IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU, FILED COURT OF APPEALS AUG 21 2009	**CASE NO. CA2009-02-10**
Relator/Petitioner,	**RELATOR'S OBJECTION TO AND MOTION TO STRIKE RESPONDENT'S MATERIAL IN SUPPORT OF PARTIAL REPLY TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT and RELATOR'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO RELATOR'S MOTION FOR SUMMARY JUDGMENT**
-vs-	
DWAYNE WENNINGER RITA M. MERANDA BROWN COUNTY CLERK OF COURTS	
Respondent/Defendant.	

Now comes the Relator, by and through counsel, and objects to and moves the Court to issue an order striking from the record in this case and disregarding for all purposes the attachments to the Respondent's Partial Reply to Petitioner's Motion for Summary Judgment, filed on or about August 13, 2009, and the affidavits and exhibits attached thereto.[1] Relator further submits this Memorandum in Reply to the Respondent's Opposition to Relator's Motion for Summary Judgment.

As grounds for the Motion, counsel states that the statements, Affidavits, Exhibits, and evidence are in whole or in part incompetent and inadmissible at this stage of the proceedings and therefore should be stricken and/or disregarded. The grounds for this Motion are further set forth in the attached Memorandum.

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[1] Counsel is not aware of any rule or procedure that will allow multiple responses to the same pleading, nor of any such thing as a "partial" reply, and unless the Court intends to permit multiple responsive pleadings would expect the Court to strike or disregard the remainder of Respondent's future reply or response.

MEMORANDUM

A. OBJECTION AND MOTION TO STRIKE

The Relator filed a Motion for Summary Judgment on August 10, 2009 (subject to further necessary discovery and other pending motions), and attached certain material obtained in discovery and by subpoena, but omitting certain material received which was not believed to be admissible and was also prejudicial (and the Motion said so, see page 2 n.2). In "partial" response, Respondent filed on or around August 13, 2009, Respondent's Partial Reply to Petitioner's [sic] Motion for Summary Judgment, and attached to it material to and from attorneys for various parties (including Respondent's attorneys), documents prepared for apparent use in the State vs. Wenninger criminal case, and also "sworn" (if that is possible) and unsworn legal opinions from third-parties. Those materials include certain allegations alleged to support the legal conclusion advocated by Respondent and his counsel, although contrary to the express provisions of the Ohio Revised Code and the Ohio Administrative Code (see this Memorandum, *infra*).

Those items are inadmissible on Summary Judgment proceedings, and at trial, and therefore cannot be considered by the Court. Ohio R. Civ. P. 56(C) expressly and specifically limits the material that may be considered in a summary judgment proceeding, and "no evidence or stipulation may be considered except as stated in this rule." Affidavits for example must "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 about the matters stated in the affidavit*." Ohio R. Civ. P. 56(E) (emphasis added). See also Fisher vs. Lewis (1988), 57 Ohio App.3d 116; Penwell vs. Taft Broadcasting (1984), 13 Ohio App.3d 382. Affidavits containing inadmissible hearsay, or not based on the affiant's personal knowledge, are not to be considered by the Court. See, *e.g.*, Bonacorsi vs. Wheeling & Lake Erie Ry; Co., 95 Ohio St.3d 314, 2002-Ohio-2220; Johnson vs. Morris

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(1995), 108 Ohio App.3d 343; Brannon vs. Rinzler (1991), 77 Ohio App.3d 749. See also, Hamilton vs. Clermont County Bd. of Commissioners, 2006-Ohio-2024 ¶ 12 (Cler. App., Apr. 24, 2006).

Respondent's only basis for admission of the documents is that they were sent in response to the subpoena he also attaches[2], and citing Ohio R. Evid. 106, which only provides for the admission of parts of statements when other parts are admitted, but is expressly limited to material that is "otherwise admissible." It does not provide for the admission of anything that is not admissible by itself.

