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Court of Appeals
Bessie Decker
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LINDA H. LAMONE,	*	IN THE
Appellant,	*	COURT OF APPEALS
v.	*	OF MARYLAND
NANCY LEWIN, *et al*.,	*	September Term, 2017
Appellees.	*	No. 85

* * * * * * * * * * *

OPPOSITION TO MOTION TO RECALL MANDATE AND FOR RECONSIDERATION

Linda H. Lamone, State Administrator of Elections, respectfully submits this Opposition to Appellees' Motion to Recall Mandate and for Reconsideration pursuant to the Court's Order of May 14, 2018.

BACKGROUND

On April 9, 2018, Plaintiffs instituted this action in the Circuit Court for Anne Arundel County, alleging that former Senator Nathaniel T. Oaks's name should be removed from Democratic primary ballots because he was soon to become disqualified from his candidacy for State Senate representing Legislative District 41 because of his criminal sentencing scheduled in July 2018. On April 23, 2018, Mr. Oaks agreed to advance his disqualification by cancelling his voter registration, and on April 26, 2018 the circuit court entered a preliminary injunction requiring Ms. Lamone, in her capacity as State Administrator of Elections, to remove Mr. Oaks's name from primary ballots.

The State Administrator immediately appealed and sought certiorari from this Court as well as a stay of the preliminary injunction during the pendency of the appeal. On April 27, 2018, this Court granted certiorari and issued an order staying the preliminary

injunction entered below. Expedited briefing followed, and the Court heard argument on the appeal on May 2, 2018. Later that day, the Court issued a Per Curiam Order lifting the stay pending appeal, vacating the preliminary injunction entered by the circuit court, and remanding the case with direction that the circuit court dismiss the underlying complaint. The circuit court's order dismissing the action was entered on May 10, 2018.

Although this Court has not yet issued its opinion explaining the reasons for its ruling, the State Administrator's proffered grounds for reversal were as follows:

- Mr. Oaks's disqualification and putative withdrawal occurred well beyond the clear statutory deadlines by which a candidate's disqualification or withdrawal could result in the removal of his name from the ballot, and therefore plaintiffs were not likely to succeed on the merits as a matter of law;

- Plaintiffs' claims were also not likely to succeed because they are barred by laches, given that plaintiffs waited until after the circuit court had denied their initial motion for preliminary injunction on April 20, 2018, before attempting to request that Mr. Oaks cancel his voter registration;

- Plaintiffs had also failed to establish the other factors supporting the preliminary injunction, namely irreparable harm, that the balance of interests or convenience favored plaintiffs, and that the public interest supported injunctive relief.

(*See* Appellant's Br. 20-45.)

Subsequent Changes in the Gubernatorial Contest

On May 10, 2018, Kevin Kamenetz—one of seven candidates for the Democratic gubernatorial nomination—passed away. On May 12, 2018, Plaintiffs filed their Motion for Reconsideration, alleging that, under the laws that apply only to gubernatorial contests, all Democratic primary election ballots "will have to be changed and reprinted if a successor candidate is designated by Valerie Ervin, the candidate for Lieutenant Governor

who was running with Mr. Kamenetz." (Mot. for Reconsider. ¶ 5 (citing Md. Code Ann., Elec. Law § 5-904).)

On May 17, 2018, Ms. Ervin announced that she would serve as the successor candidate for Governor, *see* Elec. Law § 5-904(c)(2)(iii), and that Marisol Johnson would serve as the candidate for Lieutenant Governor on her ticket. *See* Ovetta Wiggins, *Valerie Ervin Says She Will Run for Md. Governor in Kevin Kamenetz's place*, The Washington Post, May 17, 2018.[1] Also on May 17, 2018, the State Administrator determined pursuant to Election Law § 5-1204(b) that there is not sufficient time to reprint ballots in advance of the primary election, and that the State Board will work instead with local boards of election to implement appropriate measures to notify voters of the change in candidacy, the procedure to be used by voters to vote for the successor candidates, and the procedure to be used by local boards to conduct the canvass. *See* Aff. of Linda H. Lamone (the "Lamone Aff.") (attached hereto as Exhibit A).

Pertinent Statutory Provisions

Although Election Law § 5-904 provides that "[t]he names of any Governor and Lieutenant Governor candidate unit that is designated" by the surviving Lieutenant Governor "shall be listed jointly on the primary election ballot," Elec. Law 5-904(b)(2), a separate provision addressing circumstances where "a vacancy in candidacy is properly filled and certified to the appropriate board within the time prescribed under this title"

[1] *Available at*: https://www.washingtonpost.com/local/md-politics/valerie-ervin-says-she-will-run-for-md-governor-in-kevin-kamenetzs-place/2018/05/17/18e43b48-5888-11e8-858f-12becb4d6067_story.html?utm_term=.206802774c41.

provides that if "the State Administrator, in consultation with the election director of the local board, determines that there is not sufficient time for the local board to change the ballots with the correct names," the appropriate board shall "take appropriate measures to notify the voters" of:

(1) the change in candidacy;

(2) the procedure to be used by the voter to record the voter's vote; and

(3) the procedure to be used by the local board to conduct the canvass.

Elec. Law § 5-1204(b).

