

**IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO**

STATE OF OHIO, ex rel	)	CASE NO. CA2009-02-10
DENNIS J. VARNAU,)	
)	
Relator/Petitioner,)	
)	
-vs-)	
)	
DWAYNE WENNINGER,	)	RELATOR'S MOTION FOR
	)	EXTENSION OF TIME TO
	)	RESPOND TO MOTION TO
	)	DISMISS AND TO PERMIT
Respondent/Defendant.	)	FILING <i>INSTANTER</i>

Now comes the Relator/Petitioner, by and through counsel, and moves this court to issue an order permitting the filing of the Relator's memorandum in opposition to the Respondent's motion to dismiss, this date. As grounds for this motion, counsel states that he received on or about March 20, 2009, the motion to dismiss and affidavit filed by respondent, which bears a certificate of service of March 16. The cover letter from opposing counsel though is not dated until March 18 (copy attached), resulting in an actual delay in it being received, and an appearance of delay by the undersigned and responding. If in fact the date on opposing counsel's cover letter was the date of filing, the filing of this memorandum would in fact be timely under the Court's Local Rules. Upon verification of the filing date of the motion to dismiss though, it apparently is not.

This delay of approximately 2 days is not prejudicial to any party and was not intentional on the undersigned part.

It is therefore requested that the memorandum in opposition to the motion to dismiss, and the accompanying Relator's motions, be extended and permitted to be filed, this date.

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



Thomas G. Eagle (#0034492)

Counsel for Relator

3386 North State Route 123

Lebanon, Ohio 45036

Phone: (937) 743-2545

Fax: (937) 704-9826

E-mail: eaglelawoffice@cs.com

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 2nd day of April 2009.



Thomas G. Eagle (#0034492)

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

3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

PATRICK L. GREGORY

ATTORNEY AT LAW
717 W. PLANE ST., P.O. BOX 378
BETHEL, OHIO 45106

TELEPHONE 1-513-734-0950
FAX 1-513-734-7958

Date: March 18, 2009

To: Thomas G. Eagle
Attorney at Law
3386 North State Route 123
Lebanon, OH 45036

Re: Dennis Varnau v. Dwayne Wenninger

The enclosed documents are referred to you for the purpose indicated.

_____ Title Report (final update)
_____ Recorded Deed
_____ Recorded Mortgage
_____ Answer

_____ Signed Judgment Entry
_____ Divorce Decree
_____ Decree of Dissolution

_____ Motion for Continuance
_____ Not Guilty Plea
_____ Letter
_____ Complaint
_____ Other

_____ As you requested
_____ For your information
_____ xx For your records
_____ Please telephone my office
Upon receipt of this letter

_____ Please sign where indicated
and return.
_____ Please telephone my office
for an appointment

_____ Please file and return a time-
stamped copy to me in the
envelope provided.

Re: Motion to Dismiss/Affidavit

Sincerely,

Patrick L. Gregory

PLG/kd

**IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO**

STATE OF OHIO, ex rel	)	CASE NO. CA2009-02-10
DENNIS J. VARNAU,)	
)	
Relator/Petitioner,)	
)	
-vs-	)	RELATOR'S MEMORANDUM
	)	IN OPPOSITION TO MOTION
	)	TO DISMISS and MOTION
DWAYNE WENNINGER,	)	FOR DISCOVERY AND
	)	PRESENTATION OF
Respondent/Defendant.	)	EVIDENCE

Now comes the Relator/Petitioner, by and through counsel, and in opposition to the Respondent's motion to dismiss, submits the following memorandum. Further, pursuant to 12th District Local Rule 20, Relator further moves the court for a scheduling order for the purposes of conducting discovery, presentation of evidence, and further briefing.

As grounds for this motion and opposition, Relator states that the Respondent's motion to dismiss is based upon an affidavit,¹ the facts of which are disputed, and are subject to contradiction not only by the Relator himself, but other officials and document custodians. Although said evidence may be reasonable by stipulation or agreement statement, or depositions, pursuant to Local Rule 20(G), additional time will be required in order to prepare said evidence.

This action is to be governed by the Ohio Rules of Civil Procedure, see 12th District Local Rule 20(A), including Civil Rule 26 (discovery), and 56. Because of the legal standard applicable by the Rules of Civil Procedure to a "motion to dismiss" with affidavits attached, being in essence a motion for summary judgment, additional time will be required

¹ The Respondent's Motion to Dismiss does not strictly comply with Local Rule 20(D), in that it does not state that the Motion "will dispose of the merits." Further, the certificate of service in the Motion, stating it was

in order to conduct appropriate discovery and prepare the evidence intended. As a result, the Respondent's Motion to Dismiss *will not dispose of the merits of this case*. See Affidavit attached hereto and incorporated herein by reference.

