

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: NOMINATION PAPER OF
ELIZABETH FAYE SCROGGIN ET
AL.

: No. 460 M.D. 2020
:
: Objections of Paul Stefano and
: Tony C. Thomas – Objectors
:
:
: **APPLICATION FOR SUMMARY**
: **RELIEF PURSUANT TO PA.R.A.P**
: **1532**
:
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: This Party:
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APPLICATION FOR SUMMARY RELIEF PURSUANT TO PA.R.A.P 1532

Petitioners, by and through their undersigned counsel, submit this
Application for Summary Relief Pursuant to Pa.R.A.P. 1532, stating as follows:

I. INTRODUCTION

On August 3, 2020, the Green Party of Pennsylvania (“GPPA”) purported to file a Nomination Paper for, among others, candidates for President and Vice President of the United States. That Nomination Paper, however, did not include candidate’s affidavits for the candidates actually listed on the Nomination Paper slate. Accordingly, the Nomination Paper with respect to GPPA candidates for President and Vice President of the United States is invalid, should not have been accepted for filing, and should be set aside now. Because no nomination was effectuated, there can be no substitution. In addition, the GPPA chose to present a slate of candidates on its Nomination Paper. On July 23, 2020, while the signatures were being collected, the GPPA had determined that the named candidates for

President and Vice-President were no longer seeking the nomination, and thus all signatures collected after that date should be stricken. Further, contrary to law, each of the purported candidates listed on the nomination paper did not file an affidavit. As a result, the nomination of Timothy Runkle for State Treasurer, Olivia Faison for Auditor General, and Richard L. Weiss for Attorney General, should also be set aside.

Because this ground for setting aside the Nomination Paper is based on undisputed facts and a discrete issue of law, and because the Election Code requires counties to begin processing ballots on September 14, Applicants move for summary relief to prohibit the placement of GPPA candidates for President or Vice President on the 2020 General Election ballot, and further to set aside the nominations of the three statewide row office candidates.

II. FACTUAL BACKGROUND

GPPA is a “political body” under the Pennsylvania Election Code. *See* 25 P.S. § 2831(c). As members of a “political body,” GPPA candidates circulate a “nomination paper” to collect a valid number of signatures to qualify for the ballot. 25 P.S. § 2911(a). “Nomination papers” also have an affidavit requirement:

“There shall be appended to each nomination paper offered for filing *an affidavit of each candidate nominated therein*, stating – (1) the election district in which he resides; (2) the name of the office for which he consents to be a candidate; (3) that he is eligible for such office; (4) that he will not knowingly violate any provision of [the Election Code] or of any law regulating and limiting election

expenses, and prohibiting corrupt practices in connection therewith; (5) that his name has not been presented as a candidate by nomination petitions for any public office to be voted for at the ensuing primary election, nor has he been nominated by any other nomination papers filed for any such office; (6) that in the case where he is a candidate for election at a general or municipal election, he was not a registered and enrolled member of a party thirty (30) days before the primary held prior to the general or municipal election in that same year; (7) that, in the case where he is a candidate for election at a special election, he is not a registered and enrolled member of a party; and (8) that he is not a candidate for an office which he already holds, the term of which is not set to expire in the same year as the office subject to the affidavit.

25 P.S. § 2911(e). (emphasis supplied). The Pennsylvania Department of State makes available a form candidate's affidavit. *See Political Body Candidate's Affidavit*, PENNSYLVANIA DEPT. OF STATE, DSBE-PBCA (rev. 2/19).

Starting on February 19, 2020, political bodies were permitted to begin circulating nomination paper pages for their party slates. 25 P.S. § 2913(b). Pursuant to a 2018 Consent Order, political body candidates for President and Vice President had until August 3, 2020 to collect 5,000 signatures to qualify for the ballot, and candidates for Attorney General, Auditor General and State Treasurer had until that date to collect 2,500 signatures to qualify for the ballot. *Constitution Party of Pa. v. Aichele*, Case No. 5:12-cv-2726 (E. D. Pa. Feb. 1, 2018) at ECF 115.

