ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel. Dennis Varnau	:	Case No. 11- 1414
Appellant/Cross Appellee	:	
Vs	:	On Appeal from the Court of Appeals, Twelfth Appellate District
Dwayne Wenninger	:	
Appellee/Cross Appellant	:	Twelfth Appellate District No. 2009-02-10

REPLY AND MERIT BRIEF OF APPELLEE/CROSS APPELLANT DWAYNE WENNINGER

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Introduction, Summary and Statement of Facts

This is an appeal of right by Appellant/Cross-Appellee Varnau (Varnau) of an adverse decision in a quo warranto action brought by him. The Appellee/Cross-Appellant is the Brown County Sheriff, Dwayne Wenninger (Wenninger). Wenninger has appealed the appellate court's decision that overruled a motion to dismiss that was filed by him as well as the decision in quo warranto to the extent that the court of appeals failed to award him attorney fees. Wenninger now abandons that part of his appeal related to the overruling of the motion to dismiss as the substance of that issue will be addressed in his reply to Varnau's brief. Though Varnau characterizes this case as "a long battle through politics and courts to enforce Ohio election laws", this case is, in fact (and as will be addressed later), Varnau's continued pursuit of a writ that he is ineligible to obtain. For reasons unknown to Wenninger, Varnau continues to cite *State v. Wenninger*, 125 Ohio Misc.2d 55, 2003-Ohio-5521 to courts. If anything, *State v, Wenninger, infra*, flies directly in the face of Varnau's position as a jury in a criminal case long ago rejected the argument(s) that Varnau makes: Wenninger was never qualified to hold the office of Brown County Sheriff.

Wenninger and Varnau ran for the office of Brown County Sheriff in the general election of 2008. Wenninger won the election by receiving 62.92% of the vote. Varnau was Wenninger's sole challenger. Varnau thereafter commenced his action in quo warranto in the Twelfth District Court of Appeals.[1] The Twelfth District Court of Appeals (Court of Appeals), on cross-motions for summary judgment, held that Wenninger lawfully holds the office of Brown County Sheriff and overruled Varnau's motion for summary judgment.[2]

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[1] App. Dec., 8/16/10, ¶¶ 2, 3.
[2] App. Dec. of 8/8/11.

Wenninger, in his appellate court filing dated May 11, 2011, in addition to advocating that he was entitled to retain the office of Brown County Sheriff, sought costs and attorney fees related to his defense of this action. The appellate court judgment entry of August 8, 2011 orders that costs be taxed to Varnau but neither the appellate court decision nor does the judgment entry award attorney fees. Notably absent from these proceedings has been Wenninger's statutory counsel, the Brown County Prosecutor. In addition to his costs, Wenninger seeks an award of attorney fees in this matter.

As has been previously indicated, the Court of Appeals granted judgment to Wenninger on cross-motions for summary judgment. When Varnau filed his complaint, Wenninger filed a motion to dismiss with his affidavit attached to the motion. The Court of Appeals converted the motion to dismiss to one for summary judgment and placed the parties on a schedule whereby discovery could be conducted and briefing would occur. Varnau was granted numerous continuances to pursue exhaustive discovery. The Court of Appeals, in reaching its summary judgment determinations, resolved issues surrounding motions to strike evidence including those related to opinions and business or public records.[3] These facts will be discussed more specifically in the reply to Varnau's propositions of law.[4] The Court of Appeals found the following facts to be determinative to Wenninger's right to summary judgment.

The Court of Appeals observed that, throughout the history of this case, Varnau's contention has been that, as a matter of law, Wenninger was not qualified to become Brown County Sheriff when he first ran and was elected in 2000. Further, the Court of Appeals

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[3] App. Dec., 8/8/11, ¶6, et seq.

[4] In addition to his affidavit, Wenninger presented affidavits from Lee Spievack and Jamie Callender. The Court of Appeals struck portions of the affidavits of Spievack and Callender. However, the remaining portions of the affidavits of Spievack and Callender provide factual support for a finding that Wenningr met the post-secondary education requirement of the sheriff qualification statute prior to his election in 2000.

determined that any right that Varnau might have to pursue quo warranto must be determined as of the qualification date for the term for sheriff for which Wenninger and Varnau vied, January 4, 2008.[5] Varnau's right and contention must be based upon a current right to hold office as a quo warranto action is rendered moot by the expiration of a term of office.[6] In fact, the Court of Appeals examined Wenninger's affidavit as filed in this case with regard to the sheriff qualification statute as that statute existed on the date of qualification and found that it was unrebutted and that Wenninger, having defeated Varnau in the election, was entitled to become sheriff on the qualification date (January 4, 2008).[7]

Varnau's other basic contention was that Wenninger had a break in service so as to disqualify him from holding the office of Sheriff. Essentially, Varnau argued that Wenninger's break in service started on January 1, 2000 as Wenninger was not then qualified to hold office. The Court of Appeals found that Varnau could not seek to invalidate Wenninger's present term of office based upon an alleged disqualification from an expired term of office since the issue in a quo warranto action is the right to presently hold the office.[8]

Lastly, the Court of Appeals found that Varnau had not created a genuine issue of material fact as to Wenninger's qualification to be elected and hold the office of Brown County Sheriff.[9] Conversely, Wenninger did, through his evidentiary materials, establish as a matter of law that he is lawfully holding and exercising the office of Brown County Sheriff and was entitled to summary judgment.[10]

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[5] App. Dec., 8/8/11, ¶ 22.
[6] App. Dec., 8/8/11, ¶¶ 23, 38.
[7] App. Dec., 8/8/11, ¶25-43.
[8] App. Dec., 8/8/811, ¶ 44.
[9] App. Dec., 8/8/11, ¶ 45.
[10] App. Dec., 8/8/11, ¶ 46.

ARGUMENT

Reply to Appellant's Propositions of Law No. I & II:

Evidence of opinions or conclusions that a candidate met legal requirements based on an interpretation of a (sic) Statute are not admissible in summary judgment proceedings.

Objections to evidence submitted in summary judgment proceedings are waived when the objections are not raised until after a ruling is made on the merits of motions, after initial appeal, and only raised for the first time in a reply memorandum on remand from the appellate court.

As these two propositions deal with evidentiary issues at summary judgment, Wenninger addresses them together.

At the outset, it is apparent from a casual reading of the August 8, 2011 Decision of the Court of Appeals, that it (at A below) did not rely on any of the materials of which Varnau complains. Further, as a result of the Court of Appeals ruling(s) upon the motion to strike evidence, (at B below) the opinion evidence to which Varnau objects was, for the most part stricken or otherwise was not considered by the Court of Appeals in its Decision. As to the Second Proposition, the Court of Appeals, (at C below) as a matter of law, may only rely on evidence and materials as allowed by Ohio Rule of Civil Procedure 56(C) and (E) [Civ. R.].

(A) Materials that the Court of Appeals used for determination of summary judgment

In reaching its decision, the Court of Appeals relied solely upon Wenninger's affidavit in support of his motion for summary judgment. No other evidentiary material is referenced in the pertinent part of its Decision.[11] Though the Court of Appeals refers to other materials

[11] App. Dec., 8/8/11, ¶ 35 et seq.

in its Decision, all of the materials were submitted by Varnau.[12] There is nothing in this record that supports Varnau's contention that the Court of Appeals relied upon any impermissible affidavits, opinions or materials other than those allowed by Civ. R. 56. In fact, the Court of Appeals acknowledged its obligations under Civ. R. 56 [13] and scrupulously adhered to them.[14]

(B) Whether opinion evidence was improperly considered

Though it is crystal clear from the Court of Appeals' Decision of August 8, 2011 that it did not rely on stricken opinions in rendering summary judgment, it is important to be mindful of the content of Evidence Rule (Ev. R.) 701: opinion evidence of non-experts (lay witnesses) is admissible if rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Though Wenninger has not cross-appealed on this point, the stricken portions of the affidavits of Callender and Spievack are probably permissible opinions, whether lay or expert.

Wenninger reiterates that the Decision of the Court of Appeals relied solely upon the affidavit of Wenninger and its interpretation of the sheriff qualification statute, R.C. 311.01. The meat (where the Court begins its factual and legal analysis) of the Decision (beginning at ¶25) refers to only those two things (Wenninger's affidavit and the statute) and pertinent portions of the Ohio Administrative Code. It is very apparent that the Court of Appeals did not consider any stricken part of the affidavits of Callender or Spievack in rendering summary judgment.

(C) As a matter of law, at summary judgment, any court may only consider those materials set forth in Civ. R. 56.

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[12] For instance, at ¶ 37 of the Decision of 8/8/11, the Court refers to business records from a post-secondary school that Wenninger attended and as offered by Varnau and at ¶ 38, the Court refers to documents that Varnau obtained from OPOTC that establish Wenninger's tenure as Brown County Sheriff.

[13] App. Dec., 8/8/11., ¶¶ 7, 8

[14] App. Dec., 8/8/11, ¶ 20

To Wenninger, the resolution of Varnau's second proposition of law is axiomatic: any court may only consider those materials set forth in Civ. R. 56(C) and (E) in making a summary judgment determination. A motion to strike any given pleading, affidavit or document is either unnecessary or superfluous as if it is not of the evidentiary character allowed by Civ. R. 56, it may not be considered. The resolution of Varnau's second proposition of law is that simple. There was no 'foul' in this case.

Reply to Proposition of Law No. III:

Business or public records are "certified" and authenticated for purposes of admissibility in summary proceedings when a custodian of those records states that they are certified records of that business agency.

Under this proposition, Varnau complains that the Court of Appeals erred in refusing to consider records of Technicron Technical Institute (TTI), documents from the State Board of Career Colleges and Schools, records from the Ohio Board of Regents (OBR) and documents from the Ohio Secretary of State. For a number of reasons, the Court of Appeals properly declined to consider these documents.

At the outset, these documents were irrelevant (regardless of whether considered on summary judgment or at a trial) as they all are part of Varnau's trip in the 'way back machine'[15], a trip that is without basis since Varnau can not go behind an expired term of office, something that all of these documents do.

Secondly, the Court of Appeals specifically addressed the issues surrounding what materials it could or could not consider (Decision of 8/8/11, ¶7, et seq) and specifically addressed the particular documents of which Varnau now complains at ¶18. Wenninger

[15] Professor Peabody used to put Simon in the 'way back machine' for the purpose of traveling to an historic moment, perhaps Columbus setting sail toward America. The Rocky and Bullwinkle Show, Saturday morning cartoons from a kinder, gentler time.

reiterates that without a proper foundation, the documents may not be considered pursuant to Civ. R. 56.

