

Mr. Anthony J. Albence
State Election Commissioner
State of Delaware
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September 14, 2020

This appeal is submitted pursuant 15 *Del. C.* § 7552 from a Decision of the Dewey Beach Board of Elections dated September 12, 2020.

This appeal involves a challenge under Section 5(b) of the Town's Charter to the qualifications of David Moskowitz to be on the ballot as a candidate for Resident Commissioner.

The Town has an election scheduled for September 26, 2020.

BACKGROUND FACTS

The Notice of Solicitation of Candidates

On July 21, 2020 the Town of Dewey Beach posted a "Notice of Solicitation of Candidates" in connection with its Annual Municipal election to be held on September 26, 2020 (the "Notice"). **Exhibit 1 hereto**, available at <https://www.townofdeweybeach.com/NoticeofSolicitationofCandidates>.

The Notice set forth specific candidate age and elector qualifications and highlighted felony disqualifiers:

- Each Commissioner shall be at least twenty-one (21) years of age.

- A candidate must not have been convicted of a felony, must be at least twenty-one (21) years of age on or before the date of the election, and must have been a qualified elector in the Town of Dewey Beach for at least one (1) year prior to the date of Election.

Id.

The Notice included the specific language of Section 5(b) of the Town's Charter concerning the defined term "Resident Commissioner:"

A Resident Commissioner shall have the following qualifications:

- 1) be a bona fide resident and domiciliary of the Town; **and**
- 2) be an owner of real estate within the Town, **or**

be both a settlor/creator and trustee of a valid trust to which real property which is located within the Town has been conveyed which conveyance is recorded in the Office of the Recorder of Deeds in and for Sussex County, **or**

be a leaseholder of real estate in the Town under a valid lease of a term of five (5) years or more. Any person applying as a leaseholder candidate pursuant to this subsection will be required to include a copy of a valid lease with his or her candidate filing.

Id. (emphasis added).

Finally, the Notice set specific candidate filing-related timelines and deadlines on August 27, 2020 and included numerous other specific requirements directed to "those persons with intentions to file as candidates," including:

Filings of an individual's intent to run for office will only be accepted in letter form or other written certification. A person's letter of intent must be accompanied by a completed "Candidate Filing Form", available from the Town's Website at

www.townofdeweybeach.com. Both must be received at the Town Manager's office no later than 5:00 p.m. on Thursday, August 27, 2020.

Id. (emphasis added).

The Candidate Filing Form

The blank candidate filing form requires each candidate by a notarized signature to:

... ***affirm*** that I will be at least twenty-one (21) years of age on or before the date of the election, that I will have been a qualified elector in the Town of Dewey Beach for at least one (1) year prior to the date of the election, that I have not been convicted of a felony, and that I meet all qualifications of Mayor and Commissioners, as specified in the Dewey Beach Town Charter.

Exhibit 2 hereto (emphasis added).

David Moskowitz's August 18, 2020 Candidate Filing Form

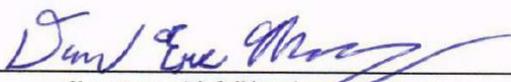
On August 18, 2020 David Moskowitz filed his letter of intent to run as a candidate for Resident Commissioner and, as required, attached a candidate filing form. **Exhibit 3 hereto.**

He confirmed by a checkmark on the form that he was filing for the position of "Resident Commissioner" and affixed his signature affirming that he met all qualifications, "as specified in the Dewey Beach Town Charter:"

hereby affirm that I will be at least twenty-one (21) years of age on or before the date of the election, that I will have been a qualified elector in the Town of Dewey Beach for at least one (1) year prior to the date of the election, that I have not been convicted of a felony, and that I meet all qualifications of Mayor and Commissioners, as specified in the Dewey Beach Town Charter.

Further, I hereby file as a candidate for the Office of (Mark the appropriate category) Resident or Non-resident Commissioner in the Town of Dewey Beach _____ Municipal Elections.

Year


Signature with full legal name

302-300-4000

Telephone number (Optional)

Id.

