**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS**

**STATE OF GEORGIA**

LEWIS A. MASSEY, :

SECRETARY OF STATE, :

:

Petitioner, :

: Docket Number:

v. : OSAH-SS-CE-98-005-60-MMM

:

RALPH DAVID ABERNATHY, III, :

:

Respondent. :

 **INITIAL DECISION**

This matter involves Secretary of State Lewis A. Massey’s (the Petitioner) decision to disqualify Ralph David Abernathy, III, (the Respondent) as a candidate for the Office of Georgia State Senator from District 38. More specifically, the Petitioner alleges that on April 29, 1998, the Respondent qualified to run in the Democratic Party Primary. In so doing, the Petitioner alleges, the Respondent completed and submitted to the Georgia Democratic Party a Declaration of Candidacy and Affidavit along with a check for $400.00 to pay his qualifying fee, as required under O.C.G.A. Section 21-2-153. The Petitioner further alleges that the Respondent’s check for his qualifying fee was dishonored and returned by the bank on which it was drawn. Therefore, the Petitioner argues, the Respondent is not an eligible candidate for the Office of Georgia State Senator from District 38.

Having heard the evidence presented at a hearing held on Wednesday, June 3, 1998, I find that the Petitioner’s decision to declare the Respondent disqualified was authorized under the applicable provisions of Georgia law. THEREFORE, the Petitioner’s decision is **AFFIRMED**.

 **I.**

 **FINDINGS OF FACT**

 1.

On April 29, 1998, the Respondent filed with the Petitioner a Declaration of Candidacy and Affidavit to run in the Democratic Party primary for the Office of Georgia State Senator from District 38. (Petitioner Exhibit 2). The qualifying period to run as a candidate in a partisan political primary in Georgia in 1998 opened at 9:00 a.m. on Monday, April 27, 1998, and closed at 12 noon on Friday, May 1, 1998.[[1]](#footnote-1) (Testimony of Steve Anthony, the Executive Director of the Democratic Party of Georgia, and of Respondent).

 2.

In qualifying to run for the Senate, along with his Declaration of Candidacy and Affidavit, the Respondent submitted a check for $400.00 to pay his qualifying fee.[[2]](#footnote-2) (Petitioner Exhibits 2 and 3; Testimony of Steve Anthony and Respondent).

3.

The Respondent’s check to pay his qualifying fee was made payable to “the Democratic Party of Georgia” and was drawn on the Wachovia bank account of his wife, Ms. Annette W. Abernathy. (Petitioner’s Exhibit 3; Testimony of Respondent and Annette Abernathy). In anticipation of his qualifying and other expenses, the Respondent had previously given his wife $1,000.00 to deposit in her account. *Id.*

4.

The Respondent is the incumbent Senator from District 38 and has held office in the Georgia General Assembly since 1989, when he was initially elected to the House of Representatives. (Testimony of Respondent). After serving four years in the House, the Respondent was elected to the Georgia State Senate. *Id.* Counting his initial unsuccessful attempt to be elected to the Georgia House, the Respondent has qualified to run for the Georgia General Assembly at least five times. *Id.*

5.

On virtually every prior occasion on which the Respondent had qualified to run for the Georgia General Assembly, the Respondent had paid his qualifying fee with a cashier’s check. (Testimony of Respondent). The Respondent paid with a cashier’s check, he testified, “because I have heard of horror stories. There are tricks in the trade, things that people will do to you . . . for any reason a check doesn’t clear or something of that nature. I have always qualified with a cashier’s check.” *Id.*

6.

However, in qualifying to run in 1998, the Respondent did not follow his customary practice of obtaining a certified check to pay his qualifying fee. (Testimony of Respondent). Instead, the Respondent submitted his qualifying fee two days before the close of the qualifying period through a personal check drawn on Ms. Abernathy’s account. *Id.*

7.

On March 31, 1998, prior to the qualifying period, the Democratic Party of Georgia notified current members of the General Assembly, such as the Respondent, of the dates for qualifying, the locations for qualifying and the qualifying fees. (Petitioner Exhibit 1). Additionally, the Democratic Party cautioned the Members, “Please be aware that checks with insufficient funds will cause a candidate to be disqualified.” *Id.*

8.

On May 11, 1998, the Respondent’s qualifying check was returned to the Democratic Party of Georgia due to insufficient funds. (Petitioner Exhibits 3 and 4; Testimony of Steve Anthony and Respondent).

9.

On May 18, 1998, the Executive Director of the Georgia Democratic Party notified the Respondent and the Office of the Secretary of State of the status of the Respondent’s qualifying check. (Petitioner Exhibit 5; Testimony of Steve Anthony and Respondent).

10.