Thirdly, Varnau filed his complaint on February 27, 2009. Varnau was granted numerous continuances to pursue discovery including gathering records by subpoenas duces tecum and could have deposed anyone that he desired whether that be affiant Spievack (from TTI) or any record custodians or people holding public office and chose not to do so. The only affidavit that Varnau tendered was his own. None were submitted from any record custodian or any public officer. Varnau simply failed to take those steps necessary to have these otherwise irrelevant documents considered by the Court of Appeals.

Reply to Propositions of Law No. IV and V:

An opposing qualified candidate for the office of county sheriff is entitled to a writ of quo warranto where the elected candidate purported to meet the minimum statutory educational requirements for the office by the length of post-secondary education and by attendance at an institution that at that time was not accredited by statute.

An elected candidate for county sheriff who did not meet the minimum statutory requirements for the office, upon first taking office, cannot use the period of unqualified service in that office to support later qualification for the same office, and therefore had a "statutory break in service" of four or more years which cancelled the elected candidate's Ohio Peace Officer Training Academy (OPOTA) certificate, making the elected candidate unqualified for the office, and entitles the opposing qualified candidate for the office of county sheriff to a writ of quo warranto.

As these two propositions deal with Wenninger's qualifications for office when he was elected in 2000 and 2004, they will be addressed together. Wenninger submits that the American Rule as to elections and quo warranto should, at least in part, control the resolution of these propositions and will give the legal and factual reasons why these propositions should be rejected.

The American Rule as to Elections

The general rule as to elections where votes are cast for a deceased or disqualified person is annotated at 133 A.L.R. 319. The general rule is stated as follows:

> The general rule—that votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates—has been most frequently applied in cases where the highest number of votes were cast for the deceased or disqualified person. The result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes.

The annotation thereafter cites cases from 28 states, Puerto Rico, England, Australia and Canada. The following Ohio cases are cited: *State ex rel. Sheets v. Speidel* (1900), 62 Ohio St. 156 (sheriff); *Prentiss v. Dittmer* (1916), 93 Ohio St. 314 (judge); *State ex rel. Haff v. Pask* (1933), 126 Ohio St. 633 (sheriff); *State ex rel. Cox v. Riffle* (1937), 132 Ohio St. 546 (engineer); and but see, *State ex rel. Clay v. Madigan* (1927), 29 Ohio App. 117 (primary election for Lima city commission, four to be nominated, fourth highest vote recipient ineligible, fifth highest recipient placed on general election ballot). The rule is stated more succinctly in *People ex rel. Duncan v. Beach* (N.C. Sup. Ct., 1978), 294 N.C. 713, 242 S.E.2d 796 (at 294 N.C. 721):

> "In this country, the great current of authorities sustains the doctrine that the ineligibility of the majority candidate does not elect the minority candidate. And this is without reference to the question of whether the voters knew of the ineligibility of the candidate for whom they voted. It is considered that in such a case the votes for the ineligible candidate are not void."

The reason for this rule appears to be best set forth in *Evans v. State Election Bd. Of State of Okl.,* (Ok. Sup. Ct., 1990), 804 P.2d 1125, 1130 (*Evans*). "An election is a deliberate choice of a majority or plurality of the electoral body. (portion omitted) Where an ineligible

candidate receives the majority or plurality of the votes, it is fairer, more just and more consistent with the theory of our institutions, to hold that the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject." The clear reason for the rule (as Varnau urges the Court to do in the conclusion to his merit brief) is to uphold the integrity of elections, not place a person in office that was clearly rejected by the voters. See also, *State ex rel. Lease, Pros. Atty. v. Turner* (1924), 111 Ohio St.38, 45; *State ex rel. Corrigan v. Hensel* (1965), 2 Ohio St.2d 96, 100. Application of this rule affects this case in two ways.

As will later be discussed, Wenninger believes that he is and always has been statutorily qualified to hold the office of Brown County Sheriff. Assuming arguendo that Wenninger is ousted, Varnau should not be placed in office. Though Varnau, as a Brown County resident or voter, may have standing to seek Wenninger's ouster, he, as the losing candidate, should not be placed in office since he was not elected. Instead, the vacancy should be filled in the manner prescribed by law. *Evans, supra,* at 1131.

Varnau cannot succeed on his Petition as a Matter of Law

The Court is well familiar with Varnau's theories: when he became sheriff as a result of the general election of 2000, Wenninger did not meet (1) the post-secondary education requirements of the sheriff qualification statute as the statute then existed and (2) as a result of not meeting the post-secondary education requirement of the qualifications statute, having never been eligible to assume the office of sheriff, Wenninger had a four year break in service prior to the 2004 general election where he was once again elected sheriff. The Court of Appeals has set forth axioms that apply to quo warranto actions.

Quo warranto is the remedy by which title to office may be litigated. (cit. om.). In order for a writ to issue, a relator must establish (1) that the office is being unlawfully held and exercised by respondent and (2) the relator is entitled to the office. (cit. om.). Because the law does not favor removal of a duly elected official (cit. om.), an elected official should not be removed except for clearly substantial reasons and conclusions that his presence in office would be harmful to the public welfare. (cit. om.).[16] A person other than the attorney general or a prosecuting attorney can bring a quo warranto action, as a private citizen, only when the person is personally claiming title to a public office. (cit. om.). Further, the individual must be claiming title to a ***current*** public office as a quo warranto action is rendered moot by the expiration of a term of office. (cit. om.).[17]

As advocated above, as the loser of the election, Varnau can not be placed in office and is unable to succeed on that aspect of his petition. However, the issue of ouster may be tried. *State ex rel. Newell v. Jackson*, 118 Ohio St.3d 138, 2008-Ohio-1965, ¶8. Where Varnau's contention fails is that his attack is as to expired terms (Wenninger's qualification for general election years 2000 and 2004) and, as the Court of Appeals found, the terms having expired, the issues are moot. *State ex rel. Ziegler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, ¶14 [and citing *State ex rel. Paluf v. Feneli* (1995), 100 Ohio App.3d 461]; *See also, State ex rel. Wilmot v. Buckley* (1899), 60 Ohio St. 273, 299-300.

Wenninger has always, as a matter of fact, been qualified to be Brown County Sheriff

An interesting aspect of this case is that Varnau often cites *State v. Wenninger*, 125 Ohio Misc. 2d 55, 2003-Ohio-5521, a case where Wenninger was prosecuted for election

[16] App. Dec., 8/8/11, ¶ 23 (citations omitted contained therein).
[17] App. Dec., 8/8/11, ¶ 24 (citations as omitted contained therein).

fraud. The election fraud case was highly publicized and the State's theory was that, for the same reasons that Varnau now claims, Wenninger was not qualified to hold the office of Brown County Sheriff due to a lack of the requisite post-secondary education. The jury rejected the State's theories and acquitted Wenninger. Two observations are appropriate. First, this matter is, in some basic sense, res judicata as the jurors/voters in the criminal case rejected the same theory that Varnau pursues. Secondly, given the highly publicized nature of the criminal trial, one must assume that the voters have actual knowledge of Wenninger's alleged deficiencies and continue to elect him. Assuming such to be the case, votes for Wenninger were, in effect, votes against Varnau. See, *Evans, supra*, 1129.

Factually, as the Court of Appeals noted, Varnau did not establish that Wenninger suffered any break in service so as to be disqualified from the office of Brown County Sheriff.[18] Likewise, even though as to a former and mooted term, Varnau has failed to establish that Wenninger failed to have the requisite post-secondary education.

The foundation to Varnau's mooted theory or theories is that Wenninger lacked the two years of post-secondary education under the qualification statute as it existed in 2000 (R.C. 311.01 as eff. 9-29-99). If, in fact, Wenninger did have the requisite post-secondary education, Varnau's mooted theory or theories fail as his 'break in service' concept relies on the lack of post-secondary education in 2000.

Wenninger has established the fact that he had the requisite two years of post-secondary education. A review of those portions of the affidavits of Spievack and Callender deemed admissible for Civ. R. 56 purposes establishes this fact. Spievack is the former owner of TTI. Spievack established that during all periods applicable to Wenninger's attendance at TTI, TTI possessed a Certificate of Registration with the State Board of School

[18] App. Dec., 8/8/11/

and College Registration. Spievack also established that as a result of Wenninger's attendance at TTI, Wenninger attained more than two years of post-secondary education.[19] At the time that Callender gave his affidavit, he was in the unique position of being an Ohio Attorney, a member of the Ohio House of Representatives and an ex officio member of the Ohio Board of Regents. Callender affided, whether as fact or admissible opinion[20], as a matter of fact, that the State Board of School and College Registration operated under the umbrella of the Ohio Board of Regents. Callender also observed, as a matter of fact, that Wenninger's certificate from TTI was a two year diploma.[21] These two affidavits establish that at the time that Wenninger initially ran for sheriff, he met the requirements of R.C. 311.01(B)(9)(b). These affidavits stand unrebutted.

Cross Appellant's Sole Proposition of Law:

An unsuccessful petitioner in an action in quo warranto is liable for reasonable attorney fees in addition to costs.

Sheriff Wenninger is an elected public officer. R. C. 309.09 requires a county prosecuting attorney to defend legal actions that are brought against a county officer. In this case, the Brown County Prosecutor has not made an appearance and Wenninger has had to retain counsel to defend against the various legal actions of Petitioner Varnau. Wenninger suggests that R.C. 309.13 provides a basis for an award of attorney fees in this case.

The statutory quo warranto scheme provides that a relator can recover his or her costs (R.C. 2733.14) and damages from a usurper (R.C. 2733.18). No similar provision is

[19] Spievack affidavit, ¶¶ 2 (last sentence stricken), 4, 5.
[20] The Court of Appeals noted that the admission of certain portions of Callender's affidavit contained opinion provided in accordance with Ev. R. 701. App. Dec., 8/8/11, ¶ 10.
[21] Callender affidavit, admissible portion of ¶4 and ¶ 5.

made for the benefit of a respondent who is not ousted. Wenninger suggests that he should be able to recover his attorney fees and costs under R.C. 309.13.

This Court has long upheld the American Rule as to the recovery of attorney fees: unless provided for by statute, a prevailing party in litigation is not entitled to recover attorney fees as part of the costs of litigation. *Sorin v. Board of Education of Warrensville Hts. School Dist.* (1976), 46 Ohio St.2d 177 [and citing *Alyeska Pipeline Service Co. v. Wilderness Society* (1975), 421 U.S. 240]. R.C. 309.13 provides that taxpayers may bring suits where a prosecuting attorney is unwilling to do so, and if successful in the action the taxpayer is "...allowed his costs, including a reasonable compensation to his attorney". The quo warranto action brought by Varnau is an action brought in the name of the state as contemplated by R.C. 309.13. The facts of this case are unique. Should Wenninger continue to prevail in this case, Wenninger should receive a judgment against Varnau for his costs and reasonable compensation for his attorneys as provided for in R.C. 309.13.

