

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on March 13, 2025, the following order was made and entered:

SCA Filed: Mar 13 2025
12:20PM EDT
Transaction ID 75853232

State of West Virginia ex rel.
The West Virginia Democratic Party,
Mike Pushkin, and Jill Michaels,
Petitioners

v.) No. 25-65

Patrick Morrissey, in his official capacity as
Governor of the State of West Virginia,
Respondent

ORDER

On January 28, 2025, the petitioners, the West Virginia Democratic Party, Mike Pushkin, and Jill Michaels, by counsel Robert M. Bastress, Jr., filed with the Court a petition for a writ of mandamus to be directed against the respondent, the Honorable Patrick Morrissey, in his official capacity as Governor of the State of West Virginia, together with an appendix record. On February 5, 2025, the respondent, by counsel Michael R. Williams, Solicitor General, Office of the Attorney General, and David E. Gilbert, Deputy Attorney General, Office of the Attorney General, filed the respondent’s brief and appendix record. On February 10, 2025, the petitioners moved for leave to file a reply brief. The Court granted the petitioners’ motion and ordered the reply brief filed.

The parties generally do not dispute the facts giving rise to this action. On November 5, 2024, Joseph A. de Soto was elected to the West Virginia House of Delegates (“House”) as a Republican from the 91st Delegate District in Berkeley County, West Virginia. Shortly thereafter, two events occurred: (1) Mr. de Soto was named a defendant in a criminal complaint filed in the Magistrate Court of Berkeley County, West Virginia, in which he was charged with the felony

offense of violating West Virginia Code § 61-6-24 concerning threats of terrorist acts,¹ and (2) Mr. de Soto changed his political party affiliation from Republican to Democrat. Mr. de Soto did not appear when the House convened on January 8, 2025, to take his oath of office. On the same day, the House passed House Resolution 4 declaring Mr. de Soto's seat vacant. On January 14, 2025, the Berkeley County Democratic Executive Committee submitted a list of three persons to the respondent to fill the vacancy in the House, and on January 18, 2025, the Berkeley County Republican Executive Committee also submitted a list of three persons to the respondent to fill the vacancy. The respondent selected a person from the list submitted by the Berkeley County Republican Executive Committee, who was not on the list sent by the Berkeley County Democratic Executive Committee.

The petitioners then filed this petition for a writ of mandamus requesting that this Court (1) declare that Mr. de Soto is a lawfully elected and qualified delegate from the 91st House District and is entitled to his seat upon his appearance in the House Chambers for the administration of his oath; and (2) if the House Resolution proclaiming Mr. de Soto's seat vacant is sustained, issue a writ of mandamus requiring the respondent to choose a delegate for the 91st House District from the list of three candidates provided to him by the Berkeley County Democratic Executive Committee.² The petitioners maintain that denial of a seat to an elected and qualified member can only be achieved by following the procedures for expulsion set forth in article VI, section 25 of the

¹ Mr. de Soto was subsequently arrested and was placed on home confinement pending further proceedings.

² To the extent the petitioners are seeking relief in the form of a declaration of rights, this Court is without original jurisdiction to afford the petitioners relief. *See* W. Va. Const. art. VIII, § 3 (“The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition, and certiorari.”); *see also* W. Va. Code § 51-1-3 (“The Supreme Court of Appeals shall have original jurisdiction in cases of habeas corpus, mandamus and prohibition.”).

West Virginia Constitution. The petitioners further argue that any vacancy must be filled by a person of the same political party affiliation as the person holding office immediately preceding the vacancy and that Mr. de Soto was a member of the Democratic Party immediately preceding the vacancy.

According to the respondent, the Court should not grant the relief requested in the petition because the petitioners' claims fail on multiple grounds. As an initial matter, the respondent contends that the Court should not grant the petition because the petitioners failed to comply with the thirty-day pre-suit notice requirement set forth in West Virginia Code § 55-17-3(a)(1). In addition to this procedural ground, the respondent also argues that the petition must be denied on other grounds, including lack of standing and that the House has the power to decide whether Mr. de Soto was qualified, and this Court does not have the authority to review that decision.

In their reply, among other arguments, the petitioners assert that their action falls under an exception to the statutory pre-suit notice requirement, an exception for actions seeking injunctive relief where irreparable harm will occur if the action is delayed.

Acting without undue delay to resolve these issues, the matter was considered without oral argument. Having promptly scheduled the matter for review and having considered the arguments of counsel, the Court now issues its decision through this order. *See* W. Va. R. App. P. 16(i) (“After the response or summary response has been filed, or upon the date set forth in the scheduling order, the petition will be deemed to be mature. Thereafter, the Supreme Court will fully consider the written arguments of the parties. Upon its consideration, the Supreme Court may . . . issue an order appropriate to the circumstances of the case.”).

The petitioners failed to satisfy the thirty-day notice requirement pursuant to West Virginia Code § 55-17-3(a)(1) because the petition at issue is against a governmental agency and does not

fall within an exception to the thirty-day pre-suit notice requirement. With limited exception, West Virginia Code § 55-17-3(a)(1) requires at least thirty days' notice prior to instituting an action against a governmental agency:

Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a governmental agency, the complaining party or parties shall provide the chief officer of the governmental agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired. . . . The provisions of this subdivision do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.

This Court has held that the pre-suit notice as required by West Virginia Code § 55-17-3(a)(1) “is a jurisdictional pre-requisite[.]” Syl. Pt. 3, in part, *Motto v. CSX Transp., Inc.*, 220 W.Va. 412, 647 S.E.2d 848 (2009). The Court rejects the petitioners’ assertion that the pre-suit notice requirement does not apply to this action. While the petitioners are correct that there is an exception to the pre-suit notice requirement for actions seeking injunctive relief where irreparable harm will occur, the action pending before this Court by the petitioners seeks a writ of mandamus and does not seek injunctive relief. *See, e.g., State ex rel. McDavid v. Tennant*, No. 14-0939, 2014 WL 4922641, at *3 (W. Va. Oct. 1, 2014) (memorandum decision) (noting in an action for mandamus relief that “[i]n response to the Secretary of State’s rejection of its candidate appointment, the Republican Committee, on August 22, 2014, provided a ‘Notice of Claim Against State’ to respondents and the Attorney General as required by W. Va. Code § 55-17-3(a)(1) (2008) (Repl.Vol.2008)”). For that reason, the injunctive relief exception does not apply under these circumstances.

Because we lack jurisdiction to review the merits of this action, we do not address other issues, which may also be jurisdictional, including whether these petitioners have standing to bring

this action, whether a writ of mandamus directed against this respondent can remedy the injuries alleged, whether the Court can review the House's qualification decision, or any other issue.

Therefore, the petition for a writ of mandamus filed by the petitioners must be dismissed. The petitioners have failed to comply with the pre-suit notice requirement under West Virginia Code § 55-17-3(a)(1). This Court is without jurisdiction to consider the petitioners' claims.

A True Copy

Attest: /s/C. Casey Forbes
Clerk of Court

