

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO ex rel. DENNIS J. VARNAU,	:	
Relator,	:	CASE NO. CA2009-02-010
	:	<u>DECISION</u>
- vs -	:	8/16/2010
	:	
DWAYNE WENNINGER,	:	
Respondent.	:	
	:	

ORIGINAL ACTION IN QUO WARRANTO

Thomas G. Eagle, 3386 N. St. Rt. 123, Lebanon, Ohio 45036, for relator

Gary A. Rosenhoffer, 302 East Main Street, Batavia, Ohio 45103, for respondent

Patrick L. Gregory, 717 W. Plane Street, P.O. Box 378, Bethel, Ohio 45106, for respondent

Per Curiam.

{¶1} The above cause is before this court pursuant to a complaint for a writ of quo warranto filed by relator, Dennis Varnau, seeking to oust respondent, Dwayne Wenninger, from the office of Brown County Sheriff.

{¶2} Varnau is a Brown County resident who ran as an independent candidate for the office of Brown County Sheriff in the November 4, 2008 general election.

Following Varnau's unsuccessful protest of Wenninger's candidacy, Wenninger, the Republican Party nominee who has served as Brown County Sheriff since January 1, 2001, won the election by receiving 62.92% of the vote.¹

{¶3} On February 27, 2009, Varnau, Wenninger's lone challenger, filed a complaint for a writ of quo warranto seeking to oust Wenninger from the office of Brown County Sheriff and to have himself appointed to that same position. Now pending before this court are the parties' competing motions for summary judgment.

{¶4} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Forste v. Oakview Const., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. Summary judgment is properly granted only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *State ex rel. Layshock v. Moorehead*, 185 Ohio App.3d 94, 2009-Ohio-6039, ¶46; *Levinsky v. Lamping*, Mahoning App. No. 05 MA 71, 2005-Ohio-6924, ¶10, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶5} Throughout the pendency of this matter, Varnau insists that Wenninger failed to meet the necessary requirements found in R.C. 311.01(B) and (C) "to be a valid candidate in the 2000, 2004, and 2008 elections," that he "is not legally entitled to hold the office," and that "no board of elections has ever adjudicated [Wenninger's] actual eligibility" besides "verifying that [Wenninger] said on an application he met the

1. Sometime after the March 4, 2008 primary election, Varnau filed a protest with the Brown County Board of Elections challenging Wenninger's candidacy. The Board denied Varnau's protest as being untimely and for not being "filed by a member of the appropriate party." This court later affirmed the Brown County Court of Common Pleas decision dismissing Varnau's petition for a writ of mandamus seeking to compel the Board to accept his protest as valid. See *State ex rel. Varnau v. Brown Cty. Bd. of Elections* (Oct. 29, 2008), Brown App. No. CA2008-09-006, accelerated calendar judgment entry.

qualifications * * *."² These arguments lack merit.

{¶16} "County boards of elections are of statutory creation, and the members thereof in the performance of their duties must comply with applicable statutory requirements." *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, ¶12, quoting *State ex rel. Babcock v. Perkins* (1956), 165 Ohio St. 185, 187.

Pursuant to R.C. 311.01(F)(2), "[e]ach board of elections *shall certify* whether or not a candidate for the office of sheriff who has filed a declaration of candidacy * * * *meets the qualifications specified in divisions (B) and (C) of this section.*" (Emphasis added.) In other words, "a county board of elections is responsible for determining whether, on particular facts, a person satisfies the qualifications specified in R.C. 311.01(B) [and (C)] for the office of county sheriff." 2001 Ohio Atty.Gen.Op. No. 2001-026, paragraph one of the syllabus.

{¶17} This court "must give effect to the words of a statute and may not modify an unambiguous statute by deleting words used or inserting words not used." *State v. Bess*, Slip Opinion No. 2010-Ohio-3292, ¶18, quoting *State v. Teamer*, 82 Ohio St.3d 490, 491, 1998-Ohio-93. In turn, contrary to Varnau's claims, and in light of the clear statutory mandate provided by R.C. 311.01(F)(2), we find it readily apparent that the Brown County Board of Elections previously determined Wenninger satisfied the necessary requirements of R.C. 311.01(B) and (C) to be elected sheriff in 2000, 2004, and 2008. In fact, following Varnau's unsuccessful protest of Wenninger's candidacy, the Board sent Varnau a letter dated May 9, 2008 that states, in pertinent part, the following:

2. The crux of Varnau's argument is that Wenninger did not have the "educational credentials qualifying him to be an Ohio sheriff" upon taking office on January 1, 2001, that this alleged deficiency caused Wenninger to have a "break in service" from January 1, 2001 to January 1, 2005, thereby disqualifying him from holding the office following the 2004 election, and that, as a result of his "break in service," he "did not possess a valid peace officer certificate" prior to the 2008 general election making his current term a mere

{¶8} "The Board further believes that it has been put on notice that the qualifications of Dwayne Wenninger have been challenged under [R.C.] 311.01, Stare decisis and the Board of elections is tasked with determination of the sheriff's qualifications and this Board by necessity will conduct an independent investigation into Dwayne Wenninger's qualifications to run for the office of county sheriff." (sic)

{¶9} There is nothing in the record to suggest the Board did not conduct such an investigation prior to accepting Wenninger as a qualified candidate, nor is there any evidence to suggest the Board engaged in fraud, corruption, abused its discretion, or that it clearly disregarded any of the applicable statutes and legal provisions. Cf. *State ex rel. Shumate v. Portage Cty. Bd. of Elections* (1992), 64 Ohio St.3d 12 (discussing board of elections' duty when qualifications of candidate for sheriff are challenged); *State ex rel. Ross v. Crawford Cty. Bd. of Elections*, 125 Ohio St.3d 438, 2010-Ohio-2167, ¶17.

{¶10} As stated by the Ohio Supreme Court, "[b]oards of elections are obligated to weigh evidence of a candidate's qualifications, and courts should not substitute their judgment for that of the board." *State ex rel. Kelly v. Cuyahoga Cty. Bd. of Elections* (1994), 70 Ohio St.3d 413, 414; see, also, *State ex rel. O'Beirne v. Geauga Cty. Bd. of Elections*, 80 Ohio St.3d 176, 181, 1997-Ohio-348; *State ex rel. Herdman v. Franklin Cty. Bd. of Elections*, 67 Ohio St.3d 593, 596, 1993-Ohio-24. Therefore, because the Board previously determined Wenninger satisfied the necessary requirements to be elected Brown County Sheriff in 2000, 2004, and 2008 as statutorily required by R.C. 311.01(F)(2), we find that, based upon the record before us, there is no genuine issue of material fact, reasonable minds can reach only one conclusion which is adverse to Varnau, and Wenninger is entitled to judgment as a matter of law. Accordingly,

Wenninger's motion for summary judgment is granted and Varnau's motion for summary judgment is denied. Varnau's application for a writ of quo warranto is also denied.

{¶11} Judgment accordingly.

YOUNG, P.J., BRESSLER and HENDRICKSON, JJ., concur.