Respondent's disputed evidentiary material does not comply with Ohio R. Civ. P. 56, and therefore Relator objects to same and requests that it be stricken and disregarded, for at least the following reasons:

1. Failure to establish foundation for the statements

Ohio R. Civ. P. 56(E) requires any affidavits filed in support of a Motion for Summary Judgment *affirmatively state* that the witness and affiant is "competent" to testify to those matters, and have personal knowledge of them. Respondent's affidavit (of Jaime Callender) does none of that. All it does is say the affiant is an elected official who looked at documents and the law, and "believes" in a certain legal conclusion from them, although not even the creator or custodian of the documents. The mere statement for example that one is "duly authorized" to make statements on behalf of another is not sufficient to show personal knowledge or competence to testify to them. Olverson vs. Butler (1975), 45 Ohio App.2d 9. Applying that principle and as applicable to this case:

> Kirkland explicitly states in her affidavit that she had "personal knowledge" that federal funds were used to install crossbuck signs at all Ohio railroad crossings marked with passive warning devices. In her deposition, however, Kirkland testified that ODOT was responsible for handling federal funds, that she did not work for ODOT, and that her knowledge that federal funds were used to install signs at railroad crossings came from other people. After

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[2] Arguably, the material Respondent attaches is *not* responsive to the subpoena, according to its terms.

> reviewing Kirkland's deposition testimony we find that she clearly lacked the personal knowledge required by Civ.R. 56(E) to support the statements in her affidavit regarding federal funding. Consequently, we find that W&LE failed to prove that federal funds paid for the installation of the Howe Road crossbuck sign. Because, at a minimum, federal funding is required to trigger preemption, we hold that W&LE's motion for partial summary judgment should not have been granted.
>
> Bonacorsi v. Wheeling & Lake Erie Ry. Co., *supra* at 2002-Ohio-2220, ¶27-28.

Respondent's material not only contains handwritten notations, unsworn letters and emails, of unknown origin, but obviously were all generated by someone else, and apparently for litigation. In Janosek vs. Janosek, 2007-Ohio-68, the trial court excluded from the husband's expert witnesses' testimony, gift tax returns, because the documents had not been personally prepared by the parties or by the witness, they were not signed by the donor, were not dated, were also not signed by the preparer, and they appeared to have been "doctored." See also, Barker v. Strunk, 2007-Ohio-84 (bank statements). In State v. Hirtzinger (1997), 124 Ohio App.3d 40, a customer's own telephone record was excluded, because the customer could not verify how the entry of a phone call got put on the record by the phone company. These documents are no better.

2. The affidavit and documents contain inadmissible hearsay.

More importantly, all the affidavit does -- and concedes -- is look at material from someone else and opine upon it, although Callender never was the custodian of the documents as required by Ohio R. Evid. 803(6).[3] Statements of what someone said or heard or did out of court are not covered by any hearsay exceptions, without more would not be admitted in court, and therefore cannot be admitted in opposition to summary judgment. Tokles & Sons, Inc. vs. Midwestern Indemnity Co. (1992), 65 Ohio St.3d 621; Fisher vs. Lewis, *supra*; Olverson vs. Butler, *supra*.

3. The statements are conclusory and not statements of fact.

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The affidavit containing such hearsay, outside the affiant's personal knowledge, and affidavits with merely conclusory statements, should therefore be stricken by the Court and not considered. Brannon vs. Rinzler, *supra*. The conclusory statements are unsupported by evidence or inadmissible in or of themselves and cannot help the Court make a decision on Summary Judgment. See Sethi v. WFMJ Television (1999), 134 Ohio App.3d 796.

The Affidavit says, I looked at papers from someone else, and either they told me, or I think, this is what they mean. This is not proper evidence. In Bonacorsi v. Wheeling & Lake Erie Ry. Co., *supra,* the Court was confronted with the affidavit of a party that said they knew how certain money was handled, although it turns out that money was actually handled by someone else. The Court rejected the affidavit and reversed summary judgment for that party:

> Civ.R. 56(E) requires that affidavits supporting motions for summary judgment be made on personal knowledge. [Citations omitted]. For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. Id.; Evid.R. 602. "Personal knowledge" is "[k]nowledge gained through firsthand observation or experience, *as distinguished from a belief based on what someone else has said.*" Black's Law Dictionary (7th Ed.Rev.1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.").