On May 19, 1998, the Petitioner initiated this action against the Respondent due to his alleged failure to pay the statutorily required qualifying fee during the qualifying period.[[3]](#footnote-3) (Attachment to Notice of Hearing).

11.

If the Democratic Party representatives learn during the qualifying period that a candidate’s qualifying fee check has been dishonored due to insufficient funds, the candidate is notified and given a chance to make good on the check or the qualifying fee. (Testimony of Steve Anthony).

12.

If the Democratic Party representatives learn after the close of qualifying and after they have certified their list of candidates to the Secretary of State[[4]](#footnote-4) that a candidate’s qualifying fee check has been dishonored due to insufficient funds, the candidate and the Secretary of State are notified and the Democratic Party treats this as a failure to pay the qualifying fee.[[5]](#footnote-5) (Testimony of Steve Anthony).

**II.**

**CONCLUSIONS OF LAW**

1.

The Petitioner bears the burdens of going forward and persuasion as to any alleged failures of the Respondent to meet the constitutional and statutory requirements of the office the Respondent seeks. OSAH Rule 616-1-2-.07. The standard of proof on all issues is the preponderance of evidence standard. OSAH Rule 616-1-2-.21(4).

2.

The requirements for candidates to qualify for a partisan political primary are outlined in O.C.G.A. Section 21-2-153. The statute specifically provides that a candidate may qualify for a party nomination only by (1) payment of the qualifying fee set under O.C.G.A. Section 21-2-131 or by (2) submitting a pauper’s affidavit in accordance with other procedural requirements. O.C.G.A. Section  21‑2‑153(a)(1, 2).

3.

There is no constitutional right for a person to be a candidate on a political party primary ballot. *See* *Duke v. Massy*, 87 F.3d 1226 (11th Cir. 1996); *Belluso v. Poythress*, 485 F. Supp. 904 (N.D. Ga. 1980).

4.

In addition to the payment of the qualifying fee, each candidate is required to file a Declaration of Candidacy Affidavit as outlined in O.C.G.A. Section 21-2-153(e)(1-8). Candidates must complete these requirements for qualifying beginning at 9:00 a.m. on the fourth Monday in April immediately prior to the primary and ending by 12:00 noon on the following Friday.[[6]](#footnote-6) O.C.G.A. Section 21-2-153(c). All qualifying must cease by the 12:00 noon deadline. *Id*.

5.

The qualifying fee for candidates to the Georgia General Assembly is set at $400.00 by statute. O.C.G.A. Section 21-2-131(a)(2).

 6.

 The qualifying fee for a candidate in a primary shall be paid to the county or state political party at the time the candidate qualifies. O.C.G.A. Section 21-2-131(b)(1).

 7.

 The qualifying fee is then divided between the appropriate political party and the State, with the political party being required to transmit 25 percent of the qualifying fee and its certified list of candidates to the Secretary of State by 12:00 noon on the third day after the close of the qualifying period. O.C.G.A. Section 21-2-131(c)(2).

8.

Georgia law also requires that:

[e]very candidate for federal and state office who is certified by the state executive committee of a political party or who files a notice of candidacy shall meet the constitutional and statutory qualifications for holding the office being sought.

O.C.G.A. Section 21-2-5(a). The Secretary of State may, upon his own motion, challenge the qualifications of any candidate at any time prior to the election of such candidate.[[7]](#footnote-7) O.C.G.A. Section 21-2-5(b).

9.

A check is a “negotiable instrument,” meaning that it is an “unconditional promise or order to pay a fixed amount of money which is payable on demand and drawn on a bank.” O.C.G.A. Sections 11-3-104(a)(1), (f); 11-3-108.

10.

A check, once executed and delivered, is “a contract in writing by which the drawer contracts with the payee that the bank will pay to the payee therein the amount designated on presentation.” *Sawgrass Builders, Inc. v. Realty Cooperative, Inc.*, 172 Ga. App. 324(1) (1984); *Bailey v. Polote*, 152 Ga. App. 255, 256 (1979).

11.

If a person accepts an uncertified check, as the Democratic Party did here from the Respondent, the obligation for which the check is accepted is not considered satisfied or completed. O.C.G.A. Section 11-3-310(b). Instead, the obligation for which the check is given is merely *suspended* until the check is either paid or dishonored. *Id*. Only when the check is paid or certified is the obligation discharged. *Id.*

12.

A check is dishonored when it is duly presented for payment to the payor bank and the payor bank makes a timely return of the check or sends a timely notice of dishonor or nonpayment under the law. O.C.G.A. Section 11-3-502(b)(1). The purported stamp or writing of the bank on or accompanying the instrument is admissible evidence to show the dishonoring of a check. O.C.G.A. Section 11-3-505(a)(2). This admissible evidence also creates a presumption of the dishonor of the check itself. O.C.G.A. Section 11-3-505(a). A photostatic copy of a check which has been returned for insufficient funds is admissible where evidence accounts for the original. *See Hamilton v. State*, 118 Ga. App. 842 (1968).