By March of 2020, the GPPA had begun circulating the Nomination Paper for its slate. On that slate, and on each of the 710 individual pages of the

Nomination Paper, Elizabeth Faye Scroggin and Neal Taylor Gale are listed as the GPPA candidates for President and Vice President. On July 11, 2020, the national Green Party convention selected Howie Hawkins and Angela Walker as candidates for President and Vice President of the United States. On July 23, 2020, Mr. Hawkins completed the Department of State's form candidate's affidavit.¹

Despite these events, GPPA circulators continued to circulate Nomination Paper pages listing Ms. Scroggin and Mr. Gale as the GPPA candidates for President and Vice President. At least 600 of the 710 Nomination Paper pages continued to circulate on and after July 23, 2020 with Ms. Scroggin and Mr. Gale as the listed candidates, containing over 7,000 of the Green Party's 8,551 signatures.²

On August 3, 2020, GPPA submitted 710 Nomination Paper pages purporting to contain 8,551 signatures to the Department of State.³ Appended to

¹ At some point in time, Ms. Walker filled out some of the information on the form candidate's affidavit, but it was neither notarized nor dated.

² During the signature gathering period, GPPA participated in a lawsuit in federal court demanding that its candidates achieve ballot access without receiving *any* signatures. *See Libertarian Party of Pa. et al. v. Wolf et al.*, Case No. 5:20-cv-2299 (E.D. Pa.). On July 14, 2020 the District Court rejected that demand. *Id.* at ECF 57-58. On July 28, 2020, the Third Circuit affirmed the District Court's decision. *Libertarian Party of Pa. et al. v. Wolf et al.*, Case No. 20-2481 (3d Cir. Jul. 28, 2020) at ECF 36-1. A review of the full signature challenge (subject to the instant Petition to Set Aside) indicates that a substantial majority were collected after the District Court's ruling.

³ Based on individual line review, Objectors have challenged a sufficient number of signatures as invalid to remove all GPPA candidates from the ballot. This Application, however, does not require a line-by-line analysis. The court need only consider the facial defect of the missing

the Nomination Paper pages were candidate's affidavits from the candidates listed on the 710 Nomination Paper pages *except for Ms. Scroggin and Mr. Gale*. In their place, GPPA instead appended the July 23, 2020 candidate's affidavit of Mr. Hawkins and the undated, non-notarized candidate's "affidavit" of Ms. Walker.

On July 31, 2020, the Libertarian Party of Pennsylvania ("LPPA"), another political body, also submitted a Nomination Paper for its slate of candidates. Like GPPA, LPPA began circulating its Nomination Paper pages prior to its national party convention. Like GPPA, LPPA listed candidates (William Martin Sloane and Daniel Fishman) other than the eventual national nominees (Jo Jorgenson and Jeremy "Spike" Cohen). *In stark contrast to GPPA, however*, LPPA dutifully appended candidate's affidavits from Mr. Sloan and Mr. Fishman (the candidates actually listed as candidates for President and Vice President) to its Nomination Paper.

III. PROCEDURAL BACKGROUND

On August 10, 2020, Objectors timely filed their Petition to Set Aside the Nomination Paper of GPPA's slate with respect to, among others, Ms. Scroggin and Mr. Gale. The Petition to Set Aside also includes over 7,000 individual line challenges. (Pet. at Ex. 1). Because August 10, 2020 was also the Election Code's

candidate's affidavits, and the fact that without the signatures obtained after July 23, 2020, none of the candidates has gathered the required number of signatures,

deadline for substituted candidates, and because Mr. Hawkins' July 23, 2020 candidate's affidavit could be interpreted as an attempted substitution, Objectors' Petition simultaneously included objections to any substitution of Ms. Scroggin and/or Mr. Gale with Mr. Hawkins and/or Ms. Walker. (Pet. at ¶¶ 19-23). That same day, GPPA did, in fact, file purported substitutions of Ms. Scroggin and Mr. Gale with Mr. Hawkins and Ms. Walker.

On August 13, 2020 this Court entered a Case Management Order setting the service requirements on the challenged candidates and scheduling a status conference for August 25, 2020.

IV. LEGAL ARGUMENT

A. The Standard for Summary Relief Under Pennsylvania Law

This Court has laid out the standard for summary relief. "Summary relief under Pa. R. A. P. 1532(b) is similar to the relief envisioned by the rules of civil procedure governing summary judgment." *Brittain v. Beard*, 974 A.2d 479, 484 (Pa. 2009). Further, "[a]n application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute." *Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008) (quoting *Calloway v. Pa. Bd. of Probation & Parole*, 857 A.2d 218, 220 n. 3 (Pa. Commw. Ct. 2004)). See also Pa. Appellate Law and Practice §1532.7 ("summary relief and summary judgment are generally treated as interchangeable.").

As set forth below, Applicants are entitled to summary relief. There are no disputed facts, and the right to relief under the law is clear.

B. The Right to Relief Is Clear

1. Candidates Scroggin and Gale’s failure to file candidate’s affidavits is a fatal defect that requires this Court to set aside their Nomination Papers.

