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Election Law

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> Under certain circumstances, those provisions do, however, extend a protection to governmental employees to be free from employment decisions made solely for political reasons. Therefore, *W.Va. Code,* 7-7-7 [1982] may not be interpreted as permitting a governmental employer to make employment decisions based solely upon political reasons, unless the employees hold certain types of positions.[1289]

XIX. ELECTION LAW

A. *Recall Official*

In the case of *State ex rel. Durkin v. Neely,*[1290] taxpayers petitioned a circuit court for a writ of mandamus to compel the clerk of a municipality to certify the sufficiency of a petition to recall certain members of city council at a special election. The circuit court denied the writ and the taxpayers appealed. Writing for the court, Justice McHugh found a technical problem with the appeal and held:

> If, pending an appeal to an order denying a writ of mandamus to require a clerk of a municipality to certify the sufficiency of a petition to recall certain members of a city council at a special election, and the city charter requires the council to cause such special election to be held "unless the general municipal election shall occur within one hundred twenty days from" the date the petition is certified as sufficient, and the next general municipal election is scheduled within one hundred twenty days when the case is heard, the appeal will be dismissed.[1291]

B. *Qualifications to be a Candidate for Public Office*

Justice McHugh addressed the issue of restrictions on a person's right to run for office in the case of *Sturm v. Henderson.*[1292] The court said initially that "[t]he right to become a candidate for public office is a fundamental right, and restrictions upon that right are subject to constitutional scrutiny."[1293] Justice McHugh then stated that

> *W.Va. Code,* 18-5-1 [1945], and *W.Va. Code,* 3-5-6 [1978], to the extent that they contain a provision that no more than a certain

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1289 *Id.* at Syl. Pt. 2.

1290 276 S.E.2d 311 (W. Va. 1981).

1291 *Id.* at Syl. Pt. 2.

1292 342 S.E.2d 287 (W. Va. 1986).

1293 *Id.* at Syl. Pt. 1.

> number of members of a county board of education "shall be elected from the same magisterial district," are in conflict with *W.Va. Const.* art. IV, § 4, and *W.Va. Const.* art. IV, § 8, concerning the qualifications of candidates for certain public offices, and are, therefore, unconstitutional.[1294]

In *Deeds v. Lindsey*,[1295] Justice McHugh stated that "[t]he right to become a candidate for public office is a fundamental right, and . . . any restriction on the exercise of this right must serve a compelling state interest."[1296] The court also stated that

> [a] deputy sheriff is not denied equal protection of the law when he or she is prohibited from becoming a candidate for public office pursuant to *W.Va. Code,* 7-14-15(a) [1971], nor is a deputy sheriff denied equal protection of the law when he or she is not permitted a leave of absence to become such a candidate, notwithstanding the provisions of *W.Va. Code,* 29-6-20 [1983] which guarantees these rights to other state civil service employees, because there is a compelling state interest in prohibiting deputy sheriffs from seeking candidacy for public office.[1297]

In *State ex rel. Harden v. Hechler*,[1298] Justice McHugh stated that

> [c]ompelling state interests are served by article IV, section 4 of the *West Virginia Constitution*, which provides that a candidate for senator must be a citizen of the State for five years next preceding the election, and therefore, that constitutional provision does not violate a candidate's rights to equal protection.[1299]

C. Filing Requirements for Candidacy

Justice McHugh addressed the issue of timely filing a certificate of candidacy in *Brady v. Hechler*.[1300] The court held:

> Under *W.Va. Code,* 3-5-7 [1985], which provides that a person

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1294 *Id.* at Syl. Pt. 2.

1295 371 S.E.2d 602 (W. Va. 1988).

1296 *Id.* at Syl. Pt. 1.

1297 *Id.* at Syl. Pt. 2.

1298 421 S.E.2d 53 (W. Va. 1992).

1299 *Id.* at Syl. Pt. 1.

1300 346 S.E.2d 546 (W. Va. 1986).

> seeking election to an office "to be filled by the voters of more than one county" shall file with the Secretary of State of West Virginia a certificate of candidacy for nomination for such office, it is mandatory that the certificate be filed with the Secretary of State "not later than the first Saturday of February next preceding the primary election day, and must be received before midnight, eastern standard time, of that day or, if mailed, shall be postmarked before that hour."[1301]

Justice McHugh concluded in *Brady* that

> [w]here the record indicated that a certificate of candidacy for nomination was received by the Secretary of State of West Virginia, or postmarked, after the time required under *W.Va. Code,* 3-5-7 [1985], for such receipt or postmarking, petitioners, seeking to strike the candidate's name from a primary election ballot, were, in view of the candidate's failure to comply with *W.Va. Code,* 3-5-7 [1985], entitled to mandamus relief.[1302]

Justice McHugh stated in *Haynes v. Hechler*[1303] that "[a] private postage meter stamp is a presumptively valid and accurate postmark for purposes of *W.Va. Code,* 3-5-7 [1985]."[1304]

D. Holding Dual Public Offices

In *Carr v. Lambert,*[1305] Justice McHugh stated that "[t]he position of assistant prosecuting attorney is an appointed public office and pursuant to *W.Va. Code,* 18-5-1a [1967], a person holding such office is ineligible to serve as a member of any county board of education."[1306]

E. Removing Elected Official from Office

In *George v. Godby,*[1307] Justice McHugh confronted the issue of impropriety by a county assessor. The court held:

1301 *Id.* at Syl. Pt. 2.

1302 *Id.* at Syl. Pt. 3.

1303 392 S.E.2d 697 (W. Va. 1990).

1304 *Id.* at Syl.

1305 367 S.E.2d 225 (W. Va. 1988).

1306 *Id.* at Syl. Pt. 2.

