**DENY; and Opinion Filed May 10, 2018.**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-18-00542-CV**

**IN RE CHRISTOPHER D. MARTIN, Relator**

**Original Proceeding from**
**Van Zandt County[1], Texas**

## MEMORANDUM OPINION

Before Justices Francis, Evans, and Schenck
Opinion by Justice Evans

Before the Court is relator's petition for writ of mandamus in which he seeks a writ ordering the Van Zandt County Republican Party Chair to declare real party in interest Tina Marie High Brumbelow ineligible to be a candidate in the May 22, 2018 run-off election for the office of judge of the 294th Judicial District Court of Van Zandt County. Relator, also a candidate for the same position, contends that public documents conclusively establish that Brumbelow is ineligible because she was not registered to vote in the district for six months prior to the election filing deadline as required by sections 141.001(5) and 141.001(6) of the election code. *See* TEX. ELEC. CODE § 141.001. For the reasons stated below, we deny the petition.

[1] Although originally filed in the Twelfth District Court of Appeals and docketed as case number 12-18-00115-CV, this original proceeding was transferred to this Court pursuant to Tex. Gov't Code § 73.001. *See* TEX. SUP. CT. ORDER, Misc. Docket No. 18–9072 (May 10, 2018).

This Court has jurisdiction to consider a request for mandamus relief and to "compel the performance of any duty imposed by law in connection with the holding of an election ... regardless of whether the person responsible for performing the duty is a public officer." TEX. ELEC. CODE ANN. § 273.061; *see also* TEX. GOV'T CODE ANN. § 22.221 ("Each court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court."). This standard is in line with the traditional use of the writ of mandamus to compel the performance of a ministerial act or duty. *Wentworth v. Meyer*, 837 S.W.2d 148, 151 (Tex. App.—San Antonio 1992, orig. proceeding). Consequently, we have no authority to resolve factual disputes. *In re Link*, 45 S.W.3d 149, 152 (Tex. App.—Tyler 2000, orig. proceeding). Further, neither the election code nor our general mandamus authority permits us to simply declare a candidate ineligible. *In re Cullar*, 320 S.W.3d 560, 565 (Tex. App.—Dallas 2010, orig. proceeding). Instead, we may issue mandamus only when the record shows that the respondent has failed to perform a "duty imposed by law." ELEC. CODE § 273.061*; see also In re Armendariz*, 245 S.W.3d 92, 94 (Tex. App.—El Paso 2008, orig. proceeding) (noting that mandamus relief is appropriate when the record establishes "a clear abuse of discretion or the violation of a duty imposed by law"). Additionally, the relator must show that a demand for the performance was made and denied. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (noting that, as a general rule, mandamus is not available to compel an action that has not first been demanded and refused).

Moreover, mandamus is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles. *Id.* One such principle is that "equity aids the diligent and not those who slumber on their rights." *Id.* Thus, delaying the filing of a petition for mandamus relief may waive the right to mandamus unless the relator can justify the delay. *In re Int'l Profit Assocs., Inc.*, 274

S.W.3d 672, 676 (Tex. 2009) (orig. proceeding). "Two essential elements of laches are (1) unreasonable delay by one having legal or equitable rights in asserting them; and (2) a good faith change of position by another to his detriment because of the delay." *Rogers v. Ricane Enters.*, 772 S.W.2d 76, 80 (Tex. 1989).

Here, relator challenged Brumbelow's eligibility almost two months after the primary election took place in which Brumbelow accumulated sufficient votes to be eligible for the runoff election. Relator filed this original proceeding less than a week before early voting by appearance begins in the run-off election. Relator has not explained if he investigated Brumbelow's eligibility before the primary and, if not, why he did not do so. He also has not sufficiently explained why he did not challenge Brumbelow's eligibility sooner. The timing of relator's complaint and this original proceeding have effectively deprived Brumbelow of any opportunity to meaningfully respond, to marshal responsive facts and law, and to obtain counsel at a time in which she could meaningfully defend his allegations before the early voting deadline. Under these circumstances, we conclude that relator's complaint is barred by laches.

We also conclude that the record does not conclusively establish that Brumbelow is ineligible to be a candidate for the office sought. Section 145.003 of the election code provides the procedures for obtaining a declaration that a candidate is ineligible for office. TEX. ELEC. CODE ANN. § 145.003. A candidate may be declared ineligible only if: (1) the information on the candidate's application for a place on the ballot indicates that the candidate is ineligible for office; or (2) facts indicating that the candidate is ineligible are conclusively established by another public record. *Id.* § 145.003(f). When the appropriate authority is presented with an application for a place on that ballot or another public record containing information pertinent to a candidate's eligibility, the appropriate authority shall promptly review the record. *Id.* § 145.003(g). If the record conclusively establishes that a candidate is ineligible, the authority must declare the

candidate ineligible. *Id.* An authority's obligation to declare a candidate ineligible when required to do so under section 145.003 is a "duty imposed by law" and is subject to mandamus relief. *See id.* § 273.061; *see also In re Sanchez*, 366 S.W.3d 255, 257 (Tex. App.—San Antonio 2012, orig. proceeding) (explaining that party chairman had duty to declare candidate ineligible if public record established that candidate was ineligible and, because he did not, mandamus relief would be appropriate).

Here, relator contends that public records conclusively demonstrate Brumbelow's ineligibility, and he has presented these records to the Court with his petition for writ of mandamus. He relies on certified computer printouts of what purport to be documentation showing that Brumbelow's voter registration was transferred from Smith County to Van Zandt County on November 29, 2017, and Smith County voting records showing Brumbelow last voted in a Smith County election on November 8, 2016. Relator has not shown that the registration records are conclusive or even reliable to the point that would compel the Chair to remove Brumbelow from the ballot. Further, none of the records submitted by relator establish that Brumbelow was not registered to vote in Van Zandt County prior to the November 29, 2017 transfer. Under this record, we conclude relator has not conclusively established Brumbelow's ineligibility.

Accordingly, we deny relator's petition for writ of mandamus. Due to the time sensitive nature of the issues presented, the Court will not entertain motions for rehearing.

/David Evans/
DAVID EVANS
JUSTICE

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