Pennsylvania’s Election Code requires that the nomination papers of a political body must include “an affidavit of each candidate nominated therein.” 25 P.S. § 2911(e). The candidate’s affidavit must assert, *inter alia*, that the candidate is eligible for the office at issue and that “his name has not been presented as a candidate by nomination petitions for any public office to be voted for at the ensuing primary election.” *Id.* The Pennsylvania Supreme Court has clarified that the information sworn to on these candidate’s affidavits is vital to the legitimacy of the election process:

[O]ur cases have made clear that the provisions of the election laws relating to the form of nominating petitions and the accompanying affidavits are not mere technicalities but are necessary measures to prevent fraud and to preserve the integrity of the election process. ***The requirements of sworn affidavits are to insure the legitimacy of information crucial to the election process.*** Thus . . . liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process.

Petition of Cianfrani, 467 Pa. 491, 494, 359 A.2d 383, 384 (1976) (emphasis added) (internal citations omitted). Accordingly, a candidate’s failure to affix her

affidavit to nomination papers is a “fatal defect” that voids and invalidates her nomination papers. *See id.*

“Moreover, the Election Code makes no exceptions to the requirement for the filing of the affidavit.” *In re Owens*, 62 Pa. Cmwlth. 281, 283, 436 A.2d 260, 261 (1981). “The failure to attach a required affidavit” is a facial defect that necessitates the rejection of nomination papers. *Id.* 25 P.S. § 2911(e) requires “each candidate” nominated by nomination papers to file an affidavit, including Presidential and Vice-Presidential candidates. *See also De La Fuente v. Cortes*, 261 F. Supp. 3d 543, 547 (M.D. Pa. 2017), *aff’d*, 751 F. App’x 269 (3d Cir. 2018) (discussing rejection of Presidential candidate’s nomination papers based on information contained in candidate’s affidavit).

Here, it appears that neither Ms. Scroggin nor Mr. Gale *ever* filed candidate’s affidavits as required by § 2911(e), despite the fact that their names appear at the top of *each* of the 710 numbered Nomination Paper pages circulated to electors and filed with the Department of State. Each Nomination Paper presented to electors listed Ms. Scroggin and Mr. Gale as the candidates for President and Vice President, respectively, at the top of the page. The electors who signed the sheets affixed their signatures with the understanding that they were supporting the nomination of Ms. Scroggin and Mr. Gale for those positions.

In reality, however, Ms. Scroggin and Mr. Gale never filed—or even attempted to file—candidate’s affidavits. Pennsylvania law clearly establishes that this failure to file candidate’s affidavits for the candidates actually listed on the Nomination pages is a fatal defect that requires this Court to set aside the Nomination Papers.

2. Because Ms. Scroggin and Mr. Gale were never duly nominated, any purported “substitution” of other candidates was ineffective.

Ms. Scroggin and Mr. Gale’s failure to file candidate’s affidavits cannot be rectified by the later “substitution” of other candidates. The Election Code provides that “[i]n case of the death or withdrawal of any candidate nominated by any political body by nomination papers, the committee named in the original nomination papers may nominate a substitute in his place by filing in the proper office a substituted nomination certificate.” 25 P.S. § 2940.

However, Pennsylvania’s Supreme Court has unequivocally established that “[t]he authorized party committee can make *substituted* nominations *only when the duly nominated candidate of the party dies or withdraws as a candidate*. Before there can be a ‘*substituted* nomination’ there must have been a nomination.” *Watson v. Witkin*, 343 Pa. 1, 10, 22 A.2d 17, 21 (1941) (emphasis in original). *See also Essler v. Davis*, 53 Pa. Cmwlth. 580, 586–87, 419 A.2d 217, 220 (1980) (holding that a substitution nomination certificate cannot be used to fill a vacancy

caused by a party's failure to make a nomination). Accordingly, a party may not "substitute" one candidate for another where the original candidate was not duly nominated. Instead, to effectuate a valid substitution, both the original and substituted candidate must "fully compl[y] with the rigors of the Election Code in effectuating the withdrawal and substitution at issue." *In re Barr*, 956 A.2d 1083, 1088 (Pa. Commw. Ct.), aff'd sub nom. *In re Substitute Nomination Certificate of Barr*, 598 Pa. 558, 958 A.2d 1045 (2008).