Id. at ¶ 26 (emphasis added). Similarly, in Brannon vs. Rinzler (1991), 77 Ohio App.3d 749, 756, the Court affirmed the disregard of a conclusory hearsay filled affidavit:

> "Personal knowledge" is defined as, "[k]nowledge of the truth in regard to a particular fact or allegation, which is original, and *does not depend on information or hearsay*. Personal knowledge of an allegation in an answer is personal knowledge of its truth or falsity; and if the allegation is a negative one, this necessarily includes a knowledge of the truth or falsity of the allegation denied." Black's Law Dictionary (6 Ed.1990) 873, citing Hidalgo v. General Fire & Cas. Co. (La. App. 1971), 254 So.2d 493, 496.

According to Ohio case law, statements contained in affidavits must be based

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[3] Although their authentication as what they are may not be in dispute, for Ohio R. Evid. 901 purposes, that doesn't make them admissible or non-hearsay.

> on personal knowledge *and cannot be legal conclusions*. [Citations omitted]. The statements set forth in the appellants' form affidavits do not fulfill the personal-knowledge requirement of Civ. R. 56(E). On the contrary, the affidavits contain hearsay statements *and legal conclusions*, as well as statements contradictory to written documents and depositions. *The incorporation of the allegations set forth in the complaint and the statement of facts results in the appellants restating legal conclusions. Neither can the rest of the appellants' averments be categorized as personal knowledge, as they depend on hearsay or other information* or are contradictory to statements set forth in the documents the appellants admit they did not read. The trial court properly found that the appellants' affidavits were not based on personal knowledge; thus, appellants' third assignment of error is overruled.
>
> (Emphasis added).

4. Affidavits based on a review of others records are not admissible.

Exactly what this Respondent purports to do was disallowed (provide hearsay testimony on the content of someone else's records, based only upon a review of those records), in St. Paul Fire & Marine Insurance Co. v. Ohio Fast Freight, Inc. (1982), 8 Ohio App.3d 155. Although this is not proper authentication under Rule 901, it is more importantly not proper for admission under Rule 806. See Hinte v. Echo, Inc. (1998), 130 Ohio App.3d 678 (a person who has no personal knowledge of the source of records sought to be entered into evidence is not qualified to identify the records for purposes of admission); Spencer v. Lakeview School District, 2006-Ohio-3429 (business record excluded since the final element of hearsay exception was not met, because the nurse could not identify or testify as to which person specifically gave her what information that was contained in the record). As a result, even if it is not hearsay, it is not relevant and therefore also not admissible. See AMF, Inc. vs. Mravec (1981), 2 Ohio App.3d 29.

5. Documents prepared for litigation are hearsay.

The documents verify they were prepared at the request of attorneys and for the purposes of the litigation between them. Such litigation records do not count as "business" records for purposes of the hearsay rules. See Johnson v. Cassens Transp. Co. (2004), 158 Ohio App.3d 193 (letter from a doctor to patient's attorney, written while litigation was

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pending, did not qualify as business records for hearsay exceptions); State v. Lane (1995), 108 Ohio App.3d 477 (laboratory report prepared for prosecution did not qualify as a business record).

6. The affidavits and statements of legal opinion are not admissible.

In addition, Respondent's submitted "expert witness" testimony on the nature of the requirements of law established by Statute, and construction of legal documents, are nothing more than an attempted legal opinion, secondarily expressing an opinion (purportedly) to this Court on the issues of law pending before the Court in the motions for summary judgment, and for trial if summary judgment is not granted. Sworn legal opinions on what is required by law, or what a Statute means or how it should be applied, is inadmissible for summary judgment or trial.

