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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 4995

In the Supreme Court of Appeals of Virginia at Richmond

E. WEBSTER ANDREWS, ET AL.

v.

FRED R. SHEPHERD, MAYOR, ETC., ET AL.

FROM THE CIRCUIT COURT OF CHESTERFIELD COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4995

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 11th day of February, 1959.

E. WEBSTER ANDREWS, ET AL., Appellants,

against

FRED R. SHEPHERD, MAYOR, ETC., ET AL., Appellees.

From the Circuit Court of Chesterfield County

Upon the petition of E. Webster Andrews, Samuel E. Barker, Stanley C. Burton, Louis F. Butler, W. W. Williams, Alton N. Moody, R. G. Howlett and W. F. Carwile an appeal was awarded them by one of the justices of the Supreme Court of Appeals on February 10, 1959, from a decree entered by the Circuit Court of Chesterfield County on the 16th day of May, 1958, in a certain proceeding then therein depending wherein the said petitioners were plaintiffs and Fred R. Shepherd, Mayor, etc., et al., were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4995

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 28th day of April, 1959.

E. WEBSTER ANDREWS, ET AL., Appellants,

against

FRED R. SHEPHERD, MAYOR, ETC., ET AL., Appellees.

This day came John E. Brockwell, Jr., and Rachel B. Brockwell, by counsel, and moved the court that they be substituted as appellees in this proceeding in the place and stead of Frank L. Farris and Clyde C. Hart:

And it appearing to the court from said motion and the stipulation of counsel filed with the clerk of this court that John E. Brockwell, Jr., and Rachel B. Brockwell are the successor members of the Council of the City of Colonial Heights of the appellees Frank L. Farris and Clyde C. Hart,

It is ordered that the said John E. Brockwell, Jr., and Rachel B. Brockwell be substituted as appellees in the place and stead of the said Frank L. Farris and Clyde C. Hart.

RECORD

• • • • •

PETITION FOR A WRIT OF MANDAMUS.

page 2 } To the Honorable William Old, Judge of said Court:

Your Petitioners respectfully represent:

1. That Petitioners are citizens, taxpayers and registered voters of the City of Colonial Heights, Virginia;
2. That the City of Colonial Heights is a municipal corporation of the Commonwealth of Virginia, chartered under Chapter 144 of the 1950 Acts of the General Assembly of Virginia;
3. That the said City of Colonial Heights now has a population of approximately 9,000 inhabitants;
4. That the administration and government of the City of Colonial Heights is vested by its charter in The Mayor and The Council of said City, and the defendant Shepherd is now The Mayor while the defendants Farris, Dishman, Short, Hart and Swearingen presently constitute The Council.
5. That there is now, and has been for several years only one ward and one election district established in the said City of Colonial Heights;
6. That there are now, and have been since about 1956, approximately 2900 persons who have registered to vote in the said election district in the said City of Colonial Heights, of whom approximately 2800 persons have paid their capitation taxes, as will more fully appear from "A list of all persons in the City of Colonial Heights, County of Chesterfield, Va. who have for one or more of the years, 1954, 1955, 1956 and those becoming of age who have paid their State Capitation Tax in advance only, on or before the 4th day of May, 1957," hereto attached marked Exhibit A;
7. That the voting district for the said election district in the said City of Colonial Heights is in the Municipal Building located on the Boulevard (U. S. Route #1) between James and Highland Avenues, as shown on the map of Colonial Heights, Virginia 1957, hereto attached marked Ex-
page 3 } hibit B;
8. That Section 24-45 of the Code of Virginia, 1950, as amended, provides as follows:

"*The council of a city shall establish for each ward as many election districts as it may deem necessary, and a voting place in each district,* except in cities in which officers are elected by wards the council in its discretion may establish election districts, the location of which may be within two or more wards. *Such districts,* except in a city having a population of more than twenty thousand but less than thirty thousand inhabitants, *shall be established so that there shall not be less than one election district for every one thousand voters or fractional part thereof above five hundred.* The council shall prescribe and cause to be published the boundaries of the districts. It may alter the boundaries of any such election district, and rearrange, increase, or diminish the number thereof, and change the voting places or establish others therein, not to exceed, however, one voting place for each election district. No change shall be made in any of the boundaries or voting places within thirty days next preceding any general election." (Italics added)

9. That said Section 24-45 of the Code of Virginia imposes upon the said City Council a duty to establish promptly a second election district whenever the number of voters in a present election district exceeds 1500;

10. That although requested several times to do so, the said City Council has refused to establish an additional election district or precinct as required by said Section 24-45 of the Code of Virginia;

11. That at a special meeting held on February 20, 1958, the said City Council unanimously adopted the following resolution:

"That the City Attorney be instructed to prepare the proper ordinances, resolutions, etc., using Old Town Creek as a boundary line for an additional precinct, to become effective at about the time the new school is completed."