When considering whether substitution of a candidate is permitted, "[o]ur Supreme Court and this Court have recognized the significant distinction between a candidate who withdraws his name from nomination, and a candidate whose name is stricken from the ballot." *Pennsylvania Democratic Party v. Pennsylvania Dep't of State*, 159 A.3d 72, 77 n.5 (Pa. Commw. Ct. 2017) (citations omitted). In *Pennsylvania Democratic Party*, this Court considered a mandamus action to require the Department of State to accept the substituted nomination certificate of a candidate where the original candidate's nomination petition had been set aside. *Id.* at 74. This Court dismissed the mandamus action, reasoning that substitution was inappropriate where "Original Candidate's name was removed from the ballot because the Party's Nomination Certificate was set aside, not because Original Candidate withdrew his name from nomination." *Id.* at 77. Thus, case law and the

Election Code are clear: valid substitution cannot occur without an existing, perfected valid nomination.

Here, no valid nomination took place, and any attempted substitution was thus impossible. Ms. Scroggin and Mr. Gale never perfected their nominations for the Presidential and Vice-Presidential nominations by filing the required candidate's affidavits. Instead, Mr. Hawkins and Ms. Walker—purported candidates for the Presidency and Vice Presidency—executed candidate's affidavits that were then filed along with nomination papers that bore the names of *other* candidates: Ms. Scroggin and Mr. Gale. These ineffective (and in Ms. Walker's case, incomplete) affidavits contradicted the plain language of the Election Code, which provides that candidate's affidavits shall be appended to the nomination paper "of each candidate nominated *therein*." 25 P.S. § 2911(e) (emphasis added). None of the Nomination Papers nominated Mr. Hawkins or Ms. Walker, and their so-called candidate's affidavits are void.

In essence, Mr. Hawkins and Ms. Walker each attempted to effectuate substitutions by filing affidavits that do not correspond to the names circulated to electors on the nomination papers. Neither the Election Code nor established case law permits such a maneuver, and the Nomination Papers should be set aside due to their failure to validly nominate candidates for either the presidency or vice presidency.

3. The Nomination Papers contain fatal defects that deceived the electorate and must be set aside.

Under the Election Code, materially defective nomination papers must be set aside. 25 P.S. §§ 2936, 2937. “Under its own jurisprudence, the Commonwealth Court has deemed defects ‘material’ when they have the potential to mislead an elector.” *In re Beyer*, 631 Pa. 612, 623, 115 A.3d 835, 841 (2015) (citing *In re Ford*, 994 A.2d 9 (Pa.Cmwlth.2010); *In re Nomination Petition of Delle Donne*, 779 A.2d 1 (Pa.Cmwlth.2001), aff’d 565 Pa. 561, 777 A.2d 412 (2001)). In *Beyer*, Pennsylvania’s Supreme Court struck a candidate’s name from the ballot where the nomination papers listed the candidate’s profession as “lawyer,” despite the fact that the candidate had not yet passed the bar exam. 115 A.3d at 843. The Supreme Court disregarded the candidate’s testimony that he clarified his position as a law school graduate when asked about his position by voters, holding that “[e]very presentment of a petition for signature...represented an opportunity for [the candidate] to identify clearly his occupation, and the candidate knew his petition would likely promote misinformation on that very point.” *Id.* at 842.

Here, the same problem identified by the Court in *Beyer* exists. Every presentment of the Nomination Papers for signature by an elector presented an opportunity for the GPPA to clearly identify Mr. Hawkins and Ms. Walker as its Presidential and Vice-Presidential candidates, respectively. Instead, however, the Nomination Papers named Ms. Scroggin and Mr. Gale, two individuals who never

sought or consented to nomination for those candidacies. Each elector presented with a Nomination Paper was thus deceived into believing that they were supporting the candidacies of Ms. Scroggin and Mr. Gale, when in fact those individuals were never intended to be the GPPA's candidates. This deception is not amendable and requires that this Court set the Nomination Paper aside.

4. **The Nominations of the Statewide Row Office Candidates Also Should be Set Aside.**

a. **The Election Code requires that each candidate to a Nomination Paper file an affidavit. Failure to do so renders the Nomination Paper Defective.**

Unlike Nomination Petitions that list a single candidate, the Election Code allows a Nomination Paper to include a slate of proposed candidates. Here, the Nomination Paper listed a slate of candidates for President, Vice-President, Attorney General, State Treasurer and Auditor General. When an elector is presented with a page of the Nomination Paper, the elector is thus presented with a list of candidates.