The Complaint Directed to the Town

In the first week of September 2020, Town property owner Dave Davis became aware of information indicating that David Moskowitz may not be qualified to run or to serve as candidate for “Resident Commissioner” under Section 5(b) of the Town Charter because he had sold or transferred the real estate he previously owned within the Town. Mr. Davis believed this would disqualify him to run or serve as a Resident Commissioner under Section 5 and Section 9 of the Town’s Charter.

On September 5, 2020 Mr. Davis sent an email to Elaine Bole (the Town’s Board of Elections Chair), Town Mayor Dale Cooke and Acting Town Manager Jim Dedes asking if the Town would investigate Mr. Moskowitz’ qualifications.

Mr. Davis was asked to provide his complaint in writing and he did so on September 8, 2020 (the “Davis Complaint”). **Exhibit 4 hereto.** A Board of Elections hearing on the Davis Complaint was noticed for September 11, 2020 (the “BOE hearing”).

The Davis Complaint focused on the Town’s Charter qualification requirements and, specifically, whether Mr. Moskowitz was qualified under the *second* prong of Section 5(b) at the time of the filing of his August 18, 2020 candidate application to run as a Resident Commissioner.

Under Section 5(b), a Resident Commissioner “shall have” *both* of the following qualifications:

- 1) be a bona fide resident and domiciliary of the Town; **and**
- 2) be an owner of real estate within the Town, **or**
be both a settlor/creator and trustee of a valid trust...recorded..., **or**
be a leaseholder of real estate in the Town... Any person applying as a leaseholder candidate pursuant to this subsection will be **required to include a copy of a valid lease with his or her candidate filing.**

Section 5 of the Town’s charter is attached as **Exhibit 5 hereto.**

Specifically, the Davis Complaint *did not* (and this appeal *does not*) challenge that Mr. Moskowitz may have adequately satisfied the *first* qualification prong of Section 5(b), *i.e.* that he is a “bona fide resident and domiciliary” as that term is specifically defined in the Town Charter.

The Davis Complaint (and this appeal) does challenges that Mr. Moskowitz failed to satisfy the second qualification prong of Section 5(b), *i.e.* that at the time of his August 18, 2020 candidate application filing he was not (i) **a record owner** of real estate within the Town, **or** (ii) **a settlor/trustee of a recorded trust** involving real estate within the Town, **or** (iii) **a leaseholder who had included a copy** of a valid lease with his candidate filling.

In the week before the hearing, Mr. Moskowitz initially took the position that he was qualified under Section 5(b) because he somehow remained a ‘co-owner’ of the real estate transferred to, and owned exclusively by, a Delaware limited liability company. Delaware law concerning who ‘ownership’ of LLC assets is to the contrary.

Thus, on September 10, 2020—the day before the BOE hearing—Mr. Moskowitz told the Cape Gazette that he was qualified under the second prong of Section 5(b) because he had created a trust: “I placed my house

into a sole-member LLC wrapped into a trust...”¹ But a qualifying trust under Section 5(b) required that it be “recorded” and no such qualifying trust has been proffered by Mr. Moskowitz to support his statements.

Thus, on September 11, 2020—hours before the BOE hearing—Mr. Moskowitz changed course and produced a lease drafted between himself on the one hand, and himself on the other hand, as a member of a limited liability company. Mr. Moskowitz was “**required** to include a copy of [this] valid lease with his or her candidate filing,” in order to qualify as a candidate by the August 27 deadline under Section 5(b).

At the time of the BOE hearing, all parties’ agreed and confirmed as an established matter of fact (specifically detailed below), that Mr. Moskowitz **did not** include a copy of any lease with his August 18, 2020 candidate filing.

The BOE Hearing

The BOE hearing was live streamed and recorded on YouTube and is accessible in its entirety at:

<https://www.youtube.com/channel/UCN0iYOg1yehkf4zecFfaltQ/live>

Mr. Davis presented his complaint at the time of the BOE Hearing. Having received a copy of Mr. Moskowitz’s lease only hours before the hearing, Mr. Davis first sought to call a Town Hall employee to testify at the BOE Hearing to establish the fact that Mr. Moskowitz did not—as required—include a copy of the lease with his filing form on August 18, 2020.

