

FILED  
2008 AUG 18 AM 11:24

IN THE COURT OF COMMON PLEAS  
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel  
DENNIS J. VARNAU

Petitioner

vs.

BROWN COUNTY BOARD  
OF ELECTIONS

Respondent

: Case No. CVH 2008-0566  
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: MOTION TO SET ASIDE  
: MAGISTRATE'S ORDER  
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Now comes Respondent Brown County Board of Elections, by and through counsel, and moves this Court to set aside Magistrate Nathan A. Thompson's August 11, 2008 Order Denying the Brown County Board of Election's Motion to Dismiss, pursuant to Rule 53(D)(2)(b) of the Ohio Rules of Civil Procedure. (A copy of the Order is attached.)

The Magistrate's Order was in error in that Relator Varnau failed to state a claim upon which relief can be granted. There are three requirements for a writ of mandamus: 1) the relator must establish a clear legal right to the requested relief; 2) the respondent must have a clear legal duty to perform the requisite relief; and 3) the relator has *or had* no legal remedy at law. *State ex rel. Tran v. McGrath* (1997), 78 Ohio St.3d 45; *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, paragraph one of the syllabus. All three requirements must be met; failure by the relator to show any one requires the court to deny the petition. *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 202.

Although, the Board of Elections acknowledged that Relator Varnau “does not *currently* have a legal remedy at law,”<sup>1</sup> Varnau could have raised the issue with the Board of Elections at a time when the Board, pursuant to R.C. 3501.39, could have sua sponte determined whether Candidate Wenninger possessed the necessary qualifications to hold the office of sheriff.

Additionally, upon further review of Relator Varnau’s protest of Wenninger’s candidacy, it appears that Varnau would have an action in quo warranto available if Wenninger would win the November election. The quo warranto action that could have been filed prior to the expiration of Sheriff Wenninger’s first term, which was referenced in the Amended Motion to Dismiss, would have centered on whether Wenninger was qualified to be sheriff based on his educational background. However, if Wenninger is elected to sheriff on November 4, 2008, Relator Varnau would have an action in quo warranto as to whether Wenninger is qualified to be sheriff based on whether he has, within the three-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission.

In *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, the court indicated that a losing candidate could file a quo warranto action to challenge the election winner’s right to hold office. In *Whitman*, the Democrat candidate for judge filed a protest against the Republican candidate for the same office alleging that the Republican candidate did not meet the eligibility criteria for judge


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<sup>1</sup> See unnumbered page 6 of Amended Motion to Dismiss Petition.

because he had not practiced law for at least six years. The Secretary of State determined that the protest was not timely filed. The Ohio Supreme Court declared that the Relator had a legal remedy, a quo warranto action, should the Republican candidate win the election. *Id.* at ¶24.

For those reasons, Relator Varnau has or had a legal remedy at law and therefore cannot prove a set of facts that would warrant this court issuing a writ of mandamus.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of this Motion to Set Aside Magistrate's Order was served on Julie Steddom, Attorney for Relator, 7 Main Street, Ripley, Ohio 45167, by ordinary mail and by email to Julie Steddom and Relator Dennis J. Varnau, on this 18<sup>th</sup> day of August, 2008.

  
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Mary McMullen  
Assistant Prosecuting Attorney