

IN RE: NOMINATION PETITION
OF LAWRENCE DRAGO,
Respondent,
Candidate for Exeter Township
Supervisor, 2-Year Term
DAVID VOLLMER,
Petitioner.

IN THE BERKS COUNTY COURT OF
COMMON PLEAS
No. 23-02497

IN RE: NOMINATION PETITION
OF LAWRENCE DRAGO,
Respondent,
Candidate for Exeter Township
Supervisor, 6-Year Term
DAVID VOLLMER,
Petitioner.

IN THE BERKS COUNTY COURT OF
COMMON PLEAS
No. 23-02498

IN RE: NOMINATION PETITION
OF MICHAEL KENNEDY,
Respondent,
Candidate for Exeter Township
Supervisor, 6-Year Term
DAVID VOLLMER,
Petitioner.

IN THE BERKS COUNTY COURT OF
COMMON PLEAS
No. 23-02499

IN RE: NOMINATION PETITION
OF JOHN PIHO,
Respondent,
Candidate for Exeter Township
Supervisor, 2-Year Term
DAVID VOLLMER,
Petitioner.

IN THE BERKS COUNTY COURT OF
COMMON PLEAS
No. 23-02500

IN RE: NOMINATION PETITION
OF JOHN PIHO,

Respondent,

Candidate for Exeter Township
Supervisor, 6-Year Term

DAVID VOLLMER,

Petitioner.

IN THE BERKS COUNTY COURT OF
COMMON PLEAS

No. 23-02502

IN RE: NOMINATION PETITION
OF FREDERICK D. WHITEHAWK,

Respondent,

Candidate for Exeter Township
Supervisor, 2-Year Term

DAVID VOLLMER,

Petitioner.

IN THE BERKS COUNTY COURT OF
COMMON PLEAS

No. 23-02504

IN RE: NOMINATION PETITION
OF FREDERICK D. WHITEHAWK,

Respondent,

Candidate for Exeter Township
Supervisor, 6-Year Term

DAVID VOLLMER,

Petitioner.

IN THE BERKS COUNTY COURT OF
COMMON PLEAS

No. 23-02506

**LEGAL BRIEF OF PETITIONER, DAVID VOLLMER, IN SUPPORT OF
PETITION TO SET ASIDE NOMINATION PETITIONS**

Pursuant to the instruction of this Court, undersigned counsel for the Petitioner respectfully submits this supplemental legal brief in support of his Petitions to Set Aside Nomination Petitions of the several Respondents listed above on limited issues.

I. Sufficiency of Affidavits in Light of No Answer or Answers that are Incomplete

The Election Code states that “[n]o nomination petition ... shall be permitted to be filed if (a) it contains material errors or defects apparent on the face thereof, or on the face of the appended or accompanying affidavits” 25 P.S. § 2936.

“Each candidate for any ... township ... shall file with his nomination petition his affidavit stating ,, (b) his election district, giving city, borough, town or township; (c) the name of the office for which he consents to be a candidate” 25 P.S. § 2870.

In nearly every Statement of Financial Interest and Candidate’s Affidavit objected to by Petitioner, the office was described as “Supervisor” or “Township Supervisor”. But Exeter Township has three open seats for Supervisor, one of the offices is a two-year term and two of the offices are for a six-year term. As filed, the description of the office sought fails to describe one office as against another, perhaps two.

The Supreme Court has noted, however, and the Commonwealth Court confirmed “that the two statutory schemes, the Election Code and the Ethics Act are to be read *in pari materia*.” *In re Shimkus*, 946 A.2d 139, 152 (Pa.Cmwlt. 2008) (referring to *In re Paulmier*, 937 A.2d 364 (Pa. 2007).

When the language of the Ethics Act is tempered by the language of the Election Code, it is clear that the intent of the Legislature is to encourage **both** full financial disclosure and protect voter choice. Read together, the Legislative intent is clearly best served by a rule that allows a timely filer to amend in order to come into full compliance giving the public both the benefit of full financial disclosure and the broadest choice of representatives.

In re Shimkus, 946 A.2d 139, 152 (Pa.Cmwlt. 2008) (*emphasis original*) (quoting *In re Paulmier*, 937 A.2d 364, 371 (Pa. 2007)). *Paulmier* held that the

fatality rule announced in Section 1104 of the Ethics Act was intended by the Legislature to bar only those candidates from the ballot who fail to file statements of financial interests or who file them in an untimely manner.

Section 1104 does not bar any candidate from the ballot if he or she files in a timely manner, even if there are defects on the face of the form, *so long as* that candidate subsequently amends the form to correct the defect and comes into compliance with the Act *in a timely manner*.

In re Paulmier, 937 A.2d 364, 371 (Pa. 2007), as clarified (Dec. 28, 2007) (*emphasis added*).