There is no basis to have an attorney sworn to render an opinion as to any *legal* issue before the Court. Construction of what a document is or is not, or what a law means or requires, is not a matter of fact or even interpretation, but is for the Court to determine as a matter of law. Graham vs. Drydock Coal Co. (1996), 76 Ohio St.3d 311 (construction of the operation of a deed is a matter of law for the court); Alexander vs. Buckeye Pipeline Co. (1978), 53 Ohio St.2d 241; Northwoods Condominium Owner's Ass'n vs. Arnold, 147 Ohio App.3d 343, 2002-Ohio-41; Coleman vs. Fish Head Records, Inc. (2001), 143 Ohio App. 3d 537, 541. See also, United States ex rel. Compton vs. Midwest Specialties, Inc., 142 F. 3d 296 (6th Cir. 1998) (experts may not testify as to the legal effect of a document such as a contract).

What the Respondent purports to do is to have a "second opinion" of their own legal argument presented to the Court, in an effort to outnumber Relator's counsel as to the legal arguments the Court considers, and perhaps to attempt to compel the Court to conclude that there are more attorneys who have rendered opinions in this case (in the form of arguments)

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and persuade the Court as to the legal issue.[4] Respondent's tactic is an invalid attempt to present to the Court legal opinions in the guise of sworn testimony and is uniformly prohibited. See, *e.g.*, Bostick vs. Connor (1988) 37 Ohio St.3d 144 (expert testimony properly excluded as to whether truck driver was an employee or independent contractor of a company); Frank W. Schaefer, Inc. vs. C. Garfield Mitchell Agency, Inc. (1992), 82 Ohio App.3d 322 (interpreting court of appeals opinions as to whether an insurance agent was negligent or in breach of contract, excluded); Early vs. The Toledo Blade (1998), 130 Ohio App.3d 302 (testimony by communications and psycholinguistics professors on question of invasion of privacy and defamation went to questions of law to be resolved by the Court, and properly excluded; expert witness should not be allowed to testify about his or her interpretation of law, as that is within the sole province of the Court); Sikorski vs. Link Electric and Safety Control Company (1997), 117 Ohio App.3d 822 (expert testimony as to manufacturer's duty on products liability case went to legal issue not factual issue, and was not admissible); Waste Management of Ohio vs. Cincinnati Board of Health (2005), 159 Ohio App.3d 806 (an expert's interpretation of the law should not be permitted as that is within sole province of the Court); Nicholson vs. Turner/Cargile (1995), 107 Ohio App.3d 797 (expert testimony is not admissible to interpret statutory terms, and an expert may not define duties by interpreting statutory and regulatory terms); State ex rel Simmons vs. Geauga County Department of Emergency Services (1998), 131 Ohio App.3d 482 (expert opinion is inadmissible to assist the Court in making its decision regarding the construction and interpretation of a statute, which involves a question of law and not a factual issue).

This Court determined that an expert in international affairs was unqualified to testify on the legal issue of the scope of a trust after the demise of the Soviet Union. First

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[4] The Court could of course consider Relator's counsel is also submitting to the Court other "opinions" on the validity of the Relator's claims, but not in the form of other attorneys rendering opinions, but in the form of the cases and pronouncements of the courts of Ohio, and the Statutes themselves, supporting the Relator's claims.

National Bank vs. Miami University (1997), 121 Ohio App.3d 170. Courts further have rejected affidavits of "experts" on the grammatical construction of written instruments (such as insurance policies) since such construction is an issue of law for the courts. See Weil vs. Estes Oils Co. (1994), 93 Ohio App.3d 759.

Respondent's attempt to convince the Court that Relator's legal arguments are incorrect by having one of their compatriots "testify" in the guise of an opinion should be prohibited and the "opinions" should be disregarded by the Court. The Court should not only disregard the secondary legal opinions but should issue an order prohibiting said witnesses from testifying in this case. The Court should also strike such (and all other inadmissible references) from the Respondent's supporting materials.

