

IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel
DENNIS J. VARNAU,

FILED)

CASE NO. CA2009-02-10

COURT OF APPEALS)

Relator/Petitioner,)

-vs-

AUG 10 2009)

RELATOR'S MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN
OPPOSITION TO
RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT

DWAYNE WENNINGER,)

TINA M. MERANDA)

Respondent/Defendant.)
BROWN COUNTY CLERK OF COURTS

Now comes the Relator, by and through counsel, and moves the Court to enter judgment in his favor as to the issues raised in the Petition for Quo Warranto in this case and grant the writ. Relator further opposes the Respondent's March 16, 2009, Motion to Dismiss (converted to a Motion for Summary Judgment by this Court on May 1, 2009), on the same grounds.¹

As grounds for Relator's Motion and opposition, Counsel states that there is no issue but that the Respondent never was qualified by law to run for, or hold the office he now exercises, Brown County Sheriff, and Relator is entitled to the office.

I. FACTS AND PROCEDURAL POSTURE AND HISTORY

The Respondent Dwayne Wenninger was a candidate for Brown County sheriff in 2000, won the election, and assumed the position January 1, 2001, and appointed himself as sheriff of Brown County with the Ohio Peace Officers Training Commission (OPOTC) as of that date. See Relator's Ex. 2A, pp. 2-3 (Wenninger's SF400adm Sheriff Appointment with

¹ This Motion and Memorandum is prepared and filed pursuant to this Court's most recent order requiring same by August 10, but Counsel reiterates more time is needed, as stated in the most recent Motion filed for a further stay of briefing, to fully prepare and present this case. Relator reiterates that Motion.

OPOTC, January 1, 2001).² He could not be a valid candidate for sheriff unless he met all the requirements under O.R.C. § 311.01(B), specifically (9)(a) and (b), in effect at the time. O.R.C. § 311.01.

He could not satisfy Section 311.01(B)(9)(a), because he was not, prior to that, a corporal or higher with an approved agency. See also, Relator's Ex. 6B (Wenninger's answer to Int. No. 15).

He did not satisfy Section 311.01(B)(9)(b), because the only diploma he had, from "Technichron Technical Institute" (TTI) (see Relator's Ex. 8A, Wenninger's Diploma, 1987), was not from an institution registered and approved by the Ohio Board of Regents, but an entirely different type of institution operating under Chapter 3332. See 2000 ORC Section 311.01(B)(9)(b); Relator's Ex. 8B (TTI's 1988-90 Certificate of Registration, under ORC Chapter 3332); Relator's Ex. 8C (Subpoenaed documents from State Board of Career Colleges and Schools (SBCCS), indicating TTI operated under it, not the Ohio Board of Regents, from 1978-1990); Ex. 8 (TTI "Catalog," verifying lack of Board of Regents accreditation). TTI was not authorized to confer degrees by the Ohio Board of Regents (OBR), thus Wenninger's diploma from TTI did not satisfy this requirement. Relator's Ex. 9A (Subpoenaed documents from Ohio Board of Regents; see also, Relator's Ex. 9C (O.R.C. 1713, April 14, 1985; O.R.C. 3332, October 31, 1979; O.R.C. 3332, Nov. 1, 1985).

Respondent also did not secure any other educational credentials prior to or immediately after taking office on January 1, 2001. See Relator's Ex. 10A (Respondent's answer to First Doc. Req. No. 13).

² Much of the attached evidence has been obtained by subpoena or document request from third parties. To the extent submitted in evidentiary form, it is filed in a separate appendix. Because some of the material is voluminous, redundant, irrelevant, and potentially inadmissible, that material has been removed. Discovery on many of these issues is still pending.

These facts were at least a partial basis for the felony indictment of Respondent, State vs. Wenninger, 125 Ohio Misc.2d 55, 2003-Ohio-5521 (Ringland, J., C.P.).

Thus, Respondent also had a four-year "break in service," from January 1, 2001, to January 1, 2005, by not removing his disqualification, and lost his OPOTA certification two days before he assumed his second-term seat January 3, 2005. See Relator's Ex. 2A (Respondent's OPOTC Sheriff Appointment January 1, 2001); 2001-05 O.A.C. Section 109:2-1-12-(D)(3) & (E). Since Respondent lost his peace officer certification after a four-year "break in service," in 2005, prior to the 2008 election, he was again not a qualified candidate to run for the office of sheriff (not having a valid peace officer certificate). See O.R.C. Section 311.01; O.A.C. 109:2-1-12 (Certification before service; re-entry requirements).

Relator was therefore the only other qualified candidate running for sheriff in 2008, and since Wenninger's votes did not count (he being disqualified), Varnau is entitled to the office. See Relator's Ex. 15A (Brown County Board of Elections records).