1307 325 S.E.2d 102 (W. Va. 1984).

> Where a county assessor cancelled or marked "improper" certain personal property tax tickets of associated corporations, one of which corporations had made a loan to the assessor which was never repaid, and the action of the assessor in cancelling or marking the tax tickets "improper" was done without prior authorization of the county commission under *W.Va. Code,* 11-3-27 [1939], that assessor was subject to removal from office under the provisions of *W.Va. Code,* 6-6-7 [1931].[1308]

Justice McHugh qualified wasting public funds as a basis for removal from office. In his opinion he sttaed that "[w]aste of public funds is not an absolute requirement to removal of a person from office under the provisions of *W.Va. Code,* 6-6-7 [1931]; however, waste of public funds may be considered with respect to the removal of a person from office under that statute."[1309]

Summers County Citizens League, Inc. v. Tassos[1310] presented Justice McHugh several issues related to removal of elected officials from office due to the appearance of financial conflict. The court said that "[u]nder *W.Va. Code,* 6-6-7, as amended, a threshold question is whether the removal proceeding was *filed* during the term of the public officer in which the transaction(s) in question occurred. If so, the subsequent reelection of the public officer has no effect on the removal proceeding."[1311] The court explained that

> *W.Va. Code,* 61-10-15, as amended, is preventive in nature; it provides an absolute standard of conduct which is violated by entering into or continuing a relationship with a private entity where that relationship may make it difficult for the county officer to represent the public with the singleness of purpose required by the statute. The statute forbids a county officer from engaging in business transactions on behalf of the public if, by virtue of his or her private interests, he or she may benefit financially, directly or indirectly, from the outcome of those transactions. The question is not whether the county officer was certain to benefit from the contract, but whether the likelihood that the county officer might benefit was so great that he or she would be subject to those temptations which the statute seeks to avoid.[1312]

Justice McHugh elaborated on the statute in holding that

1308 *Id.* at Syl. Pt. 3.

1309 *Id.* at Syl. Pt. 4.

1310 367 S.E.2d 209 (W. Va. 1988).

1311 *Id.* at Syl. Pt. 2.

1312 *Id.* at Syl. Pt. 4.

> [u]nder *W.Va. Code,* 61-10-15, as amended, a county officer is "pecuniarily interested, directly or indirectly, in the proceeds of any contract or service," where the county officer is an employee of a private entity which is the other party to the contract with the county, whether or not the county officer is also a shareholder, director or officer of such private entity.[1313]

The court concluded:

> A county superintendent of schools, who is not a member of a county board of education and who, therefore, has no power to vote on matters to be decided by the board, is not subject to removal from office for a violation of *W.Va. Code,* 61-10-15, as amended, as the result of owning stock of a bank acting as a depository for the board's funds, unless the county superintendent as a matter of fact had "any voice, influence or control" with respect to the selection of that bank for the board's funds.[1314]

F. Write-in Candidates

In *MacCorkle v. Hechler,*[1315] Justice McHugh held that "[t]he provisions of W.Va. Code, 3-6-5 [1978], which authorize a voter to write in votes in a general election, also authorize a voter to write in votes for members of the political party executive committee, who are elected in a primary election. To the extent that State ex rel. Hott v. Ewers, 106 W.Va. 18, 144 S.E. 578 (1928), is inconsistent with this opinion, it is overruled."[1316]

G. Filling Nomination Vacancy When Candidate Disqualified

In *State ex rel. Harden v. Hechler,*[1317] Justice McHugh held that

> [w]hen a vacancy in nomination occurs as a result of the disqualification of the candidate not later than eighty-four days before the general election, *W.Va. Code,* 3-5-19 [1991] provides that a nominee may be appointed by the executive committee of the political party for the political division in which the vacancy occurs and certified to the proper filing officer no later than

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1313 *Id.* at Syl. Pt. 5.

1314 *Id.* at Syl. Pt. 6.

1315 394 S.E.2d 89 (W. Va. 1990).

1316 *Id.* at Syl. Pt. 2.

1317 421 S.E.2d 53 (W. Va. 1992).

seventy-eight days before the general election.[1318]

XX. WEST VIRGINIA SUPREME COURT OF APPEALS APPELLATE JURISDICTION

A. *Necessity of a Ruling by Lower Court*

Wells v. Roberts[1319] held that ["a]s a general rule '[t]his Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.'"[1320] Justice McHugh elaborated on this issue in *State v. Baker*,[1321] wherein he relied upon *State v. Thomas*[1322] to hold:

> As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.[1323]

Justice McHugh ruled in *State v. Glover*[1324] that

> [w]here the record on appeal is inconclusive as to whether counsel failed to investigate the sole possible defense or a material defense adequately and with reasonable diligence, this Court will not decide on such a record whether a criminal defendant was denied effective assistance of counsel but will remand the case for development of the record on the point and for a ruling by the trial court on the question.[1325]

Justice McHugh wrote in *Abbott v. Owens-Corning Fiberglas Corp.*[1326] that "[i]n order for this Court to review a trial court's decision regarding the application of the doctrine *forum non conveniens*, it is necessary for the trial court to provide a record in sufficient detail which will show the basis of its

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1318 *Id.* at Syl. Pt. 2.

1319 280 S.E.2d 266 (W. Va. 1981).

1320 *Id.* at Syl. Pt. 3 (alteration in original).

1321 287 S.E.2d 497 (W. Va. 1982).

1322 203 S.E.2d 445 (W. Va. 1974).

1323 Baker, 287 S.E.2d at Syl. Pt. 1.

1324 355 S.E.2d 631 (W. Va. 1987).

1325 *Id.* at Syl. Pt. 3.

1326 444 S.E.2d 285 (W. Va. 1994).