25 PS Section 2911(e) specifically provides that a Nomination Paper must have appended to it affidavits of **each** candidate nominated. The requirement that each candidate submit an affidavit and confirm that they were and continued to be candidates while signatures were being collected is critical to ensure the integrity of the signature process. For example, a political body could list a celebrity candidate in an effort to gather signatures for the whole slate, without ever having

an intention of nominating that candidate, let alone have that person continue through the General Election.

Here, the two names listed on the top of the slate did not submit affidavits. Therefore, the GPPA failed to follow the clear requirement of Section 2911(e). The candidate affidavit requirement is not ministerial—it has real world implications and is a “necessary measure[] to prevent fraud and to preserve the integrity of the election process.” *Petition of Cianfrani*, 467 Pa. at 494 (internal citations omitted).

b. The purported affidavits of Mr. Hawkins and Ms. Wagner, executed on July 23, 2020, present clear and irrefutable evidence that the listing of the names on the Nomination Paper being circulated was knowingly false and inaccurate.

It is now clear that, as of July 23, 2020, the Nomination Paper being presented to electors was knowingly false. Mr. Hawkins and Ms. Wagner had executed affidavits (or attempted to do so). At that moment, electors were being presented with a slate that was knowingly inaccurate; the GPPA had no intent to even try and nominate Ms. Scroggin and Mr. Gale for President and Vice-President.

This Court, in *Barr*, recognized that a political body could substitute a candidate once the nominations of the candidates listed on the nomination paper were secured. However, this situation is very different. In *Barr*, the Libertarian Party duly nominated a candidate who timely and properly submitted her

candidate's affidavit alongside nomination papers that named her as the Party's candidate for the presidency. *Barr*, 956 A.2d at 1087. However, after submitting her affidavit, the candidate filed a withdrawal so that the Libertarian Party's nationally nominated Presidential candidate could file a substitute nomination certificate identifying him as the Party's Presidential candidate. *Id.* at 1085. Because "[b]oth [original candidate] and [substituted candidate] consented to being candidates for President, and . . . each fully complied with the rigors of the Election Code in effectuating the withdrawal and substitution at issue," the Court denied the petition to set aside the nomination papers. *Id.* at 1088.

In *Barr*, the Libertarian Party had the intent to nominate those individuals listed on the nomination paper. As the court recognized, it was difficult to ascertain if voters were being misled. In contrast, as of July 23, 2020, the electors signing the nomination paper were being deceived. Absent evidence that each and every elector was notified that the listed names for President and Vice-President were not real, then each and every signature after that date must be rejected.

V. CONCLUSION

The GPPA did not nominate a candidate for President or Vice-President because the individuals listed on each and every page of the nomination paper did not file the required affidavit. Because their candidacy was not perfected, there was no way to substitute a candidate for President or Vice-President. The

precedent is clear and irrefutable that without a valid nomination, there can be no substitution.

The GPPA chose to list its candidates as a slate. Contrary to the requirements of the Election Code, each candidate on that slate did not attach an affidavit to the nomination paper. Further, with the purported affidavits of two individuals who were “taking over” the positions even prior to the nomination (without disclosure to the public), it was clear signatures obtained after July 23, 2020 were done in a manner that was deceptive. For that reason, any signature obtained on or after July 23, 2020 must be stricken.

For these reasons, the entire slate of GPPA candidates should be set aside.

Respectfully submitted,

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3418300.v1

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	:	Objections of Paul Stefano and Tony C. Thomas – Objectors	

PROPOSED ORDER

AND NOW, upon consideration of Objectors’ Application for Summary Relief Pursuant to Pa.R.A.P. 1532, and any response thereto, it is hereby ORDERED, ADJUDGED, and DECREED, that the Application is GRANTED. The Department of State is ordered to set aside the Nomination Paper of the Green Party of Pennsylvania Slate for President of the United States, Vice President of the United States, Attorney General, Auditor General and State Treasurer. The Department of State is further ordered to direct the Boards of Election in each county that no Green Party of Pennsylvania candidates for President or Vice President of the United States or for Attorney General, Auditor General or State Treasurer shall be printed on the 2020 General Election ballot. IT IS SO ORDERED.

BY THE COURT:

_____, J.

VERIFICATION

I, Clifford B. Levine, am counsel to Objectors in this matter. I hereby verify that, to the extent that there are any facts alleged in the foregoing Application that are not yet a matter of record in this action, those facts are indisputably part of the larger public record, and can be accepted as true through judicial notice.

Accordingly, I verify that those facts are true and correct to the best of my personal knowledge, information, and belief.

I make the foregoing verification subject to the penalties of 18 Pa. C.S. § 4904.

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Summary Relief was delivered for service on August 24, 2020 on the following persons:

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