¹ See Driscoll E., “Moskowitz’s eligibility as Dewey candidate to be decided Sept. 11,”¹ Cape Gazette, September 10, 2020 available at:

<https://www.capegazette.com/article/moskowitz%E2%80%99s-eligibility-dewey-candidate-be-decided-sept-11/208119>

Mr. Davis observed that the letter and candidate filing form appeared to have been submitted by Mr. Moskowitz in person at Town Hall on August 18, 2020 (which obviated the need for the form to be notarized) and the form bears the signature (“received by”) Kate Banaszak:

Form must be notarized unless it is completed at Town Hall.

For Town Use Only	<u>Notary Information</u>
Date and time received <u>8/18/20 9:30am</u>	Subscribed and sworn to before me on the following date:
Received by <u>Kate Banaszak</u>	_____
	Notary Public Signature

	Date

See Exhibit 3. Mr. Davis proffered that Ms. Banaszak was being called to testify at the BOE Hearing to establish the fact that Mr. Moskowitz did not include a copy of any lease with his candidate filing form.

Before Ms. Banaszak had the chance to testify, Mr. Townsend—the Town’s lawyer—proffered that such fact testimony was unnecessary because it was “understood” that Mr. Moskowitz did not include a copy of any lease with his candidate filing form. See Town of Dewey Beach, *Board of Election Special Public Meeting*, YouTube (September 11, 2020) at 00:16:00 through 00:19:00, available at:

<https://www.youtube.com/channel/UCN0iYOg1yehkf4zeczFfaltQ/live>

Mr. Townsend confirmed that “the record is clear,” that it is an “established point” and “a fact that the board can accept” that Mr. Moskowitz did not include a copy of any lease with his candidate filing form. *Id.*

Mr. Townsend and Mr. Moskowitz’s counsel, Mr. Finger, confirmed the fact and all parties agreed accordingly that Ms. Banaszak’s testimony was unnecessary. *Id.*

Importantly, in connection with this exchange during the hearing, Elaine Bole (the chair of the BOE Hearing) attested that it was “absolutely true that there was no lease attached to the [Moskowitz] candidate application,” *Id.* at 00:18:00 to 00:18:22.

During the hearing, Mr. Townsend confirmed the Town’s view that by transfer of his property to an LLC, Mr. Moskowitz was no longer an owner of real estate within the Town. BOE Hearing recording at 00:22:27 to 00:22:53.

And during the hearing, Mr. Davis testified that, upon his examination, that there was no Trust recorded at the Recorder of Deeds office and Mr. Moskowitz never produced evidence of a recorded Trust. *Id.* at 00:23:00 to 00:23:35.

The BOE Decision

At the end of the BOE Hearing the board passed a motion to deny the challenge on the basis that disqualifying Mr. Moskowitz for failing to provide a copy of a lease with his candidate filing form would be “unconstitutional,” “going against the constitution of Delaware and the United States,” and “would not stand up in a court of law,” *Id.* at 1:35:00 to 1:43:00.

A written decision pursuant 15 *Del. C.* § 7552(a) was issued the next day on September 12, 2020 (the “BOE Decision”). **Exhibit 6 hereto.**

The BOE Decision does not reference—*even once*—Section 5(b) of the Town’s Charter as the basis of the Complaint. And the BOE Decision does not address—*at all*—the established fact that Ms. Moskowitz did not comply with the requirement to include a copy of his lease with his candidate filing.

ARGUMENT

Summary of Argument

There is no disputed issue of fact in connection with this Appeal.

The BOE Hearing established that Mr. Moskowitz did not comply with the requirement under Section 5(b) of the Town's Charter to include a copy of his lease with his candidate filing form. That established fact disqualifies him to run as a candidate for Resident Commissioner under the Town Charter.

The Standard of Review

Pursuant to 15 *Del. C.* § 7552, the State Elections Commissioner is empowered to hear appeals from decisions of municipal Boards of Elections, which themselves are charged to hear complaints “regarding any aspect of pre-election activity that is contrary to the provisions of this subchapter.” *See* In re: April 6, 2010 Delaware City Board of Election Appeal, available at https://elections.delaware.gov/Public_Hearings/index.shtml.