II. LAW AND ARGUMENT

Respondent never did hold the minimum requirements by law to run for or hold the office of Brown County Sheriff, did not acquire them, and therefore is not legally entitled to hold the office. State ex rel. Vana v. Maple Hts. City Council (1990), 54 Ohio St.3d 91. Relator therefore is entitled to the office and the writ of quo warranto.

A. Respondent's lack of eligibility and qualification for the Office

Respondent failed to meet all requirements of Section 311.01 of the Ohio Revised Code (ORC) to be a valid candidate in the 2000, 2004, and 2008 elections. O.R.C. Section 311.01(B) provides that an unqualified person "shall not be elected or appointed unless they

meet *all* the following requirements." (Emphasis added). See also, State ex rel. Wolfe v. Delaware Cty. Bd. of Elections, 88 Ohio St.3d 182, 2000-Ohio-294.

Respondent never legally held the office of Sheriff, beginning in 2001, and thereby "forfeited" the office on January 1, 2001, after failing to remove his disqualification "immediately upon assuming the office" as to his lack of educational credentials required at that time under ORC 311.01(B)(9)(b). *Id.*

Respondent did not have the mandatory supervisory experience of corporal or higher to satisfy ORC 311.01(B)(9)(a). He was therefore ineligible for the office. Wellington vs. Mahoning Cty. Bd. of Elections, 117 Ohio St.3d 143, 2008-Ohio-554. In addition, his educational credentials did not include a diploma from a school under the Ohio Board of Regents, as required at that time under the ORC language in (B)(9)(b). Ohio Board of Regents and the Secretary of State documents show that neither TTI nor its successor Phoenix Educational Systems ever received a certificate of authorization from the Ohio Board of Regents.

TTI was not such an "institution." Since TTI was definitely a for-profit school, it would not even qualify under Section 1713 of the Code to be Board of Regents approved. Prior to 1990, it would have had to have been a not-for-profit/nonprofit school or institute to even approach the Board of Regents for any kind of approval. R.C. 1713.01(A).

Respondent also never legally held the office of Sheriff after the 2004 election. Respondent, upon forfeiting the office on January 1, 2001, for lack of credentials, started an administrative "break in service" on his Ohio Peace Officer Training Academy (OPOTA) police certificate that same day. Respondent, not legally holding office as sheriff from January 1, 2001 through January 1, 2005, could not appoint himself as Sheriff with the Ohio

Peace Officer Training Commission (OPOTC). Four years later, January 1, 2005, respondent's OPOTA certificate completely expired to the point where respondent would have to re-take the entire OPOTA police academy course from scratch to obtain a new police certificate. See O.A.C. Section 109:2-1-12(D)(3), (E) ("Breaks in service."), which provides:

(A)(2) No person shall, after January 1, 1989, be permitted to perform the functions of a peace officer or to carry a weapon in connection with peace officer duties unless such person has successfully completed the basic course and has been awarded a certificate of completion by the executive director.

* * *

(D) Breaks in service / **requirements for update training evaluations:**
(3) **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 a peace officer 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.**

* * *

(E) **Any 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. Any training requirements required of peace officers shall also be required of sheriffs.**

(Emphasis added).

Respondent's break in service is not saved by his concurrent appointment as a police officer with the Ripley Police Department after January 1, 2001. The Ripley PD SF400adm filed with OPOTC expired on November 17, 2001. Nevertheless, per Ohio Atty. Gen. Op. 1996-017, a peace officer cannot be employed by a Sheriff's Office *and* a municipal police

department at the same time, because that would be a direct legal conflict of interest. So, when Respondent filed the SF400adm with OPOTC, appointing himself as Sheriff January 1, 2001, his appointment with Ripley PD would have had to terminate that same date to prevent any legal conflicts.

Respondent's lack of qualifications also is not saved by the ministerial function of a common pleas court, as stated (but not proven) by Respondent in his Motion. The Common Pleas Court judge only reviews the submissions under ORC 311.01(B)(6) and (7) for accuracy and reports such to the Board of Elections. Such duty has no bearing or purpose whatsoever on whether a candidate *actually* meets the requirements necessary under (B)(8) and (B)(9). See State ex rel. Snider vs. Stapleton (1992), 65 Ohio St.3d 40; O.A.G. Op. 2001-026.

Respondent has not held a valid OPOTA peace officer certificate, issued by the OPOTC, since January 2, 2005. Respondent's commission expired completely, per the Administrative Code, on January 1, 2005. Respondent assumed the same legal status as that of a civilian on January 2, 2005, one day before usurping a second term as Sheriff on January 3, 2005. Respondent has not held a valid peace officer certificate for over four years. The filing deadline for Democrat and Republican Sheriff candidates, in the 2008 election, was January 4, 2008. Respondent did not possess a valid peace officer certificate for a total of three years and two days prior to the filing deadline. Nonetheless, "Officer" Wenninger never worked a day or hour during his entire appointment with the Ripley PD, according to all evidence obtained through discovery. The mere allegation that he has been acting and performing as Sheriff of Brown County, albeit illegally, does not comply with any legal requirement. There is no known authority under O.R.C. 311.01(B)(9)(a) or

otherwise, that illegal service qualifies one to continue the illegality, or cure it; much less why a person should be able to profit or benefit from conduct that is not in accordance with the law. This argument has no direct bearing or effect on the actual legal expiration date of Respondent's OPOTA police certificate, January 1, 2005. The O.A.C. provides that one cannot be a sheriff without a valid peace officer certificate in Ohio, and Respondent did not obtain another police certificate after his preexisting one lapsed or expired due to the "break in service."