12. That by virtue of its past refusals to take any action toward the establishment of a new election district and its recently expressed intention to postpone any such
page 4 } action to an uncertain future date, the said City Council has deprived the Petitioners and other voters of the City of Colonial Heights of their rights under said Section 24-45 of the Code of Virginia;

13. That even if the ordinances referred to in paragraph 11, *supra,* are adopted, there would be less than 200 voters, to-wit 184, residing within the proposed new election district or precinct and there would be more than 1501 voters residing

within the remainder of the old election district or precinct and that in order to comply with the requirements of the said Section 24-45 of the Code of Virginia, the City Council would be required to establish still another voting district or precinct.

WHEREFORE, being without any other clear and adequate legal remedy, Petitioners pray that Fred R. Shepherd, The Mayor of the City of Colonial Heights, and Frank L. Farris, Wilbur Dishman, W. L. Short, Clyde C. Hart and Fred Swearingen, the members of The City Council of the said City of Colonial Heights be made defendants to this proceeding; that a peremptory mandamus be awarded compelling the said defendants to take all such action as may be necessary to establish forthwith an additional election district or districts within the said City of Colonial Heights as required by Section 24-45 of the Code of Virginia, as amended; and that such other relief may be granted Petitioners as may be adapted to the nature of the case.

E. WEBSTER ANDREWS
SAMUEL E. BARKER
STANLEY C. BURTON
page 5 } LOUIS F. BUTLER
W. W. WILLIAMS
ALTON N. MOODY
R. G. HOWLETT
W. F. CARWILE

Filed this 3rd day of April 1958—Process delivered to Sheriff of Chesterfield I & 6—

LOUIS H. VADEN, Clerk.

* * * * *

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* * * * *

DEMURRER.

That said defendants and each of them come and say that the petition for a writ of Mandamus in this action is not sufficient in law and state the grounds of demurrer relied upon by them to be as follows:

(1) That the petitioners do not allege that they are deprived of any adequate right or rights.

(2) That no personal inconvenience on the part of any of the petitioners is alleged.

(3) That no personal inconvenience on the part of any group of voters is alleged.

(4) That there are no legal rights inherent in any of the petitioners which are alleged to have been violated.

(5) That the power and discretion of the City Council, defendants, set forth in Section 57 of the Charter of the City, 1950 Acts of Assembly, Page 217, to-wit: "All elections shall be held at such place or places within the City as the Council by Ordinance may prescribe," are not challenged.

(6) That said petition does not allege that any election heretofore held in said City violates Code Section 24-45 or the provision of said City Charter.

HARRY L. SNEAD,
Attorney for Defendants.

Filed April 16th 1958.

LEWIS H. VADEN, Clerk
By MARGARET C. FOSTER, D. C.

* * * * *

page 9 }

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OPINION.

This matter is heard upon a petition for mandamus by certain citizens of the City of Colonial Heights, seeking a mandatory order requiring the council of said city to establish, forthwith, an additional voting precinct within said city, and upon the demurrer filed thereto.

It is contended by petitioners that mandamus should be decreed by reason of Code Section 24-45 which reads as follows:

"The council of a city shall establish for each ward as many election districts as it may deem necessary, and a voting place in each district, except in cities in which officers are elected by wards the council in its discretion may establish election districts, the location of which may be within two or more wards. Such districts, except in a city having a population of more than twenty thousand but less than thirty thousand

inhabitants, shall be established so that there shall not be less than one election district for every one thousand voters or fractional part thereof above five hundred. The council shall prescribe and cause to be published the boundaries of the districts. It may alter the boundaries of any such election district, and rearrange, increase, or diminish the number thereof, and change the voting places or establish others therein, not to exceed, however, one voting place for each election district. No change shall be made in any of the boundaries or voting places within thirty days next preceding any general election."

page 10 } The first question to be determined is whether or not the statute is mandatory or directory in nature. In determining whether the requirements are mandatory or directory the language must be considered in the context in which it appears. The nature of the act to be performed must also be taken into consideration. The act to be done is the establishment of election districts and the prescribing of the boundaries of such districts. In prescribing the boundaries of such districts the council is the sole judge. Thus, in matters involving performance under the statute, the functions of the council are in no sense ministerial functions. They involve the highest discretion on the part of the council. The statute says "The council shall prescribe and cause to be published the boundaries of the districts." The Court has no power to substitute its judgment for that of the council.

