissioner, Division of Motor Vehicles*, 226 W. Va. 23, 31, 697 S.E.2d 59, 67 (2010). A legislative rule may be set aside if "the agency has exceeded its statutory authority or is arbitrary or capricious," *Grim v. Eastern Electric, LLC*, 234 W. Va. 557, 565, 767 S.E.2d 267, 275 (2014); *Griffith v. Frontier West Virginia, Inc.*, 228 W. Va. 277, 289, 719 S.E.2d 747, 759 (2010), or is inconsistent with "the legislative intent expressed in the controlling or substantive statute which the rule is promulgated to implement. *Harrison*, 226 W. Va. at 31, 697 S.E.2d at 67. In this case, § 146-5-6.1 crosses the line drawn by the cited authorities.

Although the Campaign Finance Act is replete with deadlines, *e.g.*, W. Va. Code §§ 3-12-3(14), 3-12-7, 3-12-8(d), 3-12-9(f) & (g), and 3-12-10(d), (e), & (g), the section requiring a participating candidate to file an application and sworn statement of compliance notably does not

impose a time frame. W. Va. Code § 3-12-10(a). (As cited, the Legislature did include deadlines in subsections (d), (e), and (g) of § 3-12-10, but did not include one in subsection (a).) That no doubt reflects a legislative judgment that the step of making application is a ministerial step in the process that affects no one's rights other than the candidate's and does not need a deadline. Moreover, the two-day requirement serves no purpose; it creates an extremely abbreviated time period that operates as a substantial obstacle to fulfilling the Act's compelling purposes without a reason. That is what this Court has defined as "arbitrary," *e.g.*, *Thorne v. Roush*, 164 W. Va. 165, 261 S.E.2d 72 (1979) (one year apprenticeship requirement for graduates of barber school served no valid purpose and was arbitrary); *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977) (30-day notice of claim prerequisite to suing city in tort imposed a substantial burden on litigation rights without advancing a legitimate interest), and assuredly makes the regulation one that is beyond the Commission's authority. It cannot be that the Legislature authorized the Commission to create a substantial barrier to achieving the Act's pressing goals that serves no public or administrative purpose.

The foregoing is reinforced by subsection (b) in § 3-12-10, which sets forth the facts that the Commission must determine to find a candidate qualified to receive public financing. The subsection states:

(b) Upon receipt of a notice from the Secretary of State that a participating candidate has received the required number and amount of qualifying contributions, the State Election Commission shall determine whether the candidate or candidate's committee:

- (1) Has signed and filed a declaration of intent as required by section seven of this article;
- (2) Has obtained the required number and amount of qualifying contributions as required by section nine of this article;
- (3) Has complied with the contribution restrictions of this article;
- (4) Is eligible, as provided in section nine, article five of this chapter, to appear on the nonpartisan judicial election ballot; and
- (5) Has met all other requirements of this article.

There is no room in that section for, and no authorization to the Commission to create, a requirement that the candidate must request public financing within two business days after the end of the qualifying period.

- E. ASSUMING THAT THE STATUTE PERMITS A CHALLENGE TO AN APPLICATION FOR FUNDING, RESPONDENT WALKER'S CHALLENGE TO PETITIONER'S APPLICATION WAS NOT TIMELY FILED, AND EQUITY PRECLUDES HER FROM PROCEEDING.

Respondent Walker challenges Petitioner's application for funding because he did not meet the deadline stated in C.S.R. § 146-5-6.1 of filing two business days after the close of the qualifying period. The very same legislative rule, however, also provides that all challenges "must be filed with, and received by, the Secretary within two business days after the close of the qualifying period." W.V.C.S.R. § 146-5-7.3¹ Ms. Walker filed her challenges on February 3, App. at 5, *three* business days after the qualifying period closed. Nevertheless, the Commission accepted her challenges to give effect to the statute (as opposed to the regulation), to promote the law's purposes, and to achieve fairness. The Commission then concluded that the same sort of equities should govern the decision on Mr. Wooton:

MR. COLLIAS: Yeah, I have a question. This is Gary Collias. Tim [Tim Leach, Counsel to the Secretary of State], 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: 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 Wooton campaign file this one day late.

App. at 497-8.

¹As noted in Part I, *supra*, the operative Code provision, W. Va. Code § 3-12-10(g), and the regulation authorize challenges only as to qualifying contributions. This section assumes that a timely filed challenge could also be made against applications for funding.

Respondent Walker cannot have it both ways. Either the deadlines in the regulation control, in which case her challenge was filed out of time and is barred, or the Commission appropriately ruled to give primacy to the statute and to do equity by permitting Justice Benjamin to file his final exploratory report out of time because of technical problems in the Secretary's system, by accepting Ms. Walker's day-late challenges, and by accepting Petitioner's application and certifying him for funding.

VI. CONCLUSION

This Court must answer the certified question and hold that the Commission's decision to certify and provide funding for Petitioner Wooton's Supreme Court campaign was valid, and return this case to the Circuit Court with directions to dismiss the Petition filed therein.



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**IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

WILLIAM R. WOOTON,

Petitioner,

v.

No. 16-0226
(Circuit Court of Kanawha County
Civil Action No. 16-AA-13)

ELIZABETH D. WALKER, NATALIE E. TENANT,
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.


CERTIFICATE OF SERVICE

I, Robert V. Berthold, Jr., co-counsel for Petitioner herein, do hereby certify that I have served a copy of the foregoing *Brief of Petitioner William R. Wooton*, via e-mail, and by placing a true copy, postage prepaid, in the United States mail on this 17th day of March, 2016, upon the following:

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