CONCLUSION

A. As to Varnau's Propositions

The foundation of Varnau's case is that Wenninger did not possess the required post-secondary education when he ran for the office of Brown County Sheriff in 2000. Varnau's 'break in service' argument is dependent on a finding that Wenninger lacked the required post-secondary education when he ran in 2000. Unfortunately for Varnau, as the Court of Appeals noted, Varnau may not attack Wenninger's qualifications as to expired terms as the issues are moot. Under the American Rule as to elections, should Varnau successfully obtain ouster of Wenninger, as the loser of the election, he may not obtain the office.

In reviewing Varnau's basic claim, Varnau has not established that Wenninger lacked the required post-secondary education prior to running in 2000. On the other hand, Wenninger has clearly established (and it remains unrebutted), that Wenninger possessed the required two years of post-secondary education. Not only must Varnau's attempt to obtain a writ in quo warranto fail, so must his attempt to oust Wenninger.

B. As to Wenninger's Proposition

This case is factually unique in that Sheriff Wenninger's statutory counsel did not enter an appearance and defend him in this quo warranto action. Should Wenninger continue to prevail in this action and since there is statutory support for the same (R.C. 309.13), Varnua should be obligated to pay Wenninger's costs and reasonable compensation to his counsel. The citizens of Brown County should not have to eat the fee for Wenninger's counsel. This case should be remanded for the limited purpose of determining Wenninger's costs and attorney fees.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served upon Thomas G. Eagle, Attorney for Appellant, 3386 N. State Rt. 123, Lebanon, Ohio 45036 by ordinary mail, postage prepaid on October 14, 2011.

Gary A. Rosenhoffer

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel., Dennis Varnau	:	Case No. 2011-1414
Plaintiff-Appellant	:	
Vs	:	On Appeal from the Twelfth District Court of Appeals, Brown County, Ohio
Dwayne Wenninger	:	
		Court of Appeals Case No. CA2009-02-10
Defendant-Appellee	:	

NOTICE OF APPEAL OF
APPELLEE DWAYNE WENNINGER

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Counsel of Record for Appellee Dwayne Wenninger

NOTICE OF APPEAL OF
APPELLEE DWAYNE WENNINGER

Now comes Appellee Dwayne Wenninger, through counsel, and does give notice of appeal to the Supreme Court of Ohio as to Case No. CA2009-02-10 from the entry overruling his motion to dismiss as filed by the Twelfth District Court of Appeals on July 27, 2011 as well as the opinion filed on August 8, 2011 to the extent that it failed to grant Appellee an award of attorney fees.

This is an appeal of right pursuant to Sup.Ct.R. II, §1(A)1, being a direct appeal from an original action in *quo warranto* filed in the Twelfth District Court of Appeals for Brown County, Ohio.

Respectfully submitted,

Patrick L. Gregory (0001147)

Gary A. Rosenhoffer (0003276)

Counsel of Record for Appellee Wenninger

CERTIFICATE OF SERVICE

I certify that on August 24th, 2011, a copy of this notice of appeal was served by ordinary mail, postage prepaid upon counsel for Appellant, Thomas G. Eagle, 3386 N. State Rt. 123, Lebanon, Ohio 45036.

Gary A. Rosenhoffer

A-2

IN THE COURT OF APPEALS OF BROWN COUNTY, OHIO

STATE OF OHIO ex rel. DENNIS J. VARNAU

FILED
COURT OF APPEALS

CASE NO. CA2009-02-010

Relator,

JUL 27 2011

ENTRY DENYING MOTION TO DISMISS

vs.

DWAYNE WENNINGER

TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS

Respondent.

This matter is before the court on a motion to dismiss for lack of standing filed by counsel for respondent, Dwayne Wenninger, on July 12, 2011.

Upon due consideration of the foregoing, the motion is DENIED.

IT IS SO ORDERED.

Robert A. Hendrickson, Presiding Judge

Robin A. Piper, Judge

Rachel A. Hutzel, Judge

A-3

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO, ex rel.
DENNIS J. VARNAU,

Relator,

- vs -

DWAYNE WENNINGER,

Respondent.

CASE NO. CA2009-02-010

JUDGMENT ENTRY

The above cause is before the court pursuant to relator's complaint for a writ of quo warranto and the parties' cross-motions for summary judgment and to strike inadmissible evidence.

It is the order of this court that the motions to strike are GRANTED in part and DENIED in part to the extent outlined in the Opinion filed the same date as this Judgment Entry.

There being no genuine issue of material fact, respondent being entitled to judgment as a matter of law, and reasonable minds coming to but one conclusion which is adverse to relator, respondent's motion for summary judgment is well-taken and is hereby GRANTED for the reasons set forth in the Opinion filed the same date as this Judgment Entry.

Relator's motion for summary judgment is not well-taken and is DENIED.

Relator's complaint for a writ of quo warranto is DENIED.

Judgment accordingly.

Costs to be taxed to relator.

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
	:	OPINION 8/8/2011
- vs -	:	
DWAYNE WENNINGER,	:	
Respondent.	:	

ORIGINAL ACTION IN QUO WARRANTO

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

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

Patrick L. Gregory, 717 W. Plane, Bethel, Ohio 45106, for respondent

HENDRICKSON, P.J.

{¶1} This action in quo warranto is before the court upon remand by the Supreme Court for a determination of the merits of the parties' competing motions for summary judgment and motions to strike various exhibits submitted in support of their respective arguments.

{¶2} In February 2009, relator, Dennis J. Varnau, filed a complaint for a writ of quo warranto seeking to oust respondent, Dwayne Wenninger, from the office of Brown County

Sheriff. Wenninger, a Republican candidate who has held the office of sheriff since January 2001, ran opposed in the 2008 general election by Varnau, an Independent candidate. Prior to the 2008 election Varnau had filed a protest against Wenninger's candidacy for sheriff. The Brown County Board of Elections denied the protest as it was not "filed by a member of the appropriate party." Varnau then sought a writ of mandamus to compel the board of elections to accept his protest as valid, but his action was dismissed by the Brown County Court of Common Pleas.[1] On appeal, this court affirmed the dismissal, holding that Varnau had other legal remedies he could pursue should Wenninger be elected sheriff. See *State ex rel. Varnau v. Brown Cty. Bd. of Elections* (Oct. 29, 2008), Brown App. No. CA2008-09-006 (accelerated calendar judgment entry).

{¶3} Wenninger won the 2008 election by receiving 62.92% of the vote. Varnau filed the present action, seeking to remove Wenninger from office and have himself appointed as sheriff. Varnau contends that Wenninger is not currently qualified to hold the office of sheriff because, upon initially taking office in 2001, Wenninger did not have the necessary educational credentials qualifying him to be an Ohio sheriff under R.C. 311.01(B)(9). Varnau argues this alleged deficiency, in turn, caused Wenninger to have a break in service which then invalidated his peace officer certificate. This would have resulted in Wenninger not meeting the qualifications for sheriff under R.C. 311.01(B)(8) beginning in January 2005.

{¶4} Wenninger moved to dismiss the complaint and attached his affidavit to the motion. This court converted his motion to dismiss to a motion for summary judgment. Thereafter, Varnau filed a cross-motion for summary judgment.

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1. "The Brown County Court of Common Pleas dismissed the mandamus action because, among other reasons, the extraordinary remedy of mandamus is not appropriate in that there is a legal remedy at law through a quo warranto action and Varnau's protest was not filed by a qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate whose declaration of candidacy the elector objects to pursuant to R.C. 3513.05." (Internal quotation marks omitted.) *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759, ¶5.

{¶5} On August 16, 2010, this court granted Wenninger's motion for summary judgment and denied the writ of quo warranto "because the [Brown County Board of Elections] previously determined [that] 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)." *State ex rel. Varnau v. Wenninger*, Brown App. No. CA2009-02-010, 2010-Ohio-3813, ¶10. On appeal, the Supreme Court found that the board of elections had not exercised its quasi-judicial authority in rendering its administrative determinations prior to the elections. "[T]he court of appeals erred in holding that the board's previous administrative determinations barred Varnau from challenging Wenninger's qualifications to remain sheriff in his quo warranto case. These determinations were not res judicata as to these issues, because the board did not exercise quasi-judicial authority in rendering them." *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759, ¶15. The matter was remanded for further proceedings based on the parties' competing motions for summary judgment.

Motions to Strike Inadmissible Evidence

{¶6} Before we discuss the merits of the parties' motions for summary judgment, we must first address the parties' competing motions to strike various affidavits and exhibits offered in support of their respective motions for summary judgment.[2] Wenninger seeks to strike "any materials" that Varnau has submitted that are not certified or properly authenticated by the Rules of Evidence or are improper under Civ.R. 56(E). Varnau seeks to strike the affidavits of Jamie Callender, a former member of the House of Representatives and Ohio Board of Regents, and Lee Spievack, the former owner of Technichron Technical Institute, Inc. (hereafter, "TTI"), on the grounds that the affidavits are not based on personal

2. Varnau filed his original motion to strike on August 21, 2009. He later renewed his motion to strike on March 9, 2011. On March 17, 2011, Wenninger filed a reply to Varnau's motion to strike, and within this reply, Wenninger sought to strike various documents from Varnau's motion for summary judgment on the ground that such documents did not comply with Civ.R. 56 or the Rules of Evidence.

knowledge, contain inadmissible hearsay, and seek to improperly provide legal opinions. Varnau further seeks to strike any "material[s] to and from attorneys for various parties * * * documents prepared for apparent use in [Wenninger's] criminal case, and also 'sworn' and unsworn legal opinions from third parties."[3]

{¶7} Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment. *Spier v. American Univ. of the Caribbean* (1981), 3 Ohio App.3d 28, 29. Those materials are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." Civ.R. 56(C). "[A] party may properly introduce evidence not specifically authorized by Civ.R. 56(C) by incorporating it by reference through a properly framed affidavit pursuant to Civ.R. 56(E)." *Wilson v. AIG*, Butler App. No. CA2007-11-278, 2008-Ohio-5211, ¶29; *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562, 569.