Moreover, the statute does not prescribe any time within which such functions as may be imposed shall be performed. It does not say that the council shall *forthwith* prescribe the boundaries of the districts, nor does it say that it must be done within one year or five years. Thus the council is accorded complete discretion as to when such function shall be carried out.

I am of opinion that the statute is directory in nature and not mandatory.

In *Fleenor* v. *Dorton*, 187 Va. 659, 47 S. E., 2nd 329, the court said:

"Only performance of the ministerial duty could be compelled by mandamus and not the exercise of the discretion of the party against whom the writ issued."

It is conceded that only a mandatory statute, involving ministerial acts, is susceptible to enforcement by mandamus. I am of opinion that the remedy of the petitioners is at the

ballot box and not before the court. Decree sustaining the demurrer and dismissing the petition will therefore be entered.

WILLIAM OLD, Judge.

Filed Apr. 30th 1958.

LEWIS H. VADEN, Clerk.

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DECREE SUSTAINING DEMURRER AND DISMISSING PETITION.

This cause came on this day to be heard upon the papers formerly read, upon proof of notice and service of copies of the Petition for a Writ of Mandamus, upon the Demurrer of the defendants heretofore filed by leave of Court, the matters of law arising thereon having been argued by counsel for the defendants, and considered by the Court on the 16th day of April, 1958.

UPON CONSIDERATION WHEREOF, the Court being of the opinion, as stated in its written opinion heretofore filed in this cause, that the said Petition is not sufficient in law, and it is so adjudged, the said Demurrer is hereby sustained and the said Petition for Writ of Mandamus is accordingly hereby dismissed.

To which ruling and action of the Court in sustaining the Demurrer and dismissing this cause, the Petitioners duly excepted. And the Petitioners having indicated their intention to apply for an appeal to the Supreme Court of Appeals of Virginia from this decree, it is further ORDERED that this decree is suspended, provided Notice of Appeal and Assignments of Error are given within sixty (60) page 12 } days from the date this decree is entered, and provided the Petitioners, or one or more of them, within sixty (60) days from the date of this final decree, shall enter into bond with approved surety before the Clerk of this Court, in the penalty of Two Hundred Fifty Dollars ($250.00) for costs on appeal, conditioned as by law pro-

vided, and that such appeal is perfected in the manner required by law.

I ask for this:

HARRY L. SNEAD
Counsel for Defendants.

Seen and objected to:

RALPH H. FERRELL, JR.
Counsel for Petitioners.

Enter this May 16, 1958.

WILLIAM OLD, Judge.

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR BY THE PETITIONERS, E. WEBSTER ANDREWS, ET ALS.

The Petitioners, E. Webster Andrews, Samuel E. Barker, Stanley C. Burton, Louis F. Butler, W. W. Williams, Alton N. Moody, R. G. Howlett and W. F. Carwile, hereby give notice of their intention to appeal from the final decree entered in this cause on the 16th day of May, 1958, wherein the Circuit Court sustained defendants' Demurrer and dismissed the Petition for a Writ of Mandamus. The said Petitioners assign as error the following:

I. The Circuit Court erred in sustaining the defendants' Demurrer and dismissing the Petition for a Writ of Mandamus upon the grounds that under Code Section 24-45 the establishment of an additional election district or districts under the facts stated in said Petition is discretionary in nature and not mandatory.

II. The Circuit Court erred in failing to overrule the defendants' Demurrer and in failing to hold that under Code Section 24-45 the establishment of an election district or

districts under the facts stated in said Petition is
page 14 } mandatory.

III. The Circuit Court erred in failing to award Petitioners a Writ of Mandamus.

Respectfully,

E. WEBSTER ANDREWS,
SAMUEL E. BARKER,
STANLEY C. BURTON,
LOUIS F. BUTLER,
W. W. WILLIAMS,
ALTON N. MOODY,
R. G. HOWLETT,
W. F. CARWILE
By RALPH H. FERRELL, JR.
Counsel.

Filed May 22nd 1958.

LEWIS H. VADEN, Clerk.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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SUPREME COURT OF APPEALS
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RICHMOND, VIRGINIA