B. RESPONDENT DID NOT HAVE EDUCATIONAL CREDENTIALS QUALIFYING HIM TO BE AN OHIO SHERIFF.

Respondent's only stated argument in opposition to the Motion for Summary Judgment is that the Ohio Revised Code does not mean what it really says: that a "diploma" issued from any institution not approved by the Ohio Board of Regents is not *really* what a sheriff is required to have. The material Respondent submitted means nothing, in light of the ORC sections that pertain to Section 3332 schools and colleges. "Operating under the umbrella" of OBR does not exist in the Code or elsewhere, and is not factually true, even though not legally approved either. See Relator's Motion for Summary Judgment, Aug. 10, 2009, p. 2-4. O.R.C. 311.01(B)(9)(b) is not confusing. To be a sheriff (as relevant to this issue):

> The person meets at least one of the following conditions:
>
> * * *
>
> (b) He 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.

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(Emphasis added). First, a two-year degree is impossible since all of Respondent's materials reflect he graduated from high school in 1986 and got his TTI diploma in 1987.

Nonetheless, TTI's own material does not claim OBR authorization, and it could not according to the undisputed evidence Relator provided and cited. The Statute does not provide for any exceptions; there is no alternative, no "umbrella" for other unstated agencies under other unstated Chapters of the Revised Code, or for institutions that don't otherwise meet statutory definitions. A political friend of the Respondent using his position to argue a point of law contrary to the written words, even though inadmissible, certainly does not change the written words of the law, and serves merely to whitewash an unelectable official in a position of great authority over the citizens of Brown County.

If the General Assembly meant to include other boards or proprietary schools, it could have done so, but did not. No legislator can unilaterally do so, either. Neither can this Court. Adopting Respondent's position would require the Court to add "substantial compliance," or "some other comparable agency in the State," or "or within the umbrella or auspices" of the Board of Regents -- although that is not factually true, either. The Court cannot do that: "Courts have a duty to give effect to the words used in a statute and not to delete words used or insert words not used." State ex rel. Steele v. Morrissey, 103 Ohio St.3d 355, 360, 2004-Ohio-4960, ¶ 30.

The material is also factually and legally wrong, and the argument Respondent continues to rely upon has no basis when exposed to the written words of the law. When examined the "theory" is full of unfillable holes.

Respondent (through the affiant) argues that he (Wenninger) "substantively" met the requirements of R.C. 311.01 in that (he claims) TTI was "accredited by the National Association of Trade and Technical Schools (NATTS) which (he claims) is "a comparable agency to the Ohio Board of Regents". However R.C. 311.01 only provides for compliance

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with the Ohio Board of Regents, not some "comparable" agency in Ohio. There is no "umbrella" mentioned in the Ohio Revised Code, and the issuance of degrees, and the proper degree, by the proper agency, is paramount, specific, and different for different schools. See O.A.C. 3333-1-08 (Standards for issuance of certificates of authorization under section 1713.03, Ohio Revised Code), and O.A.C. 3332-1-16 (Program standards).

This same argument was "substantively" rejected in Respondent's criminal case:

> Beginning with Count I, *R.C. 3599.36*, election falsification, defendant argues that he substantially met the educational requirements to become Brown County's Sheriff. However, to the court's knowledge, there is nothing in *R.C. 311.01* that permits substantial compliance, and defendant has not presented any supporting statutory or case law to indicate otherwise.

State vs. Wenninger, 125 Ohio Misc.2d 55, 58, 2003-Ohio-5521, ¶ 5 (Ringland, J., C.P.). In fact, that Court (and this Court) would have been in error even to consider any "substantial compliance" with any election laws. In construing the laws relevant to election petitions, the Supreme Court recited "the settled rule," that "election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision states that it is." State ex rel. Steele v. Morrissey, 103 Ohio St.3d 355, 360, 2004-Ohio-4960, ¶ 33 (citations and quotations omitted). In that case the relators on a mandamus petition argued that the referendum laws should be "liberally" construed to allow for errors and inconsistencies. The Supreme Court rejected that proposition: "R.C. 731.32 does not expressly permit substantial compliance, so it requires strict compliance." *Id.* at 360-361, ¶ 33. So do the ones now before the Court.