B. Relator is entitled to the Office and the Writ

The Court in State ex rel. Battin v. Bush (1988), 40 Ohio St.3d 236, states that a writ of quo warranto is a high prerogative writ and is granted, as an extraordinary remedy, where the legal right to hold an office is successfully challenged. See also, State ex rel. St. Sava Serbian Orthodox Church v. Riley (1973), 36 Ohio St.2d 171, 173; State ex rel. Cain v. Kay (1974), 38 Ohio St.2d 15, 16-17. The remedy afforded is that of ouster from the public office. R.C. 2733.14. Furthermore, quo warranto is the exclusive remedy by which one's right to hold a public office may be litigated. State ex rel. Hogan, v. Hunt (1911), 84 Ohio St. 143, syl. 1. To obtain such a writ, one must demonstrate that he "is entitled to the [public] office and that the office is unlawfully held by the respondent in the action." State ex rel. Cain, supra, at 17.

State, ex rel. Williamson, v. Cuyahoga Cty. Bd. of Elections (1984), 11 Ohio St.3d 90, also states that where a relator was the only *eligible* candidate, the votes cast for relator in the election are the only ones to be counted.

Respondent does not now legally hold the office of Sheriff, in 2009. Respondent, lacking a valid OPOTA police certificate since January 2, 2005, did not satisfy requirement

ORC 311.01(B)(8)(a) or (b) prior to the 2008 election, and therefore was not a valid candidate for Sheriff in the November 4, 2008 election. Wenninger cannot act or perform or be appointed as a peace officer in any capacity without a valid OPOTA police certificate. O.A.C. Section 109:2-1-12(A)(2), (D)(3) and (E).

III. CONCLUSION

Wherefore, the Motion of Respondent should be denied. Further, the writ should issue forthwith.

THOMAS G. EAGLE CO., L.P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this 07th day of August, 2009.



Thomas G. Eagle (#0034492)

AFFIDAVIT

State of Ohio,)
)
County of Warren,) ss:

Now comes Dennis J. Varnau, being first duly cautioned and sworn, and states as follows:

1. I am the Relator in this case.

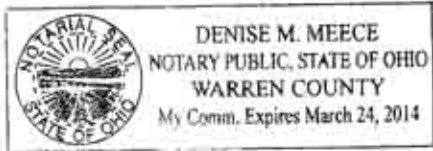
2. The documents attached hereto and the exhibits cited were all obtained either from Respondent, or pursuant to subpoena or public records requests from the custodian of the documents and records, and are believed to be true, accurate, and authentic copies of the actual records maintained by each said agency or custodian.

Further, Affiant sayeth naught.


Dennis J. Varnau

Sworn to and subscribed before me by the said Dennis J. Varnau this 10th day of August, 2009.


Notary Public



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RELATOR'S EXHIBITS
FILED IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT AND
MEMORANDUM IN
OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY
JUDGMENT

Now comes the Relator, by and through counsel, and hereby designates and submits the following exhibits filed in support of the Relator's Motion for Summary Judgment and Memorandum in Opposition to Respondent's Motion for Summary Judgment:

Exhibit 2A: OPOTC records.

Exhibit 5A: O.R.C. §311.01 (2000).

Exhibit 6B: Wenninger's answer to Interrogatory Number 15.

Exhibit 8: TTI Catalog.

Exhibit 8A: Wenninger's diploma, 1987.

Exhibit 8B: TTI's 1988-90 Certificate of Registration.

Exhibit 8C: Subpoenaed documents from State Board of Career Colleges and Schools.

Exhibit 9A: Subpoenaed documents from Ohio Board of Regents.

Exhibit 9C: O.R.C. 1713, April 14, 1985; O.R.C. 3332, October 31, 1979; O.R.C. 3332, November 1, 1985.

Exhibit 10A: Respondent's answer to First Set of Document Requests, Number 13.

- Exhibit 15A: Brown County Board of Elections records.
- Exhibit 16: Ohio Administrative Code.
- Exhibit 17: Chronological Display of Events.
- Exhibit 18: Secretary of State records.

THOMAS G. EAGLE CO., L.P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this 10th day of August, 2009.



Thomas G. Eagle (#0034492)

CHRONOLOGICAL DISPLAY OF EVENTS