{¶8} Pursuant to Civ.R. 56(E), "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." Personal knowledge is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay." *Re v. Kessinger*, Butler App. No. CA2007-02-044, 2008-Ohio-167, ¶32, quoting *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646. "Hearsay statements, i.e. statements other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted, are not admissible evidence in a summary

3. In December 2002, criminal charges for election falsification were brought against Wenninger. He was later acquitted of falsifying election records relating to his qualifications to run for and hold the office of sheriff of Brown County, Ohio. See *State v. Wenninger*, 125 Ohio Misc.2d 55, 2003-Ohio-5521.

judgment context unless an exception to the hearsay rule applies. Evid.R. 801(C)." *Koop v. Speedway SuperAmerica, LLC*, Warren App. No. CA2008-09-110, 2009-Ohio-1734, ¶11.

{¶9} In the present case, Varnau seeks to exclude both Callender's and Spievack's affidavits on the ground that these documents attempt to present legal opinions in the guise of sworn testimony. "Where an affidavit containing opinions is made part of a motion for summary judgment, it is properly considered by a trial or reviewing court when it meets the requirements set forth in Civ.R. 56(E) and Evid.R. 701." *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 335, quoting *Tomlinson v. Cincinnati* (1983), 4 Ohio St.3d 66, paragraph one of the syllabus. "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Evid.R. 701.

{¶10} Applying the requirements of Civ.R. 56(E) and Evid.R. 701 to Callender's affidavit, we find portions of the affidavit to be inadmissible. Portions of paragraph four and all of paragraph six refer to various documents that were reviewed and relied on by Callender in drafting his affidavit, but were not attached to the affidavit or served therewith as required by Civ.R. 56(E).[4] Accordingly, with respect to paragraph four, all but the final sentence is hereby stricken, and the entirety of paragraph six is hereby stricken. The remaining portions of Callender's affidavit are admissible as the statements contained therein are either based on personal knowledge or are opinions provided in accordance with Evid.R. 701.

{¶11} Portions of Spievack's affidavit are also inadmissible pursuant to Civ.R. 56(E) and Evid.R. 701. The last sentence of paragraph two refers to TTI's school catalogue which was not attached to the affidavit; likewise, a copy of a certificate of accreditation by the

4. Such documents include the indictment and bill of particulars filed in the criminal case against Wenninger and a letter dated October 4, 2002, from the Ohio Board of Regents.

National Association of Trade and Technical Schools, which Spievack refers to and relies on in paragraph three of his affidavit, was not attached to the affidavit. Because these documents were not presented in accordance with Civ.R. 56(E), the last sentence of paragraph two and the entirety of paragraph three are hereby stricken from Spievack's affidavit. The remaining portions of the affidavit are based on personal knowledge and are therefore admissible.

{¶12} Both Varnau and Wenninger seek to admit various documents under the business records, Evid.R. 803(6), and public records, Evid.R. 803(8), exceptions to the hearsay rule. Varnau attempts to introduce such documents into evidence by attaching them to a personal affidavit wherein he attests that "[t]he documents attached hereto * * * were all obtained either from [Wenninger] or pursuant to subpoena or public records requests from the custodian of the documents and records, and are believed to be true, accurate, and authentic copies of the actual records maintained by each said agency or custodian." Wenninger attempts to introduce documents into evidence under Evid.R. 106,[5] claiming that the documents represent the entirety of the records produced by various state agencies in response to Varnau's subpoena requests.

{¶13} "To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness.'" *State v. Glenn*, Butler App. No. CA2009-01-008, 2009-Ohio-6549, ¶17, quoting

5. Evid.R. 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it."

State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, ¶171. "[P]rior to admission of a business record, the record must be properly identified or authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims." (Internal quotation marks omitted.) Id. at ¶18.

{¶14} Similarly, documents purporting to be public records must also be authenticated as such. Evid.R.902 states, in relevant part:

{¶15} "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

{¶16} "* * *

{¶17} "(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, *certified as correct by the custodian or other person authorized to make the certification*, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio." (Emphasis added.)

{¶18} In the present case, there were instances where both Varnau and Wenninger failed to comply with Evid.R. 803, Evid.R. 902, and Civ.R.56(E). Documents attached to a motion for summary judgment must be sworn and certified, and the individual certifying the document as correct must be the custodian of the document or another individual with personal knowledge that the document is what its proponent purports it to be. Because Varnau failed to comply with the Rules of Evidence and with Civ.R.56(E), we find the following documents he submitted to be inadmissible: an unsworn and uncertified copy of TTI's school catalogue (exhibit 8); purported business records and uncertified public records from the State Board of Career Colleges and Schools and the State Board of Proprietary School Registration (exhibits 8B and 8C); purported business records, including a letter and

an email, from the Ohio Board of Regents (exhibit 9A); and uncertified public records from the Ohio Secretary of State (exhibit 18).

{¶19} We also find the following documents submitted by Wenninger to be inadmissible as they were not introduced through an affidavit, as required by 56(E), and were not properly certified as business records or public records pursuant to Evid.R. 803: an unsworn and uncertified May 9, 2008 letter from the Brown County Board of Elections; an unsworn memoranda on behalf of Wenninger filed by Wenninger's attorneys before the Brown County Board of elections; an unsworn and uncertified copy of Wenninger's 1989 Ohio peace officer basic training program certificate; an unsworn and uncertified copy of a September 30, 2002 letter from the Brown County Prosecuting Attorney to the Ohio Board of Regents; an unsworn and uncertified copy of an October 4, 2002 letter from the Ohio Board of Regents to the Brown County Prosecuting Attorney; and an unsworn and uncertified copy of a March 19, 2003 email from Shane DeGarmo, an employee of the Ohio Board of Regents, to Kris Frost, an employee of the Ohio Attorney General.

{¶20} The remaining evidence submitted by the parties, having conformed to the requirements of Civ.R. 56(E) and the Rules of Evidence, are deemed admissible.

Motions for Summary Judgment

{¶21} Summary judgment is appropriate when there are no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Williams v. McFarland Properties, L.L.C.*, 117 Ohio App.3d 490, 2008-Ohio-3594, ¶7. To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary materials that show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The nonmoving party must then present evidence that some

issue of material fact remains to be resolved. Id. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First Natl. Bank & Trust Co.* (1970), 21 Ohio St.2d 25, 28.

{¶22} Wenninger argues that he is entitled to summary judgment because no genuine issues of material fact exist with respect to his right to hold the office of sheriff. He contends that he was qualified to run and hold the office of sheriff as of January 4, 2008, the qualification date for the 2008 election.[6] Varnau contends, however, that as a matter of law, Wenninger was not qualified on January 4, 2008, to run or hold the office of Brown County sheriff. The premise of Varnau's argument is that Wenninger was not qualified for the position in 2000 when Wenninger first ran and was elected sheriff, and subsequent to the 2000 and 2004 elections, Wenninger's peace officer training certificate was invalidated due to a break in service. Varnau further argues that he was the *only* qualified and eligible candidate for sheriff and that the votes cast for him in the 2008 election are the only ones that should be counted.[7] Varnau maintains that the writ of quo warranto should therefore be

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6. {¶a} As it is defined in R.C. 311.01(H)(1), "qualification date" means "the last day on which a candidate for the office of sheriff can file a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate, as applicable, in the case of a primary election for the office of sheriff; the last day on which a person may be appointed to fill a vacancy in a party nomination for the office of sheriff under Chapter 3513 of the Revised Code, in the case of a vacancy in the office of sheriff; or a date thirty days after the day on which a vacancy in the office of sheriff occurs, in the case of an appointment to such a vacancy under section 305.02 of the Revised Code."

{¶b} In the present case, neither Wenninger or Varnau presented evidence to establish the qualification date for the 2008 election. On June 30, 2011, the court notified the parties of its intent, pursuant to Evid.R. 201, to take judicial notice of the Ohio Secretary of State's January 29, 2008 Directive No. 2008-19, which established that the qualification date for the office of Brown County sheriff for the 2008 election was January 4, 2008. On July 15, 2011, Varnau filed a response to the court's notice of intent to take judicial notice, questioning the purpose behind taking notice of the qualification date and the relevancy of such date. Varnau did not, however, object to or dispute the accuracy of the date. In fact, within his August 10, 2009 motion for summary judgment and memorandum in opposition to Wenninger's motion for summary judgment, and in his May 19, 2011 reply to Wenninger's argument and objections, Varnau states that "[t]he filing deadline for sheriff candidates in the 2008 election, was January 4, 2008." Accordingly, Varnau has conceded that January 4, 2008, was the qualification date for the 2008 election.

7. Varnau listed his qualifications for the office of sheriff in a personal affidavit, dated October 9, 2009, which has not been challenged by Wenninger within these proceedings.

granted as Wenninger is unlawfully holding the office of sheriff when Varnau is lawfully entitled to the office.

{¶23} A writ of quo warranto is a high prerogative writ of an extraordinary nature. *State ex rel. Cain v. Kay* (1974), 38 Ohio St.2d 15, 16. "[Q]uo warranto is the exclusive remedy by which one's right to hold a public office may be litigated." *State ex rel. Battin v. Busch* (1988), 40 Ohio St.3d 236, 238-239. "For a writ of quo warranto to issue, a relator must establish (1) that the office is being unlawfully held and exercised by respondent, and (2) that relator is entitled to the office." (Internal quotation marks omitted.) *State ex rel. Newell v. Jackson*, 118 Ohio St.3d 138, 2008-Ohio-1965, ¶6. Because "[t]he law does not favor the removal of a duly elected official"; *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 419, 2005-Ohio-2373, ¶85; "[a]n elective public official should not be removed except for clearly substantial reasons and conclusions that his further presence in office would be harmful to the public welfare." *State ex rel. Corrigan v. Hensel* (1965), 2 Ohio St.2d 96, 100.

{¶24} "A person other than the attorney general or a prosecuting attorney can bring a quo warranto action, as a private citizen, only when the person is personally claiming title to a public office." *Jackson*, 2008-Ohio-1965 at ¶6. Further, the individual must be claiming title to a *current* public office as a quo warranto action is rendered moot by the expiration of a term of office. *State ex rel. Zeigler v. Zumbar*, __ Ohio St.3d __, 2011-Ohio-2939, ¶14; *State ex rel. Paluf v. Feneli* (1995), 100 Ohio App.3d 461, 464-465; *State ex rel. Devine v. Baxter* (1959), 168 Ohio St. 559, 559. Wenninger is currently holding a four-year term of office as a result of winning the sheriff's race in the 2008 election. Accordingly, the court can only examine his qualifications and right to hold office pursuant to the 2008 election. Wenninger's qualifications, or alleged lack thereof, for the 2000 election and the 2004 election are moot as Wenninger's 2000 and 2004 terms as sheriff have long since expired. See *Feneli* at 464-465.

