

LUTHER T. MUNFORD
Resident in Mississippi
Direct (601) 360-9264
munfordl@phelps.com

September 12, 2011

26096-0006

Via Email

The Hon. Gov. Haley Barbour
The Hon. Secretary of State Delbert Hosemann
The Hon. Attorney General Jim Hood

Re: *In the matter of Todd Wade*

To the Members of the State Election Commission:

Please accept this letter on behalf of Mr. Todd Wade in advance of the September 13, 2011 Election Commission meeting.

INTRODUCTION

No express statutory power exists for the state Election Commission ("Commission") to unilaterally investigate, challenge and ultimately disqualify candidates, including Todd Wade,¹ from being placed on a general election ballot.

But even if the Commission possesses this authority, the Commission must still comply with the strict disqualification provisions set forth under Miss. Code Ann. § 23-15-963, including filing the challenge within 31 days after the primary election. The Commission has failed to do this. Consequently, the untimely challenge based on the Commission's unilateral investigation is barred, and Mr. Wade must remain on the ballot.

Leaving aside that statutory hurdle, the Commission is an "agency" within the meaning of the Mississippi Administrative Procedures Law. As an agency, the Commission has failed to formally adopt rules and procedures to govern its operations and proceedings to disqualify candidates based on the Commission's own investigations. The Commission has failed to solicit public input on how it should carry out these proceedings. These failures render the proceedings without effect and unenforceable under Mississippi law.

Furthermore, this new process to disqualify candidates based on the Commission's own investigation has been implemented for the first time this year. These changes include the Secretary of State's independent investigation of Mr. Wade's qualifications and a mandate that

¹ Mr. Wade has qualified to run as the Republican nominee for Senate District 9. Mr. Wade has attested that he was a qualified elector for at least four (4) years, as required by Section 42 of the Mississippi Constitution. No affirmative proof disputes Mr. Wade's sworn oath. Mr. Wade's former high school teacher attests that she provided the registration to Mr. Wade. See Affidavit of Susanna Orr, attached as Exhibit "A" to this letter. For unknown reasons, the circuit clerk of Rankin County no longer possesses the voter registration information, although human error in the clerk's office could account for this loss. See Affidavit of Carol Swilley, attached as Exhibit "B." Mr. Wade had no control of those records.

September 12, 2011

Page 2

Mr. Wade produce a record in the control of a circuit clerk's office, an office over which he has no control. These new proceedings by the Commission are changes in election practices that will adversely affect candidates by taking them off the ballots on which they otherwise would have appeared. Under the Voting Rights Act, such changes require preclearance by the U.S. Department of Justice. Having not sought preclearance, the Commission may not proceed with disqualifying candidates based on these new practices and proceedings.

Last, even if the Secretary of State may investigate and unilaterally challenge individual candidates' qualifications, then in the interest of fairness and justice, as well as controlling Mississippi law, the Secretary of State should recuse himself from voting to disqualify those same candidates. The Secretary of State should not be both the prosecutor and the judge.

For these reasons, as well as other discussed at the Sept. 9, 2011, meeting, Mr. Wade must remain on the ballot as the Republican nominee for Senate District 9.

I. Even if Election Commission has authority to independently investigate a candidate's qualifications, the Commission must still comply with the requirements of Miss. Code Ann. § 23-15-963 as the exclusive manner to disqualify an individual from the ballot.

Statutes must be construed according to their plain meaning. *Hill Brothers Construction Co., Inc. v. Mississippi Transportation Commission*, 42 So.3d 497 (Miss. 2010) ("[T]his Court will not defer to the agency's interpretation of the statute if it is repugnant to the plain meaning thereof"). Miss. Code Ann. § 23-15-963 expressly provides that it is the "sole and only manner in which the qualifications of a candidate...may be challenged prior to the time of his election." Furthermore, this statutory provision applies to "any person," which clearly includes the Secretary of State, who in this case has independently investigated and challenged the qualifications of various candidates. Miss. Code Ann. § 23-15-963(1).

Without dispute, there is no express statutory authorization for the Secretary of State to independently investigate and then challenge a candidate's qualifications. But even if such authority may be implied from Miss. Code Ann. § 23-15-359, then the specific language in § 23-15-963 still requires that a written petition be filed within 31 days after the date of the first primary election.