Other errors abound. The affidavit of Callender states he "reviewed a letter from the Ohio Board of Regents dated October 4, 2002 issued by Shane DeGarmo," when the only supporting document dated October 4, 2002, was the letter from Grennan to DeGarmo. Conversely, the attached communication dated March 19, 2003, from DeGarmo to Kris Frost indicates that in fact TTI *did not meet* the requirements of R.C. 311.01 to confer

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degrees, even if admissible, and it therefore creates, not dispels, a disputed issue.

Respondent uses the term "umbrella," or as reported in his criminal case, "auspices." If indeed TTI had complied with the requirements of the Ohio Revised Code and the regulations of the Ohio Board of Regents, applied for certification by it, offered academically acceptable courses, and met the criteria for semester hours, it might have been authorized by the Ohio Board of Regents -- but it didn't. It could not have, according to the material Relator has submitted. The argument, and the "affidavit," has no basis in law or fact.

The affidavit is also otherwise factually erroneous. It contradicts itself as to what year the diploma was granted or issued, and what Statute TTI operated under at that time. During that time (when the diploma was issued, in fact from his high school diploma, June 8, 1986, to TTI "graduation," October 23, 1987, was a summer and one-year of school, not two years. This is a material difference. Respondent's claim is dependent upon him having received a two-year "diploma," authorized under ORC Section 3332. OAC 3332-1-16(C)(2) dictates that such diploma issued to him had less than 90 quarter credits or 60 semester credits. A two-year degree under the Ohio Board of Regents, OAC 3333-1-04(C)(6), dictates a *minimum* of 90 quarter hours or 60 semester hours are required for a two-year associate degree. He can't have it both ways, and didn't have it the way the law requires, in substance or letter. The Ohio Board of Regents standards for two-year degrees are in OAC 3333-1-04(C) (General standards for the approval of associate degree programs), and states:

> (6) For approval by the Ohio board of regents, associate degree programs must contain a minimum of ninety quarter credits or sixty semester credits and should not exceed a maximum of one hundred ten quarter credits or seventy-three semester credits . . .

But the standards under the State Board of Career Colleges and Schools (TTI's) standards for diploma programs are in OAC 3332-1-16 (Program standards), and state:

(C) All certificate and diploma programs approved by the board shall meet

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the following minimum standards:

* * *

> (2) "Diploma program" means a program of instruction offering technical and basic coursework. General courses may be included. The program shall generally range in length from more than six hundred but less than fifteen hundred clock hours; or more than forty but less than ninety quarter credit hours; or more than twenty-seven but less than sixty semester hours.

When Respondent received his "two year" diploma from Technichron Technical Institute, the Board of Regents was not involved. In December of 1999, TTI was under the Board of Proprietary School Registration; and when Respondent got his TTI diploma, on October 23, 1987, TTI was under the State Board of School and College Registration. Their standards and requirements were different, not "comparable."

It is clear from the 1985-89 Revised Code that TTI was not associated with OBR in any way whatsoever, and *could not legally have been.* Chapter 3332 of the Revised Code *does not apply* to the following categories of courses, schools, or colleges; "(B) Institutions with certificates of authorization issued *pursuant to section 1713.02 of the Revised Code*; (C) Schools, colleges, technical colleges, or universities established by law or chartered by the Ohio board of regents." R.C. 3332.02 (emphasis added).

Further, the affidavit claims at the time that Respondent received his "two year" diploma from TTI, proprietary schools were authorized to confer two-year post-secondary education diplomas and associate degrees. This conflicts with the actual written materials from the Board and otherwise. See Exhibit 8B, previously filed.