The facts, and the legal conclusions, are in dispute. Respondent has *not lawfully* held the office of Brown County Sheriff and *does not* meet *all* requirements of Section 311.01 of the Ohio Revised Code necessary to do so. Specifically, Respondent failed to meet all the requirements of Section 311.01 of the Ohio Revised Code to even be a valid candidate in the 2000, 2004, and 2008 elections. Because he never legally held as the office, beginning in 2001, he forfeited the office on January 1, 2001, after failing to remove his disqualification – being his lack of educational credentials required *at that time* under O.R.C. 311.01(B)(9)(b) – immediately upon assuming the office. See, State, ex rel. Vana, v. Maple Hts. City Council (1990), 54 Ohio St.3d 91. The credential defects include:

A. Respondent did not have the supervisory experience of corporal or higher to satisfy O.R.C. 311.01(B)(9)(a), and his educational credentials did not include a diploma from a school under the Ohio Board of Regents, as required at that time under the O.R.C. language in (B)(9)(b). Respondent's qualifications in 2000 was the diploma received by Mr. Wenninger from the "Technichron Technical Institute" in 1987. That diploma did not meet the requirements of the 2000 Ohio Revised Code Section 311.01(B)(9)(b). Evidence, or stipulation, will be necessary from official records that his educational credits did not meet that criteria.

B. Respondent never legally held the office of Sheriff, in 2005, because he started an administrative “break in service” on his Ohio Peace Officer Training Academy

served March 16, is also incorrect, as the cover letter from respondent's counsel is not dated until March 18, resulting in a not having been received until March 20.

(OPOTA) police certificate. Respondent, not legally holding office as sheriff from January 1, 2001 through January 1, 2005, could not appoint his own commission 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 whole OPOTA police academy course in its entirety to obtain a new police certificate. See O.A.C. Section 109:2-1-12(D)(3), (E) ("Breaks in service."). Additional evidence will be required to obtain and present by stipulation, affidavit, or deposition, certified documents and sworn testimony on those points.

C. Per Ohio Attorney General Opinion 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 interests. When Respondent filed 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, and therefore cannot be used to satisfy the legal criteria to obtain a certificate or hold the office.

D. "Officer" Wenninger never worked a day or hour during his entire appointment with the Ripley PD, although he uses doing so as a basis for his eligibility to hold the office of Brown County Sheriff. Additional evidence will be necessary from the officials there to verify that. This brings into question whether or not Respondent's OPOTA police certificate was current at the time he submitted his election paperwork for the 2000 election. This issue effects his qualification under O.R.C. 311.01(B)(8)(a) or (b) for the 2000 candidate qualification deadline.

E. Respondent's claimed years of experience as corporal or higher from his time as Sheriff from January 1, 2001 to the 2004 election cycle, thus allegedly giving him the

necessary credentials to be a valid candidate under O.R.C. 311.01(B)(9)(a), making Respondent's educational qualifications under an unlawful amendment to O.R.C. 311.01(B)(9)(b) in an "emergency" bill (which, factually, benefited no one in the entire State, other than Mr. Wenninger), are actually invalid qualifications, because Respondent's OPOTA police certificate expired prior to him taking office on January 3, 2005, so those years were also false, and during that time Respondent was also not in compliance with O.R.C. 311.01(B)(8)(a) or (b) and/or O.A.C. Sections 109:2-1-12(A)(2) and (D)(3).

F. 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 O.R.C. 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. Respondent 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).

G. Respondent suggests that his qualifications were passed upon by a judge prior to being on the ballot. Whether true or not is irrelevant to the dispute between these parties, and the allegation in Respondent's affidavit and pleading is not proper evidence; but the Common Pleas Court judge only reviews the submissions under O.R.C. 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).

Respondent's entire claim to the office is based upon, essentially, "Even if I obtained it illegally, I have it now and therefore I get to keep it." This claim is both factually and legally incorrect, but nonetheless cannot be resolved on affidavits of the parties alone. The

Motion is therefore not dispositive of the merits of this case, and discovery and obtain evidence in the form prescribed by the Local and Civil Rules is required and should be permitted.


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



Thomas G. Eagle (#0034492)
Counsel for Relator
3386 North State Route 123
Lebanon, Ohio 45036
Phone: (937) 743-2545
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CERTIFICATE OF SERVICE

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Thomas G. Eagle (#0034492)

AFFIDAVIT

STATE OF OHIO,)
)
COUNTY OF WARREN,) **ss:**

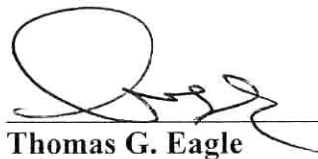
Now comes Thomas G. Eagle, being first duly cautioned and sworn, who deposes and states as follows:

1. I am counsel for the Relator in this case.

2. Although uncertified copies of numerous documents and exhibits are in counsel's and Relator's possession, all of which are supportive of the facts and law necessary to sustain this petition and to oppose the motion to dismiss, the full evidence necessary to do so, in compliance with this Court's Local Rule 20(G), or require additional time to obtain or proposed stipulations, and obtain independent third-party affidavits and or depositions, if stipulations and admissions cannot be obtained directly from opposing counsel or the respondent.

3. Therefore the undersigned cannot fully and adequately respond to the merits of Defendants Motion to Dismiss without discovery or other compliance with this Court's Local Rules on the issues presented in the foregoing Motion.

Further, Affiant sayeth naught.



Thomas G. Eagle

Sworn to and subscribed before me this ____ day of April 2009.

Notary Public