No petition was filed by the Secretary of State against Mr. Wade. Instead, the challenge was communicated to Mr. Wade by a telephone call from Secretary Hosemann's office on the same day as the Election Commission's meeting of Sept. 9. This verbal challenge was still untimely. The primary election was Aug. 2, 2011. The 31-day deadline expired on Sept. 2, 2011. Mr. Wade was telephoned on September 7, 2011. Any challenge after Sept. 2 was time-barred by the express language in the statute. *See, e.g., Gourlay v. Williams*, 874 So.2d 987 (Miss. 2004) (untimely petition to challenge candidate's qualifications was dismissed as time-barred). For this reason alone, the Commission should dismiss the challenge to Mr. Wade's qualifications.

Moreover, the challenged candidate must be given "[a]t least two (2) days" notice of the hearing. No such notice was given here. Instead, Mr. Wade received a phone call the day of the

hearing. This is less than 48 hours notice. This notice was insufficient to comply with § 23-15-963.

Because the Commission has not complied with the express provisions governing the “sole and only manner” in which to disqualify a candidate under Mississippi law, then Mr. Wade must remain on the ballot.

II. Even if Commission has authority to unilaterally investigate and challenge candidates’ qualifications outside the parameters of § 23-15-963, the Commission still failed to comply with the Mississippi Administrative Procedures Law in adopting its rules and procedures.

Under Mississippi law, all state agencies must comply with Miss. Code Ann. § 25-43-101, et. seq. (commonly known as the Mississippi Administrative Procedures Law) in formally adopting rules and procedures. The Election Commission is an agency within the purview of the Administrative Procedures Law. But the Commission has not formally adopted any rules governing its unilateral investigations, challenges and hearings regarding candidates who otherwise would be placed on the ballot. Nor has the Commission sought public input in how it should conduct these proceedings. For this reason, the Election Commission lacks the authority to enforce disqualifications based on its own investigations and proceedings until it formally adopts the necessary rules.

Miss. Code Ann. § 25-43-1, et. seq. defines a state “agency” as

(a) "Agency" means a board, *commission*, department, officer or other administrative unit of this state, including the agency head, and one or more members of the agency head or agency employees directly or indirectly purporting to act on behalf or under the authority of the agency head.... To the extent it purports to exercise authority subject to any provision of this chapter, an administrative unit otherwise qualifying as an "agency" must be treated as a separate agency even if the unit is located within or subordinate to another agency.

Id. (emphasis added). Under the plain language of the statute, election commissions are “agencies” bound by the procedural rule-making requirements of § 25-43-101, et. seq. *Id.* See also *Powe v. Forrest County Election Commission*, 249 Miss. 757, 163 So.2d 656 (1964) (election commission is an “*administrative agency*...clothed with the authority and power to determine questions of fact as to matters within its jurisdiction, one of which is the qualifications of the candidates for office”) (emphasis added).

The Administrative Procedures Law applies when an agency “take[s] action affecting the rights and duties of the public.” Miss. Code Ann. § 25-43-1.101. See also Att’y Gen. Op. 2005-0440 (Oct. 14, 2005) (implementation of rules and regulations in furtherance of and pursuant to statutory authority must comply with the Mississippi Administrative Procedures Law). Unquestionably, Mr. Wade’s rights to run as a qualified candidate are affected by the Commission’s actions.

Rules that govern the Election Commission's operations and proceedings to disqualify any candidate must be adopted in strict accordance with the Administrative Procedures Law. *See* § 25-43-3.101, *et. seq.* (process for rule-making under the Administrative Procedures Law). By statute, the Commission must:

(a) Adopt as a rule a description of the organization of the agency which states the general course and method of its operations and where and how the public may obtain information or make submissions or requests;

(b) Adopt rules of practice setting forth the nature and requirements of all formal proceedings available to the public.

§ 25-43-2.104. The reason for imposing this rule-making requirement is that "the public and interested individuals should be informed of proposed rules, have the opportunity to present their views and have the opportunity for a review of adverse ruling." Att'y Gen. Op. to Donald Road, 1980 WL 28908 (Sept. 9, 1980).