Thus, even though, under Election Law § 5-904, the names of the successor candidate for Governor and successor candidate for Lieutenant Governor will be on the primary ballot, Election Law § 5-1204(b) vests the State Administrator with authority to determine whether there is sufficient time to reprint the ballots, or whether alternative measures should be taken to notify voters of the change in candidacy, the procedures to be used to vote, and the procedures to be used to canvass the vote.

The State Administrator's Determination

On May 17, 2018, after the relevant successor candidate filings were made, the State Administrator stated that, in consultation with the election directors of the various local boards, she had determined that there was "not sufficient time for the local board[s] to change the ballots with the correct names." Lamone Aff. ¶ 4. *See* Elec. Law § 5-1204(b). Accordingly, the State Board will direct local boards to take "appropriate measures to notify voters of" the change in candidacy, the procedures to be used for voting for the

successor candidates, and the procedures to be used by the local boards to conduct the canvass. *Id.*

ARGUMENT

Plaintiffs' motion should be denied for two independent reasons. First, it remains the case that—whatever Election Law § 5-904 requires regarding the gubernatorial contest, and whether or not a reprinting of ballots is even possible at this point in the process—the law clearly forecloses the relief sought by plaintiffs. Second, even assuming plaintiffs could obtain relief if ballots were to be reprinted as a result of the designation of Ms. Ervin and Ms. Johnson as successor candidates in the Democratic gubernatorial primary, the issue is moot because ballots will *not* be reprinted.

I. SECTION 5-504(B) FORECLOSES THE RELIEF REQUESTED BY PLAINTIFFS.

Initially, Mr. Kamenetz's death has not altered the law applicable to the presence of Mr. Oaks's name on the primary ballot notwithstanding Mr. Oaks's disqualification. That law is clear: "The name of a candidate shall remain on the ballot and be submitted to the voters at a primary election," provided that the candidate "(i) has not withdrawn the candidacy in accordance with Subtitle 5 of this title;" or "(ii) has not died or become disqualified . . . by the deadline prescribed in § 5-504(b) of this title." Elec. Law § 5-601(1). Thus, even if Election Law § 5-904 required the State Board to reprint millions of ballots state-wide to reflect Ms. Ervin's designation of a successor—and it does not—the law continues to foreclose the relief sought by plaintiffs as to Mr. Oaks. To the extent that this Court's Per Curiam Order was based on the application of these clear laws, there is no basis for it to reconsider that ruling and reinstate the preliminary injunction.

II. BALLOTS WILL NOT BE REPRINTED AS A RESULT OF THE DESIGNATION OF SUCCESSOR DEMOCRATIC GUBERNATORIAL CANDIDATES.

Plaintiffs' Motion should also be denied because it is based on the faulty premise that ballots will be reprinted following the designation of successor candidates. This is incorrect. Because ballots need not be reprinted if the State Administrator determines (in consultation with local boards of election) that there is not sufficient time, *see* Elec. Law § 5-1204(b), and because the State Administrator has, in fact, made that determination here, *see* Lamone Aff. ¶ 4, the Democratic primary ballots will not be reprinted in advance of the primary election, and therefore the relief sought by plaintiffs is moot.

At the outset, there has not even been a judicial challenge to the State Administrator's determination. The extant complaint did not allege any violation of law premised on the State Administrator's determination (nor could it have), and no record below was developed that would permit this Court to evaluate that determination (nor could there have been). A collateral attack on the State Administrator's determination via this Motion for Reconsideration would be inappropriate.

In any event, such an attack would not likely succeed. Discretionary actions are reviewed by Maryland courts under an "arbitrary or capricious" standard, which this Court has held "is best understood as a reasonableness standard." *Harvey v. Marshall*, 389 Md. 243, 297 (2005) (quoting Arnold Rochvarg, *Maryland Administrative Law* § 4.38 at 128 (2001, 2004 Supp.)). Thus, "[i]f the agency has acted unreasonably or without a rational basis, it has acted in an arbitrary or capricious manner." *Id.* The record before this Court closed approximately three weeks ago, and the circuit court has since dismissed this action.

Nevertheless, ample justification for the "reasonableness" of the State Administrator's determination can be found even in that stale record. *See generally* Appellants' Br. 6-10, 37-42. Not only have the first round of absentee ballots now *already been mailed* (including ballots to military and overseas voters, as required by 52 U.S.C. § 20302(a)(8)(A), but the timelines for the various ballot printing and voting machine testing regimens likely precluded the requested relief *three weeks ago*. As of today, it is no longer possible.

Because ballots will not be reprinted to reflect the change in the candidacies in the contest for the Democratic nomination for Governor and Lieutenant Governor, plaintiffs' requested relief is moot.

CONCLUSION

For all of the foregoing reasons, the Motion for Reconsideration should be denied.

Respectfully submitted,

/s/ Julia Doyle Bernhardt

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May 18, 2018

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This document contains 1,674 words, excluding the parts exempted from the word count by Rule 8-503.

2. This document complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Julia Doyle Bernhardt
_____
Julia Doyle Bernhardt

CERTIFICATE OF SERVICE

I certify that on this 18th day of May 2018, a copy of the foregoing was filed and served electronically on the MDEC system and sent by electronic mail to:

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