One of the provisions of the subchapter is § 7555 which addresses “Candidates; eligibility; declaration of candidacy,” and includes that “Candidate eligibility shall be established in the town charter.” 15 *Del. C.* § 7555(a). The State Elections Commissioner has “no power to decide issues relating to the constitutionality of election conduct...,” and “do[es] not have jurisdiction” to hear complaints relating to the constitutionality of voter or candidate qualifications existing in Town Charters or City Codes. *Id.* Additionally, the State Elections Commissioner “may not decide questions involving the interpretation of a municipal charter.” *See* In re: February 4, 2015 Decision on Welch Appeal – Frankford 2015, available at [available at https://elections.delaware.gov/Public_Hearings/index.shtml](https://elections.delaware.gov/Public_Hearings/index.shtml).

The Established Fact Record Dictates That Mr. Moskowitz Must Be Disqualified Under Section 5(b) of the Town Charter

The “pre-election activity” at issue here is Mr. Moskowitz noncompliance with of the Town's Charter in connection with his filing for candidacy as a

“Resident Commissioner” under Section 5(b). The BOE Decision acknowledges this:

“Mr. Moskowitz executed a Candidate Filing Form in which he filed as a ‘Resident Commissioner’...” BOE Decision at p.1.

“The challenger asked the Board of Elections to remove Mr. Moskowitz from the ballot as he does not have the qualifying interest in real estate *required* of Resident Commissioners as defined...” *Id.* at p.2.

During the hearing, Mr. Townsend confirmed the Town’s view that by transfer of his property to an LLC, Mr. Moskowitz was no longer an ‘owner of real estate within the Town’ as the term is used in Section 5(b):

Mr. Davis: “I don’t believe that there is any case to be made of him [Moskowitz] being considered a co-owner of the property with the LLC. The property is owned by the LLC Beachtime.com, solely.”

Mr. Townsend: “That is consistent with the advice I plan to give”²

BOE Hearing recording at 00:22:27 to 00:22:53.

There is no interpretation necessary involving the language of Section 5(b) contained in the Town’s Charter. The requirements in Section 5(b) of the Town Charter and as set forth in the July 21, 2020 Notice of Solicitation of Candidates for Mr. Moskowitz to either (i) own real estate in Town, (ii) record a valid trust, or (iii) “include a copy of a valid lease with his or her candidate filing” is plain and unambiguous.

²This is consistent with Delaware law and jurisprudence. *See Stone & Paper Inv’rs, LLC v. Blanch*, 2020 WL 3496694, at *10 (Del. Ch. June 29, 2020) citing 6 Del. C. § 18-701 (“A member of a limited liability company has no interest in the specific assets owned by the limited liability company.”).

The BOE Decision indicates that the “basis of the challenge is a technical one.” *Id.* at p.1. To the extent the BOE Decision is referring to the technical requirements set forth in Section 5(b) above, there is no disputed issue of “technical” fact, or otherwise, in connection with this Appeal:

Mr. Moskowitz did not as a matter of established fact “include a copy of a valid lease with his or her candidate filing” on August 18, 2020 or at any time before the August 27, 2020 deadline.

The BOE Hearing confirmed this. That established fact disqualifies him to run as a candidate for Resident Commissioner under the Town Charter.

Mr. Davis respectfully requests a summary decision in his favor based upon that established fact record. It would promptly end this dispute for the Town of Dewey Beach and would clear the way for a rule-compliant and fair election process in the Town.

The Requirements of Section 5(b) are not “Technicalities;” and Mr. Moskowitz’s Failure to Comply is not a “Mere Irregularity”

Technical compliance with election laws set forth in Town Charters respecting voter eligibility, candidate qualifications and the conduct of elections matters—it is the very essence of a free and fair electoral process.

The BOE Decision seems to suggest that compliance with actual, specific provisions in Section 5(b) that are otherwise “required” in order to qualify as a candidate for Resident Commissioner are mere “technicalities”—as if non-compliance with such requirements is inconsequential and does no harm. See BOE Decision at p. 1, 3 (suggesting that Mr. Moskowitz’s failure to include a “required” copy of his lease with his candidate filing form as “mere irregularities in the filing process”).