No rules have been formally adopted by the Commission. No public input has been sought. On the contrary, the Commission itself was unsure how to proceed at the Sept. 9, 2011 meeting regarding this new practice, essentially making up how it should proceed as the meeting went along.

Until formal rules governing the disqualification proceedings are adopted in accordance with the Administrative Procedures Law, they are not effective or enforceable. Att'y Gen. Op. 97-0509 (Sept. 5, 1997) (Secretary of State must formally adopt rules under the Administrative Procedures Law to enforce Lobbying Law Reform Act of 1994).

Furthermore, without formally adopted rules, there are no known standards governing the investigations or proceedings. There are no formally adopted procedures to contest a unilateral challenge by the Commission. These deficiencies adversely affect Mr. Wade's (and any candidate's) procedural protections afforded under the Administrative Procedures Law. For these reasons, the Commission's self-started investigation and challenge to Mr. Wade's qualifications are contrary to the Administrative Procedures Law.

III. New Procedure In Unilateral Challenges By Commission To Disqualify Otherwise Qualified Candidates Is A Change In Election Practices That Must Be Precleared by The U.S. Department of Justice.

During the Sept. 9, 2011, meeting of the Election Commission, Gov. Haley Barbour candidly told the Commission that, in his eight years on the Commission, he has never had to vote to disqualify a candidate based on the *sua sponte* investigation of the Secretary of State. For the first time, the Secretary of State's office has unilaterally investigated and challenged candidates' qualifications. Moreover, for the first time, a requirement that an individual must produce records (as opposed to sworn testimony) from a circuit clerk's office in order to prove he is a qualified elector is a new test for candidate qualifications. These changes have the potential to disqualify candidates who otherwise would have appeared on the November ballot. These are new election practices that must be precleared by the U.S. Department of Justice before they are implemented.

As the Election Commission is aware, Section 5 of the Voting Rights Act requires preclearance by the federal government of any changes to the practices or procedures to election laws in Mississippi. The Attorney General has previously noted that if an election commission makes changes in election practices, then those changes “may require preclearance under the Voting Rights Act by the U.S. Department of Justice.” Att’y Gen. Op. 2009-00025 (Feb. 13, 2009) (discussing powers of Clay County Election Commission to change rules).

In this case, the Election Commission has implemented a new practice of independently investigating and challenging candidates for public office who otherwise were qualified and would be on the general election ballot. In addition, the Commission has stated that the “proof” of being a qualified elector must be a record in the circuit clerk’s office (over which a candidate has no control) as opposed to the sworn, uncontradicted testimony by the candidate himself.

These new practices, tests and procedures by the Election Commission have not been submitted to the U.S. Department of Justice and have not been precleared. Without preclearance, these new practices and procedures are unenforceable.

IV. Notwithstanding All Of The Above, Rules of Fundamental Fairness Require the Secretary of State To Recuse Himself From Voting On Disqualification Since He Investigated And Is Challenging Mr. Wade’s Qualifications.

The election commission performs a “quasi-judicial” role in reaching its determination of whether a candidate is qualified to be on the general election ballot. *See Powe, supra*, at 764. As the Mississippi Supreme Court has made clear: “Administrative proceedings should be conducted in a fair and impartial manner, free from any suspicion of prejudice or unfairness...Due process guarantees neutrality on the part of those sitting in a judicial or semi-judicial capacity.” *Freeman v. Public Employees’ Retirement System of Mississippi*, 822 So.2d 274, 281 (Miss. 2002). (citations omitted).

In light of this, the Secretary of State, or his proxy, should recuse himself from voting on those candidates that his office has independently investigated and brought to the Commission to be challenged. The Secretary of State should not act as both prosecutor and judge.

By analogy, under Canon 3 of the Code of Judicial Conduct, a judge should recuse himself from matters in which “his impartiality might be questioned by a reasonable person knowing all the circumstance...” As the chief investigator of the alleged reasons that individuals should be disqualified, the Secretary of State should not also then vote to thus disqualify those same individuals. There is no question that the Secretary’s impartiality may be questioned by a reasonable person.