{¶25} R.C. 311.01(B) sets forth the specific qualifications a candidate for sheriff must possess in order to be elected sheriff. "[N]o person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

{¶26} "(1) The person is a citizen of the United States.

{¶27} "(2) The person has been a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date.

{¶28} "(3) The person has the qualifications of an elector as specified in section 3503.01 of the Revised Code and has complied with all applicable election laws.

{¶29} "(4) The person has been awarded a high school diploma or a certificate of high school equivalence issued for achievement of specified minimum scores on the general educational development test of the American council on education.

{¶30} "(5) The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state.

{¶31} "(6) The person has been fingerprinted and has been the subject of a search of local, state, and national fingerprint files to disclose any criminal record. Such fingerprints shall be taken under the direction of the administrative judge of the court of common pleas who, prior to the applicable qualification date, shall notify the board of elections, board of county commissioners, or county central committee of the proper political party, as applicable, of the judge's findings.

{¶32} "(7) The person has prepared a complete history of the person's places of residence for a period of six years immediately preceding the qualification date and a complete history of the person's places of employment for a period of six years immediately preceding the qualification date, indicating the name and address of each employer and the period of time employed by that employer. The residence and employment histories shall be filed with the administrative judge of the court of common pleas of the county, who shall forward them with the findings under division (B)(6) of this section to the appropriate board of elections, board of county commissioners, or county central committee of the proper political party prior to the applicable qualification date.

{¶33} "(8) The person meets at least one of the following conditions: (a) [h]as obtained or held, within the four-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 or has been issued a certificate of training pursuant to section 5503.05 of the Revised Code, and, within the four-year period ending immediately prior to the qualification date, has been employed as an appointee pursuant to section 5503.01 of the Revised Code or as a full-time peace officer as defined in section 109.71 of the Revised Code performing duties related to the enforcement of statutes, ordinances, or codes; [or] (b) [h]as obtained or held, 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 and has been employed for at least the last three years prior to the qualification date as a full-time law enforcement officer, as defined in division (A)(11) of section 2901.01 of the Revised Code, performing duties related to the enforcement of statutes, ordinances, or codes.

{¶34} "(9) The person meets at least one of the following conditions: (a) [h]as at least two years of supervisory experience as a peace officer at the rank of corporal or above, or

has been appointed pursuant to section 5503.01 of the Revised Code and served at the rank of sergeant or above, in the five-year period ending immediately prior to the qualification date; [or] (b) [h]as completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located or in a school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code." R.C. 311.01(B).

{¶35} Wenninger submitted a personal affidavit stating that he met all nine of the statutory requirements set forth in R.C. 311.01(B). Wenninger specifically states that he meets the requirements set forth in (B)(1) and (B)(2) as he is a U.S. citizen who has resided in Brown County, Ohio since 1971. He further states that he meets the requirements (B)(3) as he has all the qualifications of an elector as set forth in R.C. 3503.01, and he has complied with the applicable election laws. Wenninger attests that he received a high school diploma in 1986, and he has not been convicted of a felony or offense involving moral turpitude, has not been convicted or pleaded guilty to an offense that is a misdemeanor of the first degree, and has not been convicted or pleaded guilty of an offense that carries a penalty that is substantially equivalent to the penalty of a misdemeanor of the first degree, thereby complying with requirements set forth in (B)(4) and (B)(5). He further attests that he has been fingerprinted as required by (B)(6) and has filed all necessary documents with the administrative judge of Brown County, Ohio as required by (B)(7). Wenninger states that he meets the requirements of (B)(8)(b) as he has obtained or held within the three-year period ending immediately prior to the qualification date for the 2008 election a valid peace officer certificate of training issued by the Ohio Peace Officer Training Commission (OPOTC), and he has been employed as sheriff for Brown County on a full-time basis since January 2001.

Finally, Wenninger attests that he has been acting and performing as Brown County sheriff since 2001, and therefore has complied with the supervisory experience requirement set forth in (B)(9)(a).

{¶36} Varnau only contends that Wenninger has not met the requirements set forth in R.C. 311.01(B)(8) and (9). With respect to R.C. 311.01(B)(9), Varnau alleges that as of 2000, Wenninger did not possess the necessary supervisory experience to be elected sheriff. In support of this argument, Varnau relies upon Wenninger's response to a request for admission wherein Wenninger admits that prior to January 7, 2000, he had not attained the rank of corporal or higher in any municipal police department or sheriff department. Varnau further contends that any supervisory experience Wenninger obtained after taking office as sheriff on January 1, 2001, cannot count towards the requirement set forth in R.C. 311.01(B)(9)(a), as such experience was illegally obtained because Wenninger was never lawfully qualified to hold the office.

{¶37} Varnau also argues that Wenninger has not met the post-secondary education requirements of R.C. 311.01(B)(9)(b), as Wenninger did not complete two years of schooling and did not obtain a degree from a college or university authorized to confer degrees by the Ohio Board of Regents.[8] In support of this argument, Varnau relies on three pieces of evidence, namely Wenninger's October 23, 1987 diploma from TTI, Wenninger's deposition testimony wherein Wenninger states that he attended TTI from August 1986 to October 23, 1987, and TTI's certificate of registration for the period of August 22, 1986 through August

8. At the time of the 2000 election, a former version of R.C. 311.01 was in effect. Under the prior version of the statute, a sheriff candidate either had to have two years of supervisory experience or the candidate must have "completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located." R.C. 311.01(B)(9)(b) (West 2000). The current version of the statute, which was in effect at the time of the 2008 election, states that post-secondary education may be obtained from a "school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the revised code." R.C. 311.01(B)(9)(b).

22, 1988, which was issued by the Ohio State Board of School and College Registration rather than the Ohio Board of Regents. Varnau contends because Wenninger was not qualified to hold the office of sheriff as of the 2000 election since he could not meet the requirements of R.C. 311.01(B)(9)(a) or (b), Wenninger illegally held the office of sheriff beginning in January 2001. Varnau further contends Wenninger failed to remove his disqualification immediately upon assuming office in 2001, and that this disqualification persisted to the 2008 election, thereby making Wenninger ineligible to run for and hold the office of sheriff.

{¶38} The specific language of R.C. 311.01(B)(9)(a) requires that a sheriff candidate's supervisory experience occur "in the five-year period ending immediately prior to the qualification date." As discussed above, any challenge to Wenninger's qualifications to run for or hold the office of sheriff for the 2000 and 2004 election terms has been rendered moot as those office terms have already expired. *See Zumbar*, 2011-Ohio-2939 at ¶14; *Fenell*, 100 Ohio App.3d at 464-465; *Baxter*, 168 Ohio St. at 559. The qualification date for the 2008 election was January 4, 2008. The relevant question for our analysis then becomes, within the time period of January 4, 2003, to January 4, 2008, did Wenninger have at least two years of supervisory experience as a peace officer at the rank of corporal or above or as an officer for the state highway patrol, pursuant to R.C. 5503.01, at the rank of sergeant or above. Wenninger's affidavit and the SF400adm Appointment/Termination form attached to the affidavit of Robert Fintal, the executive director of OPOTC,[9] establish that Wenninger has held the rank of sheriff since January 1, 2001. Accordingly, at the time of the qualification date for the 2008 election, Wenninger had seven years of supervisory experience at the rank

9. This form states that Wenninger was appointed on January 1, 2001, to the rank and position of sheriff with the Brown County Sheriff's Office. The form was sworn to and subscribed before a notary public on December 18, 2003.

of sheriff, and five of those years occurred "in the five-year period ending immediately prior to the qualification date." R.C. 311.01(B)(9)(a). Varnau has failed to present evidence contradicting this requirement. Varnau's reliance on Wenninger's admission that he had not held the rank of corporal or above prior to January 7, 2000, is irrelevant in determining Wenninger's qualifications for sheriff for the 2008 election.

{¶39} Furthermore, Varnau's argument that Wenninger's supervisory experience as sheriff cannot count towards the requirement set forth in R.C. 311.01(B)(9)(a) is without merit as Wenninger was lawfully holding the office. Wenninger was duly elected as sheriff in 2000 and 2004, and he lawfully took office pursuant to those elections. There were no successful protests or challenges to his candidacy or his right to hold office during either of these two prior terms. Varnau cannot now seek to challenge or void Wenninger's right to hold office for past terms which have already expired. Wenninger's status as elected sheriff of Brown County for the period of 2001 to 2008 remains, and his time in office can and does count as supervisory experience under R.C. 311.01(B)(9)(a).

{¶40} R.C. 311.01(B)(9) explicitly states that a candidate for sheriff need only meet one of the conditions set forth in that subsection. Because Wenninger obtained the necessary supervisory experience set forth in R.C. 311.01(B)(9)(a), the court need not discuss Wenninger's educational qualifications under R.C.311.01(B)(9)(b).

{¶41} Varnau also challenges Wenninger's ability to hold the office of sheriff under R.C. 311.01(B)(8), claiming that Wenninger's peace officer training certificate expired on January 1, 2005. Varnau contends that because Wenninger was not originally qualified to be sheriff in 2001, his appointment to the office was invalid. According to Varnau's argument this invalid appointment started a break in service on January 1, 2001, and four years later,

on January 1, 2005, Wenninger's peace officer training certificate expired.[10] Without a valid peace officer certificate, Varnau contends Wenninger was ineligible to run for sheriff in the 2008 election. Wenninger, on the other hand, contends that he has always held a valid peace officer training certificate and that he has never had a break in service.

{¶42} R.C. 311.01(B)(8)(b) requires that within the three years immediately prior to an election qualification date, a candidate for sheriff must have obtained or held a valid peace officer training certificate issued by OPOTC and must have been employed as a full-time law enforcement officer performing duties related to the enforcement of statutes, ordinances and codes. Ohio Adm.Code Chapter 109:2-1 governs peace officer basic training programs and provides that individuals are awarded a peace officer certificate of training after they have completed a basic training course. See Ohio Adm.Code 109:2-1-07(A). A peace officer training certificate remains valid so long as it has "legal force." See *State ex re. Hayburn v. Kiefer* (1993), 68 Ohio St.3d 132, 133. Further, "[a]ny person who has been appointed as a peace officer and has been awarded a certificate of completion of basic training by the executive director and *has been elected or appointed to the office of sheriff shall be considered a peace officer during the term of office for the purpose of maintaining a current and valid basic training certificate.*" (Emphasis added.) Ohio Adm.Code 109:2-1-12(E).

