

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE ex rel. KEN MacPHERSON,	:	PER CURIAM OPINION
Relator,	:	
- vs -	:	CASE NO. 2011-T-0028
TRUMBULL COUNTY BOARD OF ELECTIONS,	:	
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Petition denied.

Harry J. DePietro, The DePietro Law Office, L.L.C., 7 West Liberty Street, Girard, OH 44420 (For Relator).

Dennis Watkins, Trumbull County Prosecutor, and *James T. Saker*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent).

PER CURIAM.

{¶1} This is an expedited election action for a writ of mandamus to compel a board of elections to place a candidate’s name on the May 3, 2011 primary election ballot for a city council seat. Because the board of elections neither abused its discretion nor acted in clear disregard of applicable law by upholding a protest to the relator’s candidacy, we deny the writ.

{¶2} **Substantive Facts and Procedural History**

{¶3} Ken MacPherson, relator, filed a declaration of candidacy and petition to be a Democratic candidate for one of the three at-large seats on the Warren City Council. The Trumbull County Board of Elections initially certified him as a candidate for the race. On February 17, 2011, Bill Kruppa, another Democratic candidate in the same race, filed a written protest against Mr. MacPherson's declaration and petition. He claimed Mr. MacPherson is a resident of Howland Township, not the city of Warren.

{¶4} On March 4, 2011, the board of elections held a hearing on Mr. Kruppa's protest pursuant to R.C. 3513.05. Both Mr. MacPherson, who was represented by counsel, and Mr. Kruppa appeared at the hearing and provided testimony. After the hearing, the members of the board voted unanimously to uphold the protest and to declare Mr. MacPherson's candidacy invalid.

{¶5} On March 8, 2011, Mr. MacPherson filed a petition in this court requesting a writ of mandamus to compel the board of elections to place his name on the May 3, 2011 Democratic primary ballot. On the same day, this court issued an alternative writ directing respondent, the Trumbull County Board of Elections, to file an answer within three days, pursuant to the local rules. On March 11, 2011, the board filed "Respondent's Answer and Motion to Dismiss under Ohio Civ.R. 12(B)(6)." On March 14, 2011, Mr. MacPherson filed "Relator's Rebuttal and Memo Contra to Respondent's Motion to Dismiss." The parties each separately stipulated to the transcript of the March 4, 2011 hearing, including the exhibits, as the sole evidentiary submission in this matter.

{¶6} This cause is now before us for a consideration of respondent's "Answer and Motion to Dismiss under Ohio Civ.R. 12(B)(6)." First, we overrule the motion to dismiss because such a motion is inappropriate in expedited election cases. See *State*

ex rel. N. Main St. Coalition v. Webb (2005), 106 Ohio St. 3d 437, 2005-Ohio-5009, ¶20.

Instead, we proceed to consider the final merits in this case.

{¶7} **Mandamus**

{¶8} “To be entitled to the requested writ, relator[] must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of the secretary of state [and the board of elections] to provide it, and the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, ¶8, quoting *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 2007-Ohio-5838, ¶13.

{¶9} Because of the proximity of the May 3, 2011 election, Mr. MacPherson has established that he does not have an adequate remedy in the ordinary course of the law. *Id.*, citing *State ex rel. Greene v. Montgomery Cty. Bd. of Elections*, 121 Ohio St.3d 631, 2009-Ohio-1716, ¶10.

{¶10} “For the remaining requirements, ‘[i]n extraordinary actions challenging the decisions of the Secretary of State and boards of elections, the standard is whether they engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions.’” *Id.* at ¶9, quoting *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, ¶11.

{¶11} **Pertinent Election Statutes: R.C. 731.02 and R.C. 3503.02**

{¶12} R.C. 731.02 governs the qualifications of members of a municipal legislative authority. It states:

{¶13} “Members of the legislative authority at large shall have resided in their respective cities, and members from wards shall have resided in their respective wards,

for at least *one year immediately preceding their election*. Each member of the legislative authority shall be an elector of the city, shall not hold any other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment with said city. A member who ceases to possess any of such qualifications, or removes from the member's ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit the member's office.

{¶14} “The purpose of establishing a one-year residency requirement in this section is to recognize that the state has a substantial and compelling interest in encouraging qualified candidacies for election to the office of member of the legislative authority of a city by ensuring that a candidate for such office has every opportunity to become knowledgeable with and concerned about the problems and needs of the area the candidate seeks to represent. In enacting this requirement, the general assembly finds that the one-year period is reasonably related to this purpose, while leaving unimpaired a person's right to travel, to vote, and to be a candidate for public office.” (Emphasis added.)

{¶15} “In election cases involving candidate-residence issues, the court applies R.C. 3503.02.” *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 115 Ohio St.3d 405, 2007-Ohio-5346, ¶11, quoting *State ex rel. Stine v. Brown Cty. Bd. of Elections* (2004), 101 Ohio St.3d 252, 2004-Ohio-771, ¶15. That statute states, in pertinent part:

{¶16} “All registrars and judges of elections, in determining the residence of a person offering to register or vote, shall be governed by the following rules:

{¶17} “(A) That place shall be considered the residence of a person in which the person’s habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.

{¶18} “(B) A person shall not be considered to have lost the person’s residence who leaves the person’s home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.

{¶19} “(C) A person shall not be considered to have gained a residence in any county of this state into which the person comes for temporary purposes only, without the intention of making such county the permanent place of abode.