In *Paulmier*, the candidate, after the Petition to Set Aside his Nomination Petition was filed but prior to the close of evidence, Greg Paulmier, the candidate, amended his statement to include the information that was missing or incorrect, and cured the defect.

In this case, and as of the close of the hearing held this morning, no candidate had taken any steps to amend his affidavit and thereby cure the defects complained of by Petitioner. Hence, even if the candidate attempts to amend the petition at this point, it would be untimely and fall short of the requirements of 25 P.S. § 2936 and 65 Pa.C.S.A. 1104.

And even if this court were to find the errors curable still as to some of the nomination petitions, the fatality rule continues to preclude the opportunity to amend a petition where the Statement of Financial Interest was not timely filed in the first place, as in the case of Mr. Piho's failure to timely file the Statement of Financial Interest with Exeter Township on or before March 7, 2023.

The propriety of the application of the fatality rule to cases where the Statement of Financial Interest is not timely filed in the first place, as in the case of both nomination petitions filed by John Piho and are the subject of Case Nos. 23-02500 and 23-02502, was reaffirmed by our Supreme Court in 2014. In *In re Guzzardi*, our Supreme Court warned generally that courts "should be reluctant to interfere with political matters by granting equitable relief outside the scope of election contest statutes." *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) (quoting *Repsold v. Indep. Sch. Dist. No. 8*, 205 Minn. 316, 285 N.W. 827, 829 (1939)). Ultimately, the *Guzzardi* court held that

the judiciary should act with restraint, in the election arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania. At least where the Legislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity. ...

With regard to Section 1104(b)(3), quite obviously, the Legislature could have provided that the filing of a statement of financial interests with the Ethics Commission may be deemed timely where candidates are able to demonstrate ostensible non-negligent reasons for failing to meet the statutory deadline. Nevertheless, it did not do so—instead, the Assembly pronounced a bright-line rule couched in strong admonitory terms. Respectfully, contrary to the dissents' claims to a reasonable counter-interpretation, "fatal" and "curable" are simply antonyms.

Therefore, even if this court finds that the candidates' cure would not now be untimely, the failure of candidate John Piho to timely file a Statement of Financial Interest with the Township remains a fatal defect justifying the setting aside of the nomination petition.

II. Signature Lines Not In Chronological Order

Petitioner withdraws his objections to signature lines on the basis that they are not in chronological order. See *In re Nomination Pet. of Brown*, 846 A.2d 783, 790, 2004 WL 906414 (Pa.Cmwlth. 2004).

III. Michael Kennedy's Petition Must Be Set Aside

During the hearing this morning in the case docketed at Case No. 23-02499, the candidate, Michael Kennedy, offered as an explanation as to why there were mistakes related to the signature lines in the Nomination Petition he filed. Specifically, he stated that his sister, not him, gathered the signatures on the only nomination petition filed. That nomination petition was attached as Exhibit A to the Petition to Set Aside. The sworn statement of the circulator, however, was signed by Michael Kennedy, not his sister.

Our Supreme Court has clearly held that although 25 P.S. § 2869

does not explicitly state that the circulator must be present at the time signatures are obtained, the circulator clearly must be present when an elector signs the petition in order to truly be aware of the criteria listed in [that section]. Accordingly, based on the criteria listed in [that section], which a circulator must know in order to affirm the petition, we believe that the General Assembly intended that the circulator affirming the petition be present when each elector signs his name to that petition. From this point hence, therefore, signatures shall be removed from a petition if the circulator who has affirmed the petition was not in the presence of an elector as the elector signed the petition.

In re Nomination of Flaherty, 770 A.2d 327, 336-37 (2001). By his own admission, Mr. Kennedy was not present to witness the signatures placed on his nomination petition, and for that reason, the signatures contained on his single-page nomination petition should be stricken, leaving him with no signatures in support of his nomination. Without any signatures, Mr. Kennedy's nomination petition fails to contain the required 10 signatures and must be set aside.

For all the foregoing reasons, Petitioner requests that this Honorable Court find that, even where the noted defects in the candidates' Statements of Financial Interests and Candidate's Affidavit are curable, that any attempts to amend are now untimely, and grant Petitioner's Petition to Set Aside the Nomination Petitions of each of the candidates.

Respectfully submitted,

Dated: March 16, 2023

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CERTIFICATE OF SERVICE

I, James M. Smith, Esquire, certify that on the 16th day of March 2023, I caused to be served by email a true and correct copy of the foregoing Legal Brief of Petitioner, David Vollmer, In Support of Petition to Set Aside Nomination Petitions on the following, as follows:

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John Piho – Jack.Piho@Pihoengineering.com

Frederick Whitehawk – Fwhitehawk@gmail.com

Respectfully submitted,

Dated: March 16, 2023

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