{¶43} In the present case, the evidence submitted by the parties demonstrates that from the period of January 4, 2005 to January 4, 2008, Wenninger held a valid peace officer training certificate issued by OPOTC and had been employed full-time as a law enforcement officer for the Brown County Sheriff's Office. In his affidavit, Wenninger attests that he held a

10. Varnau relies on Ohio Adm.Code 109:2-1-12(D)(3) as the basis for his argument that Wenninger's peace officer training certificate expired on January 1, 2005. This regulation provides the following with respect to peace officers' breaks in service: "All persons who have previously been appointed as a peace officer and have been awarded a certificate of completion of basic training by the executive director or those peace officers described in paragraph (A)(3) of this rule who have not been appointed as either a peace officer or a trooper *for more than four years* shall, upon re-appointment as a peace officer, complete the basic training course prior to performing the functions of a peace officer. (Emphasis added).

valid peace officer certificate of training issued by OPOTC within the three-year period ending immediately prior to the qualification date of the 2008 election. Further, OPOTC documents establish that Wenninger had been employed since he received his OPOTC peace officer training certificate on May 24, 1989. Wenninger was first employed with the Brown County Sheriff's Office, and then with the Ripley Police Department before he returned to the Brown County Sheriff's Office in 2001.[11] Wenninger further attests that he has been employed as the Brown County sheriff on a full-time basis since taking office in January 2001. Because Wenninger's employment as sheriff has been continuous since January 2001, pursuant to Ohio Adm.Code 109:2-1-12(E), he has maintained a current and valid peace officer training certificate. Accordingly, there is no credible material fact disputing that Wenninger was qualified to run for and hold office pursuant to the 2008 election as he met the requirements set forth in R.C. 311.01(B)(8)(b).

{¶44} Varnau has failed to present factual evidence that demonstrates that Wenninger had a break in service that encompassed more than four years or that he otherwise had an invalid or expired peace officer certificate of training. Varnau's argument that Wenninger started a break in service on January 1, 2001, because he failed to meet the qualifications set forth in R.C. 311.01(B) is without merit. Varnau cannot seek to invalidate Wenninger's present term of office based on an alleged prior disqualification from an expired term of office. The focus must remain on Wenninger's eligibility to run for and hold the office

11. There is a dispute as to the exact dates Wenninger was employed with each law enforcement entity. In his deposition testimony, Wenninger provided employment dates that contradicted the dates set forth on the OPOTC's SF400adm Appointment/Termination form and the Update Training Evaluation Information form. The dispute as to the exact date on which Wenninger ended his employment with one entity before joining another is irrelevant and immaterial for purposes of deciding the present motions. Regardless of whether Wenninger was employed with the Brown County Sheriff's Office and Ripley Police Department on the dates attested to at his deposition or on the dates set forth on the OPOTC forms, any break in service Wenninger may have had was for less than one year. As such, his peace officer certificate of training remained valid and he was "not * * * required to complete, additional, specialized training to remain eligible for re-appointment as a peace officer." Ohio Adm.Code 109:2-1-12(D)(1).

of sheriff for the *present term*, not for previous terms that have already expired. "'His office' means his present office under his present commission, and not an old expired term in the same office under a former election or appointment. He could not be ousted from such former term of office, because the term has expired, and he is not now in office under that term, and is not now an officer under that term." *State ex rel. Wilmot v. Buckley* (1899), 60 Ohio St. 273, 299-300. Wenninger lawfully took office in 2001, and he has been employed full-time as Brown County sheriff since his original appointment. Wenninger has not had a break in service which would invalidate his peace officer training certificate.

Conclusion

{¶45} Varnau has failed to present any evidence that would establish or create a genuine issue of material fact as to Wenninger's qualification to run for or hold the office of sheriff pursuant to R.C. 311.01 for the 2008 election. Varnau has not demonstrated that Wenninger is presently holding and exercising the office of Brown County sheriff unlawfully. Accordingly, he is not entitled to a writ of quo warranto ousting Wenninger from office. The court, therefore, does not need to determine Varnau's alleged entitlement to the office. Varnau's motion for summary judgment is hereby denied.

{¶46} Conversely, Wenninger has demonstrated that there are no genuine issues of material fact that would preclude the court from entering judgment in his favor as to his motion for summary judgment. The evidentiary material presented establishes that as a matter of law, Wenninger is lawfully holding and exercising the office of Brown County sheriff. Wenninger's motion for summary judgment is therefore granted.

{¶47} Judgment accordingly.

PIPER and HUTZEL, JJ., concur

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
	:	DECISION 8/16/2010
- vs -	:	
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; *Levinksy 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

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.

"verifying that [Wenninger] said on an application he met the qualifications * * *."[2] These arguments lack merit.

{¶6} "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.

{¶7} 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:

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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 continuation of the "illegality."

{¶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 and 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.

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Ohio Statutes

Title 3. COUNTIES

Chapter 309. PROSECUTING ATTORNEY

Includes legislation filed in the Secretary of State's office through 9/26/2011, with the exception of HB 218 and HB 224

§ 309.09. Legal adviser - additional legal counsel

(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, all other county officers and boards, and all tax-supported public libraries, and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. The prosecuting attorney shall prosecute and defend all suits and actions that any such officer , board, or tax-supported public library directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

(B)(1) The prosecuting attorney shall be the legal adviser for all township officers, boards, and commissions, unless, subject to division (B)(2) of this section, the township has adopted a limited home rule government pursuant to Chapter 504. of the Revised Code and has not entered into a contract to have the prosecuting attorney serve as the township law director, in which case, subject to division (B)(2) of this section, the township law director, whether serving full-time or part-time, shall be the legal adviser for all township officers, boards, and commissions. When the board of township trustees finds it advisable or necessary to have additional legal counsel, it may employ an attorney other than the township law director or the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers, boards, and commissions in their official capacities and to advise them on legal matters. No such legal counsel may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for the legal services shall be fixed. The compensation shall be paid from the township fund.

Nothing in this division confers any of the powers or duties of a prosecuting attorney under section 309.08 of the Revised Code upon a township law director.

(2)(a) If any township in the county served by the prosecuting attorney has adopted any resolution regarding the operation of adult entertainment establishments pursuant to the authority that is granted under section 503.52 of the Revised Code or if a resolution of that nature has been adopted under section 503.53 of the Revised Code in a township in the county served by the prosecuting attorney, all of the following apply:

(i) Upon the request of a township in the county that has adopted, or in which has been adopted, a resolution of that nature that is made pursuant to division (E)(1)(c) of section 503.52 of the Revised Code, the prosecuting attorney shall prosecute and defend on behalf of the township in the trial and argument in any court or tribunal of any challenge to the validity of the resolution. If the challenge to the validity of the resolution is before a federal court, the prosecuting attorney may request the attorney general to assist the prosecuting attorney in prosecuting and defending the challenge and, upon the prosecuting attorney's making of such a request, the attorney general shall assist the prosecuting attorney in performing that service if the resolution was drafted in accordance with legal guidance provided by the attorney general as described in division (B)(2) of section 503.52 of the Revised Code. The attorney general shall provide this assistance without charge to the township for which the service is performed. If a township adopts a resolution without the legal guidance of the attorney general, the attorney general is not required to provide assistance as described in this division to a prosecuting attorney.

(ii) Upon the request of a township in the county that has adopted, or in which has been adopted, a resolution of that nature that is made pursuant to division (E)(1)(a) of section 503.52 of the Revised Code, the prosecuting attorney shall prosecute and defend on behalf of the township a civil action to enjoin the violation of the resolution in question.

(iii) Upon the request of a township in the county that has adopted, or in which has been adopted, a resolution of that nature that is made pursuant to division (E)(1)(b) of section 503.52 of the Revised Code, the prosecuting attorney shall prosecute and defend on behalf of the township a civil action under Chapter 3767. of the Revised Code to abate as a nuisance the place in the unincorporated area of the township at which the resolution is being or has been violated. Proceeds from the sale of personal property or contents seized pursuant to the action shall be applied and deposited in accordance with division (E)(1)(b) of section 503.52 of the Revised Code.

(b) The provisions of division (B)(2)(a) of this section apply regarding all townships, including townships that have adopted a limited home rule government pursuant to Chapter 504. of the Revised Code, and regardless of whether a township that has so adopted a limited home rule government has entered into a contract with the prosecuting attorney as described in division (B) of section 504.15 of the Revised Code or has appointed a law director as described in division (A) of that section.

The prosecuting attorney shall prosecute and defend in the actions and proceedings described in division (B)(2)(a) of this section without charge to the township for which the services are performed.

(C) Whenever the board of county commissioners employs an attorney other than the prosecuting attorney of the county, without the authorization of the court of common pleas as provided in section 305.14 of the Revised Code, either for a particular matter or on an annual basis, to represent the board in its official capacity and to advise it on legal matters, the board shall enter upon its journal an order of the board in which the compensation to be paid for the legal services shall be fixed. The compensation shall be paid from the county general fund. The total compensation paid, in any year, by the board for legal services under this division shall not exceed the total annual compensation of the prosecuting attorney for that county.

(D) The prosecuting attorney and the board of county commissioners jointly may contract with a board of park commissioners under section 1545.07 of the Revised Code for the prosecuting attorney to provide legal services to the park district the board of park commissioners operates.

(E) The prosecuting attorney may be, in the prosecuting attorney's discretion and with the approval of the board of county commissioners, the legal adviser of a joint fire district created under section 505.371 of the Revised Code at no cost to the district or may be the legal adviser to the district under a contract that the prosecuting attorney and the district enter into, and that the board of county commissioner approves, to authorize the prosecuting attorney to provide legal services to the district.

(F) The prosecuting attorney may be, in the prosecuting attorney's discretion and with the approval of the board of county commissioners, the legal adviser of a joint ambulance district created under section 505.71 of the Revised Code at no cost to the district or may be the legal adviser to the district under a contract that the prosecuting attorney and the district enter into, and that the board of county commissioners approves, to authorize the prosecuting attorney to provide legal services to the district.

(G) The prosecuting attorney may be, in the prosecuting attorney's discretion and with the approval of the board of county commissioners, the legal adviser of a joint emergency medical services district created under section 307.052 of the Revised Code at no cost to the district or may be the legal adviser to the district under a contract that the prosecuting attorney and the district enter into, and that the board of county commissioners approves, to authorize the prosecuting attorney to provide legal services to the district.