{¶20} “(D) The place where the family of a married person resides shall be considered to be the person’s place of residence; except that when the spouses have separated and live apart, the place where such a spouse resides the length of time required to entitle a person to vote shall be considered to be the spouse’s place of residence.”

{¶21} Conflicting Evidence Regarding Relator’s Residence

{¶22} Here, although Mr. MacPherson claims to be a Warren city resident during the entire one-year period preceding the election to be held on November 8, 2011, there is conflicting evidence concerning Mr. MacPherson’s residence.

{¶23} In an affidavit submitted to the board of elections, Mr. MacPherson stated he resides at 331 Central Parkway Avenue, Warren, Ohio, and that he has resided within the city of Warren since August 22, 2009, when he married Cindy A. Michael, who resides at that address. He also stated the Howland residence is his father’s home and he has no intention of returning to that residence.

{¶24} At the hearing MacPherson submitted (1) a mortgage loan statement, dated November 1, 2010, sent to him at the 331 Central Parkway address; (2) a bank statement for the period between July 27, 2010 through August 24, 2010, which shows his address at 331 Central Parkway; (3) a home loan statement for September 2010 showing his address as 331 Central Parkway; and (4) copies of city of Warren utilities bills dated February 6, 2010 and December 6, 2010, showing his address as 331 Central Parkway.

{¶25} On the other hand, Mr. MacPherson voted as a registered voter residing at 470 Quarry Lane in Howland Township in 2006, 2007, 2008, 2009, and as late as on November 2, 2010, after his marriage to a Warren resident. Thus, he voted in Howland in not one but two general elections after his marriage. Furthermore, in a June 2010 Warren Municipal court case, his address was listed as 470 Quarry Lane.

{¶26} A certificate of voter registration, dated January 18, 2011, shows Mr. MacPherson changed his residence to 331 Central Parkway Avenue, Warren. His driver's license, issued on his birthday, January 18, 2011, shows his address as 331 Central Parkway Avenue. Regarding his municipal income tax filing, he has yet to file a personal income tax return in the city of Warren for tax years 2009 or 2010; he testified he made tax payments to Warren for tax years 2009 and 2010 in January of 2011, although he does not have documentation of the payment.

{¶27} Therefore, there is conflicting evidence as to Mr. MacPherson's residence during the one year immediately preceding the election on November 8, 2011.

{¶28} We recognize that the place where the family of a married person resides shall be considered to be the person's place of residence pursuant to R.C. 3503.02(D).

Yet, at the same time, we must construe his voting as a Howland resident in November 2009 and on November 2, 2010, both of which occurred *after* his marriage, as a declaration of his residence in that township. At the protest hearing, Mr. MacPherson claimed he has multiple residences. Yet, R.C. 3503.02 does not contemplate multiple residences for election purposes.¹ Therefore, Mr. MacPherson's residence must be deemed to be the Howland address as of November 2, 2010.

{¶29} It follows, then, that in order to show Mr. MacPherson's residence as being in Warren during the year preceding the election date, there must be evidence of some affirmative act by Mr. MacPherson changing his residence to Warren in the crucial window of time between November 2, 2010 and November 8, 2010. The evidence in the record does not demonstrate such an act within that window of time. He changed his residence to Warren on his driver's license and in his voter registration, and paid taxes to Warren, all in January 2011, after the critical time had passed.

{¶30} *At best*, the record reflects conflicting evidence as to Mr. MacPherson's residence during the one-year period preceding November 8, 2011. As the Supreme Court of Ohio has instructed regarding election matters, when there is conflicting evidence on an issue, we are not to substitute our judgment for that of the board of elections. *Stine* at ¶21, citing *State ex rel. Commt. for the Referendum of Lorain Ord.* 77-01, 96 Ohio St.3d 308, 2002-Ohio-4194, ¶47, quoting *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections* (2000), 88 Ohio St.3d 182, 185. The court in *Stine* stressed that it had applied this principle to deny writs challenging decisions of boards of elections on candidate-residence issues, finding no abuse of discretion when the board reaches its decision based on substantial though conflicting evidence. *Stine*,

1. See OAG No. 2002-025 (2002).

citing *Herdman v. Franklin Cty. Bd. Of Elections* (1993), 67 Ohio St.3d 593, 596; *State ex rel. Clinard v. Greene Cty. Bd. of Elections* (1990), 51 Ohio St.3d 87, 88.

{¶31} Therefore, after careful review of the transcript of the hearing before the board of elections, the affidavit, and the exhibits submitted by the parties, we must conclude the board of elections did not abuse its discretion, engage in fraud or corruption, or act in clear disregard of applicable legal provisions when it upheld the challenge to Mr. MacPherson's candidacy. In this mandamus action, Mr. MacPherson has the burden of establishing a clear legal right to be qualified as a candidate under R.C. 3503.02, and he fails to do so. See *State ex rel. Eaton v. Erie Cty. Bd. of Elections*, 6th Dist. No. E-05-065, 2006-Ohio-966.

{¶32} Because relator cannot establish all necessary elements in this mandamus action, respondent is entitled to final judgment in this matter. It is the order of this court that final judgment is hereby entered in favor of respondent.

TIMOTHY P. CANNON, P.J., MARY JANE TRAPP, J., THOMAS R. WRIGHT, J.,
concur.