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Shouldn't It Be Up to the Voters?

By Jerry H. Goldfeder

On Nov. 7, 2017, Mohamed Albanna was elected to the Lackawanna City Council. One of New York's smaller cities (pop. 18,141, according to the 2010 census), Lackawanna is just south of Buffalo, near Lake Erie. Albanna's election was immediately certified by the local board of elections, and he was due to take his oath of office on Jan. 1, 2018. In late December, however, the New York Supreme Court in Erie County found him ineligible and removed him. The basis for the court's determination was that Albanna had pled guilty to the felony of operating an unlicensed money transmission business 11 years earlier, and, according to the petition (brought by Lackawanna's mayor), his crime constituted "moral turpitude." Under the Lackawanna City Charter, a crime "involving moral turpitude" renders a candidate ineligible to serve in public office. Albanna appealed, and the decision was affirmed. *Szymanski v. Albanna,* 157 A.D.3d 1189 (4th Dep't 2018).

Putting aside for a moment the merits of the decision, it appears that the court lacked jurisdiction to remove him. If the issue of Albanna's eligibility had been raised when he petitioned for a place on the ballot, the court could have exercised its authority under the

Election Law to strike his name.[1] Or, once Albanna was sworn in, the court could have entertained a quo warranto proceeding to remove him from office—which, under the Executive Law, could be brought only by the state Attorney General. Instead, during the interregnum after being certified as the next Council Member and before being sworn in, the court chose, without any express statutory authority, to set aside the decision of the voters and nullify his election. A replacement for Albanna has already been chosen by the Council, and was sworn in last week.

This case raises a variety of issues, but let's step back. The U.S. Constitution authorizes the states to regulate federal elections, and, by implication, their own state contests as well. Moreover, state laws allow municipalities broad prerogatives over their own elections. Thus, states and localities have routinely enacted hurdles for candidates, including, for example, stringent ballot access and residency requirements. Unless constitutional protections are violated, these rules generally are upheld. As the U.S. Supreme Court has repeatedly said, "there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown,* 415 U.S. 724, 730 (1974). Thus, in New York, candidates for statewide office must reside in the state for five continuous years before the election, and candidates for the state legislature must reside in their district for one year.[2] Some city charters require one-year residency for candidates for mayor, and some demand 30-day residency. Approximately two-thirds of our cities, including New York City, require only that a candidate live there on the day of the election. Almost all candidates for public office in the state must petition to get on the ballot, and, though the process has been liberalized in the last 20 years, the detailed requirements have led many hopefuls to be thrown off the ballot. Thus, no candidate is given a free ride.

Let's get back to Mr. Albanna. Only a handful of New York's cities (Lackawanna, Ogdensburg, Plattsburgh and Poughkeepsie) explicitly bar from public service a candidate guilty of moral turpitude. Other cities exclude those who have committed felonies, and some disqualify candidates who have, simply, committed any crime. The first and most obvious issue raised by Lackawanna's ban is its ambiguity. One need only consider the back-and-forth arguments in the *Szymanski* litigation to conclude that a definition of the term "moral turpitude" is elusive. As such, disqualification on this ground arguably violates the due process rights of an otherwise eligible candidate, not to mention his or her supporters' First Amendment associational rights.

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[1] In fact, the Appellate Division in *Szymanski* relied on only one case, which had been brought in the context of a petition challenge.

[2] Four years ago, Governor Cuomo attempted to knock his Democratic Party primary opponent off the ballot on the ground that she had not resided in New York for five continuous years. Although she did not have an actual New York residence throughout that period, and on her original tax returns she asserted that she did not reside in New York during one of those years, the court found that the Governor did not meet his burden of proof. *Weiss v. Teachout*, Index. No. 70014/14 (Sup. Ct. Kings Co.), aff'd 120 A.D.3d 701 (2d Dep't 2014).

The more general issue, though, is whether it is good policy to impose such restrictions.

A look at the United States Congress is instructive. The Constitution establishes only minimal eligibility requirements to serve in the House of Representatives or United States Senate. To serve in the House, one must have been a citizen of the United States for seven years, and be twenty-five years of age when sworn in. A Senate candidate must have been a citizen for nine years, and be 30 years old. Residency in the district is not required for a Representative—she must reside only in the state—and not before the day of the election; the same is true for Senators. States may not impose additional requirements. Thus, both Robert F. Kennedy and Hillary Clinton were able to move into New York to run for the Senate. To drive home the point, a Brooklyn lawyer recently ran for the U.S. Senate in four states simultaneously; had he won in any of the states (he got clobbered), he would have quickly hired a moving van.

Furthermore, a candidate for Congress cannot be disqualified for exhibiting compromised morality (if such can even be defined). One such case involves Congressman Alcee Hastings (D-Fla.), elected in 1992 after being impeached for bribery and perjury by the House and removed by the Senate from the federal bench three years earlier. Apparently, his constituents saw past his prior acts, and he continues representing the people of Fort Lauderdale and West Palm Beach.

In short, the central question is whether voters should retain the choice of voting for a candidate with a checkered past, or even a "carpetbagger." One of our nation's illustrious founders, John Adams, when composing the Massachusetts constitution in 1780, started the trend of residency requirements, bucking the existing standard exemplified by New York's 1777 constitution, which required only that gubernatorial candidates be "wise and discreet." See J. Goldfeder, "A period of adjustment: Have residency requirements for governors overstayed their welcome?" *Albany Times Union*, Sept. 14, 2014. It was up to New York voters to decide if a candidate satisfied that standard.

The voters of Lackawanna's First Ward knew full well about Mohamed Albanna's criminal past. They were familiar with the details of his wrongdoing, and knew he had been imprisoned. J.K. Radlich, "He did 5 years in federal prison, now wants 4 years on Lackawanna council," *The Buffalo News*, June 7, 2017. Nevertheless, a majority voted for him to serve as their Councilman. Shouldn't the voters' choice outweigh imposed standards that restrict eligible candidates?

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