(H) The prosecuting attorney may be, in the prosecuting attorney's discretion and with the approval of the board of county commissioners, the legal adviser of a fire and ambulance district created under section 505.375 of the Revised Code at no cost to the district or may be the legal adviser to the district under a contract that the prosecuting attorney and the district enter into, and that the board of county commissioners approves, to authorize the prosecuting attorney to provide legal services to the district.

(I) All money received pursuant to a contract entered into under division (D), (E), (F), (G), or (H) of this section shall be deposited into the prosecuting attorney's legal services fund, which shall be established in the county treasury of each county in which such a contract exists. Moneys in that fund may be appropriated only to the prosecuting attorney for the purpose of providing legal services to a park district, joint fire district, joint ambulance district, joint emergency medical services district, or a fire and ambulance district, as applicable, under a contract entered into under the applicable

division.

History. Amended by **129th General Assembly File No. 33, SB 120, §1**, eff. 9/30/2011.

Effective Date: 09-20-1999; 06-10-2004; 12-20-2005; 08-17-2006

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Ohio Statutes

Title 3. COUNTIES

Chapter 309. PROSECUTING ATTORNEY

Includes legislation filed in the Secretary of State's office through 9/26/2011, with the exception of HB 218 and HB 224

§ 309.13. Taxpayer's suit

If the prosecuting attorney fails, upon the written request of a taxpayer of the county, to make the application or institute the civil action contemplated in section **309.12** of the Revised Code, the taxpayer may make such application or institute such civil action in the name of the state, or, in any case wherein the prosecuting attorney is authorized to make such application, such taxpayer may bring any suit or institute any such proceedings against any county officer or person who holds or has held a county office, for misconduct in office or neglect of his duty, to recover money illegally drawn or illegally withheld from the county treasury, and to recover damages resulting from the execution of such illegal contract.

If such prosecuting attorney fails upon the written request of a taxpayer of the county, to bring such suit or institute such proceedings, or if for any reason the prosecuting attorney cannot bring such action, or if he has received and unlawfully withheld moneys belonging to the county, or has received or drawn public moneys out of the county treasury which he is not lawfully entitled to demand and receive, a taxpayer, upon securing the costs, may bring such suit or institute such proceedings, in the name of the state. Such action shall be for the benefit of the county, as if brought by the prosecuting attorney.

If the court hearing such case is satisfied that such taxpayer is entitled to the relief prayed for in his petition, and judgment is ordered in his favor, he shall be allowed his costs, including a reasonable compensation to his attorney.

History. Effective Date: 10-01-1953

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Ohio Statutes

Title 3. COUNTIES

Chapter 311. SHERIFF

Includes legislation filed in the Secretary of State's office through 9/26/2011, with the exception of HB 218 and HB 224

§ 311.01. Election and qualifications of sheriff

(A) A sheriff shall be elected quadrennially in each county. A sheriff shall hold office for a term of four years, beginning on the first Monday of January next after the sheriff's election.

(B) Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

(1) The person is a citizen of the United States.

(2) The person has been a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date.

(3) The person has the qualifications of an elector as specified in section **3503.01** of the Revised Code and has complied with all applicable election laws.

(4) The person has been awarded a high school diploma or a certificate of high school equivalence issued for achievement of specified minimum scores on the general educational development test of the American council on education.

(5) The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state.

(6) The person has been fingerprinted and has been the subject of a search of local, state, and national fingerprint files to disclose any criminal record. Such fingerprints shall be taken under the direction of the administrative judge of the court of common pleas who, prior to the applicable qualification date, shall notify the board of elections, board of county commissioners, or county central committee of the proper political party, as applicable, of the judge's findings.

(7) The person has prepared a complete history of the person's places of residence for a period of six years immediately preceding the qualification date and a complete history of the person's places of employment for a period of six years immediately preceding the qualification date, indicating the name and address of each employer and the period of time employed by that employer. The residence and employment histories shall be filed with the administrative judge of the court of common pleas of the county, who shall forward them with the findings under division (B)(6) of this section to the appropriate board of elections, board of county commissioners, or county central committee of the proper political party prior to the applicable qualification date.

(8) The person meets at least one of the following conditions:

(a) Has obtained or held, within the four-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 or has been issued a certificate of training pursuant to section **5503.05** of the Revised Code, and, within the four-year period ending immediately prior to

the qualification date, has been employed as an appointee pursuant to section **5503.01** of the Revised Code or as a full-time peace officer as defined in section **109.71** of the Revised Code performing duties related to the enforcement of statutes, ordinances, or codes;

(b) Has obtained or held, 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 and has been employed for at least the last three years prior to the qualification date as a full-time law enforcement officer, as defined in division (A)(11) of section **2901.01** of the Revised Code, performing duties related to the enforcement of statutes, ordinances, or codes.

(9) The person meets at least one of the following conditions:

(a) Has at least two years of supervisory experience as a peace officer at the rank of corporal or above, or has been appointed pursuant to section **5503.01** of the Revised Code and served at the rank of sergeant or above, in the five-year period ending immediately prior to the qualification date;

(b) Has completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located or in a school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code.

(C) Persons who meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, may take all actions otherwise necessary to comply with division (B) of this section. If, on the applicable qualification date, no person has met all the requirements of division (B) of this section, then persons who have complied with and meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, shall be considered qualified candidates under division (B) of this section.

(D) Newly elected sheriffs shall attend a basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section **109.80** of the Revised Code. A newly elected sheriff shall complete not less than two weeks of this course before the first Monday in January next after the sheriff's election. While attending the basic training course, a newly elected sheriff may, with the approval of the board of county commissioners, receive compensation, paid for from funds established by the sheriff's county for this purpose, in the same manner and amounts as if carrying out the powers and duties of the office of sheriff.

Appointed sheriffs shall attend the first basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section **109.80** of the Revised Code within six months following the date of appointment or election to the office of sheriff. While attending the basic training course, appointed sheriffs shall receive regular compensation in the same manner and amounts as if carrying out their regular powers and duties.

Five days of instruction at the basic training course shall be considered equal to one week of work. The costs of conducting the basic training course and the costs of meals, lodging, and travel of appointed and newly elected sheriffs attending the course shall be paid from state funds appropriated to the commission for this purpose.

(E) In each calendar year, each sheriff shall attend and successfully complete at least sixteen hours of continuing education approved under division (B) of section **109.80** of the Revised Code. A sheriff who receives a waiver of the continuing education requirement from the commission under division (C) of section **109.80** of the Revised Code because of medical disability or for other good cause shall complete the requirement at the earliest time after the disability or cause terminates.

(F)(1) Each person who is a candidate for election to or who is under consideration for appointment to the office of sheriff shall swear before the administrative judge of the court of common pleas as to the truth of any information the person provides to verify the person's qualifications for the office. A person who violates this requirement is guilty of falsification under section **2921.13** of the Revised Code.

(2) Each board of elections shall certify whether or not a candidate for the office of sheriff who has filed a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate meets the

qualifications specified in divisions (B) and (C) of this section.

(G) The office of a sheriff who is required to comply with division (D) or (E) of this section and who fails to successfully complete the courses pursuant to those divisions is hereby deemed to be vacant.

(H) As used in this section:

(1) "Qualification date" means the last day on which a candidate for the office of sheriff can file a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate, as applicable, in the case of a primary election for the office of sheriff; the last day on which a person may be appointed to fill a vacancy in a party nomination for the office of sheriff under Chapter 3513. of the Revised Code, in the case of a vacancy in the office of sheriff; or a date thirty days after the day on which a vacancy in the office of sheriff occurs, in the case of an appointment to such a vacancy under section **305.02** of the Revised Code.

(2) "Newly elected sheriff" means a person who did not hold the office of sheriff of a county on the date the person was elected sheriff of that county.

History. Effective Date: 12-09-2003

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CHAPTER 311: SHERIFF

§ 311.01 Qualifications for sheriff; basic training course; continuing education.

(A) A sheriff shall be elected quadrennially in each county. A sheriff shall hold office for a term of four years, beginning on the first Monday of January next after the sheriff's election.

(B) Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

(1) The person is a citizen of the United States.

(2) The person has been a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date.

(3) The person has the qualifications of an elector as specified in section 3503.01 of the Revised Code and has complied with all applicable election laws.

(4) The person has been awarded a high school diploma or a certificate of high school equivalence issued for achievement of specified minimum scores on the general educational development test of the American council on education.

(5) The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state.

(6) The person has been fingerprinted and has been the subject of a search of local, state, and national fingerprint files to disclose any criminal record. Such fingerprints shall be taken under the direction of the administrative judge of the court of common pleas who, prior to the applicable qualification date, shall notify the board of elections, board of county commissioners, or county central committee of the proper political party, as applicable, of the judge's findings.

(7) The person has prepared a complete history of the person's places of residence for a period of six years immediately preceding the qualification date and a complete history of the person's places of employment for a period of six years immediately preceding the qualification date, indicating the name and address of each employer and the period of time employed by that employer. The residence and employment histories shall be filed with the administrative judge of the court of common pleas of the county, who shall forward them with the findings under division (B)(6) of this section to the appropriate board of elections, board of county commissioners, or county central committee of the proper political party prior to the applicable qualification date.

(8) The person meets at least one of the following conditions:

(a) Has obtained or held, within the four-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 or has been issued a certificate of training pursuant to section 5503.05 of the Revised Code, and, within the four-year period ending immediately prior to the qualification date, has been employed as an appointee pursuant to section 5503.01 of the Revised Code or as a full-time peace officer as defined in section 109.71 of the Revised Code performing duties related to the enforcement of statutes, ordinances, or codes;

(b) Has obtained or held, 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 and has been employed for at least the last three years prior to the qualification date as a full-time law enforcement officer, as defined in division (A)(11) of section 2901.01 of the Revised Code, performing duties related to the enforcement of statutes, ordinances, or codes.

(9) The person meets at least one of the following conditions:

(a) Has at least two years of supervisory experience as a peace officer at the rank of corporal or above, or has been appointed pursuant to section 5503.01 of the Revised Code and served at the rank of sergeant or above, in the five-year period ending immediately prior to the qualification date;

(b) Has completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located.

(C) Persons who meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, may take all actions otherwise necessary to comply with division (B) of this section. If, on the applicable qualification date, no person has met all the requirements of division (B) of this section, then persons who have complied with and meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, shall be considered qualified candidates under division (B) of this section.

(D) Newly elected sheriffs shall attend a basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code. A newly elected sheriff shall complete not less than two weeks of this course before the first Monday in January next after the sheriff's election. While attending the basic training course, a newly elected sheriff may, with the approval of the board of county commissioners, receive compensation, paid for from funds established by the sheriff's county for this purpose, in the same manner and amounts as if carrying out the powers and duties of the office of sheriff.