In *Freeman*, the Court held that a doctor who serves on the Medical Review Board which determines disability cannot later serve on the Disability Appeals Committee that reviews that decision. *Freeman*, 822 So.2d at 282. To do so constitutes plain error. *Id.* The same reasoning applies here.

September 12, 2011

Page 6

Miss. Code Ann. § 23-15-211 permits only two members of the Commission to carry out the business of the Commission. Given the express statutory authority to allow the Commission to conduct its business with only two members, the Secretary of State should recuse himself from voting on the disqualification of the candidates that Secretary's office investigated.

Conclusion

Mr. Todd Wade is currently on the November ballot. He was elected in the Aug. 2 primary as the Republican nominee for Senate District 9. For all of the reasons set forth above, the Election Commission will act contrary to established law if it votes to unilaterally remove Mr. Wade from the ballot on the eve of the ballots' printing and distribution. The Commission has not complied with state law, has not adopted the proper rules and regulations per the Administrative Procedures Law, and has implemented a new election practice without seeking preclearance by the U.S. Department of Justice. Mr. Wade must remain on the November ballot.

Very truly yours,

PHELPS DUNBAR LLP



Luther T. Munford

LTM:smk

In the Matter of Todd Wade

STATE OF MISSISSIPPI
COUNTY OF RANKIN

AFFIDAVIT

Personally came and appeared before the undersigned authority in and for the jurisdiction aforesaid, the within named Susanna Orr, who, after first being duly sworn by me, said notary, doth state and certify as follows based on my personal, first-hand knowledge:

1. My name is Susanna Orr.
2. I am a resident of Rankin County, Mississippi.
3. I am over the age of 18 and of sound mind. I am in every respect competent to make this affidavit.
4. I taught Government and Economics class at Jackson Preparatory School from the 1983-1984 school year to the 2006-2007 school year, and Todd Wade was one of my students.
5. As a regular practice and matter of course each year, I provided each of my students in class with a voting registration form to complete and mail to the Circuit Clerk of the county in which they lived.

Affiant sayeth further not.

IN WITNESS WHEREOF, Affiant has executed this Affidavit on the date set forth below beside her signature.

9/12/11
Date

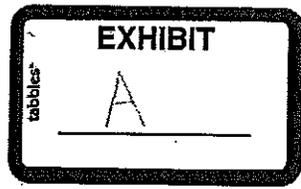
Susanna M. Orr

Subscribed and sworn to before me this 12th day of September, 2011, by Susanna Orr.

Gina Donald
NOTARY PUBLIC

My Commission Expires:

4-13-2012

STATE OF MISSISSIPPI
COUNTY OF RANKIN

AFFIDAVIT

Personally came and appeared before the undersigned authority in and for the jurisdiction aforesaid, the within named CAROL SWILLEY, Circuit Clerk of Rankin County, Mississippi, who, after first being duly sworn by me, said notary, doth state and certify as follows based on my personal, first-hand knowledge:

1. My name is Carol Swilley.
2. I am the duly elected and acting Circuit Clerk of Rankin County, Mississippi.
3. I am over the age of 18 and of sound mind.
4. The Rankin County Circuit Clerk's Office uses two computer programs to electronically maintain its voter records, the AS-400 and the Statewide Elections Management System ("SEMS").
5. Since voter registration forms in Rankin County are accepted, processed, maintained and entered into the system manually, there is always the possibility for human error.
6. If a voter registration record in Rankin County, Mississippi was lost and not entered into the electronic database due to human error, neither AS-400, SEMS nor the physical records would list the affected person as a registered voter.

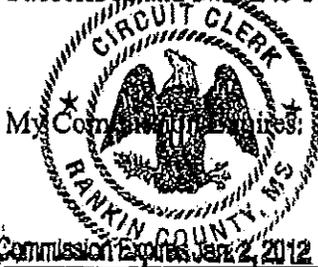
Affiant sayeth further not.

IN WITNESS WHEREOF, Affiant has executed this Affidavit on the date set forth below beside her signature.

September 12, 2011
Date

Carol Swilley

Subscribed and sworn to before me this 12th day of September, 2011, by Carol Swilley.



By: Beary Boyd De
NOTARY PUBLIC