13.

The Respondent’s check in payment of his qualifying fee was made by an uncertified check. As such, the check could not satisfy his obligation to pay his qualifying fee unless and until it was paid. The check, and therefore the Respondent’s qualifying fee, was never paid.

14.

Instead, on May 11, twelve days after its submission to the Democratic Party, the check was returned to the Party as dishonored for insufficient funds.

15.

At the time of the notice of dishonor, the unconditional promise to pay had been broken and the suspension of the Respondent’s obligation to pay his qualifying fee lapsed. The Respondent failed to pay his qualifying fee.

16.

Georgia law requires a candidate qualifying in a partisan primary to complete the necessary requirements to qualify within a week-long period. O.C.G.A. Section 21-2-153(c). All qualifying actions must be completed by noon on the Friday of the week of qualifying and must cease at that time. *Id*. If a candidate fails to meet the statutory requirements to qualify during that strict time period, including the payment of the qualifying fee, because of a dishonored check, the candidate has failed to qualify. *See, e.g., In the Matter of Willie Jones*, OSAH-SS-96-009 (June 13, 1996) (affirmed, June 17, 1996).

17.

The Respondent’s failure to make the payment of his qualifying fee during the required period, therefore, means that he has failed to qualify as a matter of law and must be removed from the ballot.[[8]](#footnote-8) *Id.*

**III.**

**CONCLUSION**

**THEREFORE**, for all of the above and foregoing reasons, the Petitioner’s decision is **AFFIRMED,** and the Respondent’s name must be removed from the Democratic Party’s July 21, 1998, primary ballot.

**SO ORDERED**, this the 8th day of June, 1998.

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MICHAEL M. MALIHI

Administrative Law Judge

**For Ralph David Abernathy, III**

Leroy R. Johnson, Esquire

Steven J. Strelzik, Esquire

Strelzik & Shapiro

Aubrey T. Villines, Jr., Esquire

**For Lewis A. Massey**

**Secretary of State**

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**For Georgia Democratic Party and Steven Anthony**

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1. O.C.G.A. Section 21-2-153(c). [↑](#footnote-ref-1)
2. The qualifying fee for candidates for the Georgia General Assembly is set at $400.00. O.C.G.A. Sections 21-2-153 and 21-2-131(a)(2). [↑](#footnote-ref-2)
3. During this same qualifying period, the Secretary of State has also challenged the candidacy of another person who qualified to run for the Georgia State House of Representatives, Yao Atiim Seidu. (Respondent Exhibit 4). Mr. Seidu had also submitted to the Georgia Democratic Party a personal check to pay for his qualifying fees, and this check too was returned due to insufficient funds. *Id.* As in the instant case, the Georgia Democratic Party notified the Secretary of State of Mr. Seidu’s failure to pay his qualifying fee, resulting in a challenge by the Secretary of State. *Id.* [↑](#footnote-ref-3)
4. Each political party is required to submit its certified list of candidates to the Secretary of State by 12:00 noon on the third day after the close of the qualifying period. O.C.G.A. Section 21-2-131(c)(2). [↑](#footnote-ref-4)
5. No evidence has been presented to show any practice, procedure or policy of the Georgia Democratic Party selectively permitting some candidates to make good on qualifying fee checks otherwise dishonored outside of the qualifying period while not providing this opportunity to other candidates. [↑](#footnote-ref-5)
6. *See* Findings of Fact, paragraph 1, above. [↑](#footnote-ref-6)
7. The Secretary had previously, successfully challenged the qualification of candidates who had failed to pay their qualifying fees due to presenting checks that were returned for insufficient funds. *See, e.g., In the Matter of Willie Jones*, OSAH-SS-96-009 (June 13, 1996) (affirmed, June 17, 1996); *In the Matter of Jim Boyd* (Order of the Secretary of State, May 29, 1992); *In the Matter of Terry Tucker* (Order of the Secretary of State, May 22, 1992). [↑](#footnote-ref-7)
8. This tribunal is most sympathetic to Ms. Annette Abernathy who has graciously volunteered to accept responsibility for the Respondent’s failure to qualify to run in the Democratic Party Primary for the Office of Georgia State Senator from District 38. However, the Georgia General Assembly has placed the ultimate responsibility of complying with the election laws on the candidates who seek political office. Therefore, this tribunal lacks authority under the law to look beyond the actions or inactions of the Respondent with respect to such compliance. [↑](#footnote-ref-8)