Exhibit 8B also shows TTI was registered initially on 10/27/78, with Certificate No. 78-10-0626T, transferred in 12/1985 to Certificate No. 70-12-0040T. Respondent's affiant though claims, in conclusory fashion, that Respondent's education met the educational standards set by R.C. 311.01(B)(9)(b) to run for Sheriff in 1999, although he graduated from TTI in 1987, and the law providing what a sheriff had to have was written, as applicable to

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the 1999 election, in 1990, then creating the requirements to allow schools, institutes, etc., *under Chapter 3332*, to apply to the OBR for a certificate of authorization for a particular course, taught at a particular location, IF, the school, institute, etc., had been teaching that course for a minimum of 10 years or more at that location. TTI started business on October 27, 1978. Wenninger got his diploma on October 23, 1987. That is nine (9) years, not the minimum to even think about applying to the OBR for a certificate of authorization. And, if any school or institute, etc., was granted a certificate of authorization by the OBR, that certificate had to be filed with the Secretary of State per Section 1713, and the documents received through subpoena from the Secretary of State show that didn't happen, either.

The argument Respondent continues to pursue, supported by an apparent political ally, that at the time 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 *non-existent* "umbrella" of the Ohio Board of Regents, as the time that Dwayne Wenninger received his two-year diploma, is factually and legally untrue and impossible. It requires some sort of non-contemporaneous time warp to allow words at one relevant point to be changed by actions at another point in time. The entire argument requires this Court to disregard and rewrite the plain language of the Ohio Revised Code, just so he can serve in the office he was never qualified to have.

It should also be noted that the letter that Prosecutor Grennan received from the Board of Regents dated October 4, 2002, with the signature of Shane DeGarmo, is misleading, in that nowhere does that piece of correspondence address the question presented: was Technichron Technical Institute, Inc. at the time periods applicable to the dispute, able to confer *two-year* post secondary education diplomas, certificates or degrees, which was not the issue then, and is not the issue now.

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The issue was/is: Was the diploma issued to Wenninger on October 23, 1987, issued from an institute authorized to confer degrees by the Ohio Board of Regents at that time of issuance? The fact is, at the time that Respondent obtained his diploma from Technichron Technical Institute, Inc., the only evidence is that it was accredited by numerous institutions, but not including the Ohio Board of Regents, the only one that matters. Respondent's allegation that the other agencies are "comparable" also ignores that "comparable" per the Statute must be in the other state where the institution is located. There is simply no provision for a "comparable" authorization for an Ohio institution by any agency other than the Ohio Board of Regents.

Contrary to Mr. Callender's conclusion, Respondent did not and could not meet the letter, much less the substance, of R.C. 311.10(B)(9)(b), at the time that he circulated his petitions for candidacy, when the petitions were presented to the Brown County Board of Elections, or when the election was held. TTI was *started* under the legislative provisions of Chapter 3332, when it was called "The State Board of School and College Registration," which is the name on the Certificate of Registration filed with the Court, that is dated after Respondent received his TTI diploma. That Board was not called "The State Board of Proprietary School Registration" until 07-28-1989. Also, from 02-17-72, R.C. 3332.02 provides: "Chapter 3332 of the Revised Code does not apply to the following categories of courses, schools, or colleges: (B) Institutions with certificate of authorization issued pursuant to section 1713.02 of the Revised Code [the Ohio Board of Regents schools]; (C) Schools, colleges, technical colleges, or universities established by law or chartered by the Ohio board of regents." They were two different boards completely separate, not within any imaginary "umbrella." This section in the law was not changed again until 03-17-89, well after Respondent obtained his TTI diploma. It wasn't until 07-28-89 that "The State Board of Proprietary School Registration" superseded "The State Board of School and College

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Registration," and that is when 3332.05 was revised to get the Ohio Board of Regents peripherally involved, well after Respondent received his diploma in 1987.

The Respondent's entire argument misreads the law, invents the law, and requires a disregard of the law.

C. CONCLUSION

It is therefore requested that the Court issue such an order striking the Plaintiff's affidavits and attachments for all purposes. It is further requested that the Relator's Motion for Summary Judgment be granted, and the Writ issue to remove Respondent from Office, and restore Relator to it.

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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 28th day of August 2009.

Thomas G. Eagle (#0034492)