Appointed sheriffs shall attend the first basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code within six months following the date of appointment or election to the office of sheriff. While attending the basic training course, appointed sheriffs shall receive regular compensation in the same manner and amounts as if carrying out their regular powers and duties.

Five days of instruction at the basic training course shall be considered equal to one week of work. The costs of conducting the basic training course and the costs of meals, lodging, and travel of appointed and newly elected sheriffs attending the course shall be paid from state funds appropriated to the commission for this purpose.

(E) In each calendar year, each sheriff shall attend and successfully complete at least sixteen hours of continuing education approved under division (B) of section 109.80 of the Revised Code. A sheriff who receives a waiver of the continuing education requirement from the commission under division (C) of section 109.80 of the Revised Code because of medical disability or for other good cause shall complete the requirement at the earliest time after the disability or cause terminates.

(F)(1) Each person who is a candidate for election to or who is under consideration for appointment to the office of sheriff shall swear before the administrative judge of the court of common pleas as to the truth of any information the person provides to verify the person's qualifications for the office. A person who violates this requirement is guilty of falsification under section 2921.13 of the Revised Code.

(2) Each board of elections shall certify whether or not a candidate for the office of sheriff who has filed a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate meets the qualifications specified in divisions (B) and (C) of this section.

(G) The office of a sheriff who is required to comply with division (D) or (E) of this section and who fails to successfully complete the courses pursuant to those divisions is hereby deemed to be vacant.

(H) As used in this section:

(1) "Qualification date" means the last day on which a candidate for the office of sheriff can file a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate, as applicable, in the case of a primary election for the office of sheriff, the last day on which a person may be appointed to fill a vacancy in a party nomination for the office of sheriff under Chapter 3513. of the Revised Code, in the case of a vacancy in the office of sheriff, or a date thirty days after the day on which a vacancy in the office of sheriff occurs, in the case of an appointment to such a vacancy under section 305.02 of the Revised Code.

(2) "Newly elected sheriff" means a person who did not hold the office of sheriff of a county on the date the person was elected sheriff of that county.

HISTORY: RS § 1202; S&C 1403; 65 v 150; 93 v 351; GC § 2923; 116 v Pt II, 184; Bureau of Code Revision, 10-1-53; 141 v H 683 (Eff 9-11-87); 146 v S 2 (Eff 7-1-96); 146 v H 670 (Eff 12-2-96); 146 v H 351 (Eff 1-14-97); 148 v H 283. Eff 9-29-99.

The effective date is set by section 162 of HB 283.

Archive

Ohio Statutes

Title 27. COURTS - GENERAL PROVISIONS - SPECIAL REMEDIES

Chapter 2733. QUO WARRANTO

Includes legislation filed in the Secretary of State's office through 9/26/2011, with the exception of HB 218 and HB 224

§ 2733.14. Judgment when office, franchise, or privilege is usurped

When a defendant in an action in quo warranto is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that he be ousted and excluded therefrom, and that the relator recover his costs.

History. Effective Date: 10-01-1953

Archive

Archive

Ohio Statutes

Title 27. COURTS - GENERAL PROVISIONS - SPECIAL REMEDIES

Chapter 2733. QUO WARRANTO

Includes legislation filed in the Secretary of State's office through 9/26/2011, with the exception of HB 218 and HB 224

§ 2733.18. Action for damages

Within one year after the date of a judgment mentioned in section **2733.17** of the Revised Code, the person in whose favor the judgment is rendered may bring an action against the party ousted, and recover the damages he sustained by reason of such usurpation.

History. Effective Date: 10-01-1953

Archive

Ohio Rules

RULES OF CIVIL PROCEDURE

Title VII. JUDGMENT

As amended through July 1, 2010

Rule 56. Summary Judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross- claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

History. Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1997; July 1, 1999.

Note:

Staff Note (July 1, 1999 Amendment)

Rule 56(C) Motion and proceedings thereon

The prior rule provided that "transcripts of evidence in the pending case" was one of the items that could be considered in deciding a motion for summary judgment. The 1999 amendment deleted "in the pending case" so that transcripts of evidence from another case can be filed and considered in deciding the motion.

Staff Note (July 1, 1997 Amendment)

Rule 56(A) For party seeking affirmative relief.

The 1997 amendment to division (A) divided the previous first sentence into two separate sentences for clarity and ease of reading, and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(B) For defending party.

The 1997 amendment to division (B) added a comma after the "may" in the first sentence and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(C) Motion and proceedings thereon.

The 1997 amendment to division (C) changed the word "pleading" to "pleadings" and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(E) Form of affidavits; further testimony; defense required.

The 1997 amendment to division (E) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(F) When affidavits unavailable.

The 1997 amendment to division (F) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(G) Affidavits made in bad faith.

The 1997 amendment to division (G) replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Ohio Rules

Ohio Rules of Evidence

Article 7. OPINIONS AND EXPERT TESTIMONY

As amended through July 1, 2007

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

History. Effective: July 1, 1980; amended effectively July 1, 2007.

AFFIDAVIT OF LEE SPIEVACK

1. I am an adult and not under legal disability. I have been sworn and cautioned as to the import of this affidavit. A copy of my resume' is attached hereto and incorporated herein by reference.

2. I am the former owner of Technichron Technical Institute, Inc. (hereinafter Technichron). ~~Technichron was a privately owned post secondary school. Portions of one of the catalogues from Technichron are attached.~~

3. Technichron was accredited by the ~~Accrediting~~ Commission of the National Association of Trade and Technical Schools ~~(a true and accurate copy of the certificate of accreditation is attached hereto)~~ and approved by the U.S. Department of Education Institutional Eligibility Branch. ~~This~~ accrediting agency had guidelines more stringent with regard to accreditation than the Ohio board of regents at the time period applicable to Dwayne Wenninger's attendance at Technichron. The ~~State~~ Board of School and College Registration was under the auspices ~~or~~ umbrella of the Ohio board of regents during the time periods ~~applicable to Dwayne Wenninger's attendance at Technichron.~~

4. Technichron possessed a Certificate of Registration from the State Board of School and College Registration during all periods applicable to Dwayne Wenninger's attendance at Technichron (a certified copy of the Certificate of Registration is attached hereto).

5. Dwayne Wenninger attended Technichron on a full time student basis for the period from August of 1986 through October 23, 1987 completing a course of study in robotics and received a diploma. Dwayne Wenninger, by his full time attendance at Technichron attained more than two years of post secondary education.

Affiant further sayeth naught.

Lee Spievack

Sworn to and subscribed before me on FEBRUARY 5TH, 2003.

Notary Public

Tammy L. Dillinger
Notary Public State of Ohio
My Commission Expires 03-24-2003
Recorded in Brown County

COURT OF COMMON PLEAS
BROWN COUNTY, OHIO

State of Ohio	:	Case No. CRI 2020 2234
	:	(Judge Ringland)
vs	:	
Dwayne Wenninger	:	AFFIDAVIT OF JAMIE CALLENDER
Defendant	:	

I, Jamie Callender, being first duly sworn and cautioned, do depose and state as follows:

1. I was admitted to the Bar of Ohio on November 9th, 1992 and I have practiced law in this State since that date;

2. I am a member of the Ohio House of Representatives representing the 62nd House District and I am presently serving my fourth term;

3. During the period from January 2001 to December 2003, I was the House of Representatives member of the Ohio Board of Regents serving *ex officio*;

4. I have reviewed the indictment and bill of particulars filed in this matter and I am generally familiar with the allegations made against Dwayne Wenninger through those documents. I have also reviewed a letter from the Ohio Board of Regents dated October 4, 2002 issued by Shane DeGarmo as well as the affidavit of Lee Spievack as it is filed in this case. I have also reviewed Ohio Revised Code Section 311.01(B)(9)(b). I offer this affidavit based upon the totality of my experience, that is, as a Member of the Ohio House of Representatives; a former member of the Ohio Board of Regents; and as an attorney at law licensed to practice in the State of Ohio;

5. During the periods of time applicable to the facts of this case, that is,

Exhibit B

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from 1987 when Dwayne Wenninger received his two year diploma from Technichron Technical Institute through December of 1999, the Board of Proprietary School Registration (formerly known as the State Board of School and College Registration) was under the umbrella of the Ohio Board of Regents. Further, at the time that Dwayne Wenninger received his two year diploma from Technichron Technical Institute, proprietary schools were authorized to confer two year post secondary education diplomas and associate degrees. In reviewing the Certificate of Registration of Technichron Technical Institute, Inc. as effective from August of 1986 through August of 1987; the Affidavit of Lee Spievack; and the diploma of Dwayne Wenninger, it appears to me that Dwayne Wenninger's education met the educational standards set by R.C. 311.01(B)(9)(b) to run for Sheriff in 1999 at the time that he received his diploma from Technichron Technical Institute as having two years of post secondary education at an institution then authorized to confer degrees and diplomas by the Ohio Board of Regents as the State Board of School and College Registration functioned under the umbrella of the Ohio Board of Regents at the time that Dwayne Wenninger received his two year diploma.

6. ~~I would observe that the letter that Prosecutor Grennan received from the Board of Regents dated October 4, 2002 over the signature of Shane DeGarmo~~ is deceiving in that nowhere does that piece of correspondence address the question presented: was Technichron Technical Institute, Inc. at the time periods applicable to this dispute, able to confer two year post secondary education diplomas, certificates or degrees. The fact is, at the time that Dwayne Wenninger obtained his diploma from Technichon Technical Institute, Inc., that Institution not only was in good standing with the State Board of School and College Registration but was also accredited by the National Association of Trade and Technical Schools (NATTS), a national accrediting body. NATTS was listed by the U.S. Department of Education and, as such was a nationally recognized accrediting agency that complies with R.C. 311.09(B)(9)(b) as a comparable

agency to the Ohio Board of Regents. The NATTS standards would meet or exceed requirements of the Ohio Board of Regents both at the time that Dwayne Wenninger received his diploma as well as at present.

7. I believe that Dwayne Wenninger met the substance of R.C. 311.10(B)(9)(b) at the time that he circulated his petitions for candidacy as well as at the time that the petitions were presented to the Brown County Board of Elections.

Affiant further sayeth naught.

Jamie Callender

Sworn to and subscribed before me this 28 day of February, 2003.

Notary Public

KATHERINE A. BRIGGS
Notary Public - State of Ohio
My Commission Expires June 20, 2005
Recorded in Geauga County