

IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

State ex rel., Varnau

Relator

Vs

Dwayne Wenninger

Respondent

FILED :
COURT OF APPEALS
:

Case No. CA2009-07-026 ²¹⁰

JUN 24 2010

REPLY TO RELATOR'S NOTICE AS TO
SUPPLEMENTAL AUTHORITY

TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS
(and) Supplemental Authority of Respondent)

Respondent Dwayne Wenninger has received Relator Varnau's notice of supplemental authority citing *State ex rel. Knowlton v. Noble Cty. Bd. of Elections*, 125 Ohio St.3d 82, 2010-Ohio-1115 (*Knowlton*). Respondent Wenninger now replies to Relator's supplemental authority.

A concept that Relator Varnau seems to have difficulty with is that a board of elections is a quasi-judicial body and, as such, finds facts. *State ex rel. Ross v. Crawford Cty. Bd. Of Elections*, Ohio Supreme Court Slip Opinion No. 2010-Ohio-2167 (at ¶15, 25, et seq.) [*Ross*]. By statute, a board of elections acts in a quasi-judicial capacity in determining election protests. *State ex. Rel. Stewart v. Clinton Cty. Bd. Of Elections*, 124 Ohio St.3d 584, 2010-Ohio-1176 (at ¶15 & 16) [*Stewart*]. As has been previously urged by Respondent Wenninger, a reviewing court may not substitute its judgment for a board of elections if there is conflicting evidence on an issue. *Ross* at ¶41 (cit. om.).

Respondent Wenninger believes that he has always been qualified to be sheriff under the statutory criteria. (See, among other materials, *Affidavit of Spievak* as found within the record in *State ex rel. Varnau v. Brown Cty, Bd. Of Elections*, 12th App. No. CA2008-09-06, affidavit attached hereto). Three general elections ago (and in every general election since), the Brown County Board of Elections found Respondent Wenninger to possess the qualifications to become sheriff. The evidence as to such findings by the Brown County Board of Elections is well established within this record. Relator Varnau, in this quo warranto action, wants this Court to substitute its judgment and find facts different than the Brown County Board of Elections: that Respondent Wenninger failed to have sufficient post secondary education as is required by R.C. 311.01(B)(9)(b).

Knowlton is otherwise easily and readily distinguishable from the present case: *Knowlton* is an election case brought in mandamus and prohibition. *Knowlton* timely protested the candidacy of an interim sheriff, Hannum. Hannum double-counted (perhaps cross counted?) credits earned for peace officer training as, or into, post secondary training. *Knowlton*, ¶32. Respondent Wenninger did not 'double count' hours. Relator Varnau does not dispute that Respondent Wenninger, as required by the sheriff qualification statute, completed the required OPOTA hours and/or certification and otherwise met the necessary experience in law enforcement requirement. Respondent Wenninger also had the required post secondary education as found by the Brown County Board of Elections. Relator Varnau is unhappy with this factual finding. There is nothing in the record before this Court that can lead one to conclude that Respondent Wenninger double-counted hours toward any statutory requirement as to qualification.


Knowlton also reiterates that defenses in equity and at law apply in extraordinary writ cases. *Knowlton*, ¶10 (laches). Respondent Wenninger suggests that the defenses of collateral estoppel, issue preclusion or res judicata apply to this case and Relator Varnau's claim in quo warranto is barred. Respondent Wenninger suggests to the Court that Relator Varnau commenced the mandamus action (seeking an order that The Brown County Board of Elections determine the validity of a protest that was filed against Respondent Wenninger) in the Brown County Common Pleas Court. Relator Varnau appealed the trial court resolution of the mandamus under Case No.CA2008-09-06. Unfortunately for Relator Varnau, at the time that he filed the mandamus action, he should have also filed an action in prohibition seeking to prevent the placement of Wenninger's name on the ballot. See, *Knowlton* and *Stewart*. Relator Varnau's failure to seek prohibition two years ago results in issue preclusion as to this case as, had this Court had a prohibition claim before it two years ago, this Court could have determined the issue now presented. Relator Varnau was required to join every ground for relief in his previous action or suffer the bar of res judicata. *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60; *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67; and *Grava v. Parkman Township* (1995), 73 Ohio St.3d 379. Relator Varnau can not now bring

an action that would have been dispositive of the issue presented prior to the election of 2008. See, *Knowlton and Stewart, supra* (actions of mandamus and prohibition joined in election protest matter).

Wherefore Respondent Wenninger respectfully requests that the Court consider the foregoing supplemental authority in resolving this matter.



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CERTIFICATE OF SERVICE

I certify that on June 24, 2010, a copy of this pleading was served by ordinary mail, postage prepaid on Thomas G. Eagle, 3386 N. State Rte 123, Lebanon, Ohio 45036.




Gary A. Rosenhoffer

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