Here, the requirement in Section 5(b) to “include a copy of a valid lease with his or her candidate filing,” is no more an inconsequential (or waivable) “technicality” than any other requirements found in Section 5 of the Town Charter. And Section 5 has many such technical requirements or prohibitions. To wit:

- Candidates cannot have a felony conviction;
- Candidate must be at least 21 on or before election day;
- Candidates have to be an eligible Town voter for one year prior to election day;
- A Candidate’s intent to run for office will only be accepted in letter form or other written certification;
- A Candidate’s intent letter or written certification must be accompanied by a completed “Candidate Filing Form;”
- The Town Manager must receive the same at the Town Manager’s office no later than 5:00 p.m;
- A trust under Section 5(b) must be recorded;
- A lease term under Section 5(b) must be at least 5 years;

The candidate qualification and voter eligibility rules of the road in Dewey Beach were conspicuously posted and plainly understandable—both in the Town’s Charter and in the July 21, 2020 Notice soliciting candidates. Mr. Moskowitz failed to comply with the rules of the “Resident Commissioner” candidate qualifications set forth in Section 5(b), failed to submit a completed candidate filing that included a copy of his valid lease, and therefore is not qualified to be on the September 26, 2020 election ballot.

The BOE Decision Incorrectly focuses on Section 5(c) instead of Section 5(b); Neither a Scriveners Error nor a Constitutional Defect in Section 5(c) was at issue in the Davis Complaint nor is at issue in this Appeal.

15 *Del. C.* § 7552(a) authorizes a municipality’s Board of Elections to hear and decide the merit of a written complaint submitted by a citizen of the municipality “...regarding any aspect of pre-election activity that is contrary to the provisions of subchapters IV and V of this chapter.” The municipality’s Board of Elections is only authorized under the §7552(a) to determine “...whether the pre-election action or activity was legally incorrect and ordering lawful action necessary to correct such legal error in the pre-election action or activity.”

As set forth herein, the pre-election action challenged by the Davis Complaint was Mr. Moskowitz’s non-compliance with Section 5(b) of the Town Charter—non-compliance with the §7555(a)—a “provision of subchapter IV.”

The BOE Decision altogether fails to address or decide the merits of the Davis Complaint’s challenge under Section 5(b).

Instead, the BOE Decision repeatedly, incorrectly, insists that “the challenge is based on §5(c) as it appears in the posted town charter.” BOE Decision at p. 2.

The BOE Decision goes on to proffer other theories: that there was a “likely error in the bill drafting process” going back to sometime before 2012 by someone at the Delaware General Assembly and involving “the absence of the key provision” involving *Section 5(c)* of the Town’s Charter. *Id.* at p. 1-2.

The BOE Decision also goes on to surmise that “the Board suspects” that an “inadvertent scrivener’s error” occurred in connection with *Section 5(c)* of the Town Charter. *Id.*

Finally, the BOE Decision impermissibly “holds” that a “strict application” of Section 5(c) “violates the 14th Amendment to the US Constitution.” *Id.* at p. 3.

At bottom, the BOE Decision is incorrectly predicated upon what the Board unilaterally deems to be a challenge pre-election actions under *Section 5(c)* of the Town Charter. It makes no determination concerning the merits of the challenge to pre-election actions actually brought by Mr. Davis under *Section 5(b)* of the Town Charter. This appeal asks that the merits of Mr. Davis’ challenge under Section 5(b) be determined forthwith.

And the BOE Decision is also impermissibly predicated (under 15 *Del. C.* § 7552(a)) upon the Board’s belief that one or more provisions of Section 5 of the Town Charter might be constitutionally defective. But mere beliefs or concerns about the constitutionality of any law (including election laws

contained in a Town Charter) does not permit disregard for compliance and does not excuse non-compliance. Nobody gets to do that.

CONCLUSION

Please accept my thanks to Office of the Commissioner staff in advance for the expedited efforts required to address this appeal submission.

I stand ready to testify to any of the facts set forth herein.

I have, as you can hopefully tell by this submission, relied upon the assistance of my trusted counsel in connection with the legal arguments made herein. That counsel's information is listed below and he is copied on this electronic appeal submission.

Michael W. McDermott, Esquire
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I respectfully request that Mr. McDermott be copied on all communications and notices in this matter. I have asked him to appear on my behalf in this matter as necessary.

Respectfully Submitted,



Dave Davis

Enclosures – Exhibits 1-6

Cc: Fred Townsend, Esquire for the Town of Dewey Beach

David Finger, Esquire for David Moskowitz