IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU,	**CASE NO. CA2009-02-10**
Relator/Petitioner	**RELATOR DENNIS VARNAU'S REPLY TO RESPONDENT'S ARGUMENT and OBJECTION**
-vs-	
DWAYNE WENNINGER,	
Respondent/Defendant	

This Court on April 15, 2011, Ordered: "[T]he parties *shall* file written *arguments* in support of their respective motions for summary judgment. The written *arguments shall* include *citations* to evidence in support of their respective positions and shall be no more than twenty (20) pages in length." Entry, April 15, 2011, p. 1 (emphasis added). The Court made no provision for submitting evidence or exhibits, new or old, so that a review is necessary to determine if that evidence was previously timely filed or not, or is admissible, or not. The filing by Respondent, *31* pages in total length, violates the Entry. Either the entire filing, or the attachments to it, should be stricken and disregarded.

Those attachments are (still) inadmissible, for the reasons previously stated. Respondent appears to be of the impression that just because something came by subpoena or from an adversary by way of discovery, it is therefore admissible and not subject to objection, and that is not the case (although an objection can be waived, as Respondent did). See Relator's Renewed Objection, March 9, 2011; Relator's Reply, March 29, 2011, p. 4-5. Everything in Respondent's letters, and affidavits, is what someone else said or found out or *believed* or that some document says or what they think *the law means*. And, just because a

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document is itself in an exhibit, doesn't admit it for the truth of the content of it, particularly when it is not a "fact" at all. Ohio R. Evid. 105, 106, 805.[1] Respondent continues to rely on inadmissible items that prove nothing.[2] On the other hand, Relator's evidence is sworn, certified, undisputed, objective, and/or not subject to any timely objection. Respondent's "unrebutted" facts are not facts, and are contradicted by the admissible evidence, and more importantly by the applicable law.

Respondent's opposition and supporting material is factually and legally wrong in many ways. His affiants *argue* that Wenninger "substantively" met the R.C. 311.01 requirements in that TTI was "accredited" by something other than the Board of Regents. R.C. 311.01 only provides for compliance with *the* Board of Regents, not some "comparable" Ohio agency. Amendments to the Statutes after the fact don't change that, or the required *hours of attendance*. This same argument was *rejected* in Wenninger's criminal case:

> [D]efendant 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 (emphasis added). The Judge was correct: there is no such law. "[T]he settled rule is that election laws are mandatory and require strict compliance," and "[s]ubstantial compliance is acceptable only when an election statute expressly permits it." State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections (1995), 72 Ohio St.3d 289, 294. See also, State ex rel. Steele v. Morrissey, 103

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[1] It is noted that the 10th page of Respondent's attachments (the Sevy letter) differs in content from the letter included in Relator's Ex. 8B. It was obviously changed for litigation purposes, but nonetheless does not present a "fact" but an opinion or conclusion.

[2] It would be helpful to the parties and the Court to have rulings on what evidence is admissible, prior to oral argument, to focus the arguments on facts that are actually before the Court.

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Ohio St.3d 355, 360-361, 2004-Ohio-4960, ¶ 33 (Relator 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).

Respondent requires this Court to make room for the *made up* interpretation of the Statutes, using the words "umbrella" and "auspices." If indeed TTI had complied with the requirements for Board of Regents' accreditation, including the requirements for semester hours that Respondent didn't meet, it might have been authorized by the Ohio Board of Regents -- but it didn't, and could not have, according to the material Relator submitted (without timely objection or dispute).

R.C. 311.01(B)(9)(b) is not confusing. To be a *legal* candidate for Sheriff in 2000 (as relevant to this issue), he had to 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* . . . ." (Emphasis added). The OBR standards for two-year degrees require those qualified programs to "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 . . . ." O.A.C. 3333-1-04(C)(6) (emphasis added). But the standards under the State Board of Career Colleges and Schools (TTI's applicable standards) require instead a "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." O.A.C. 3332-1-16 (emphasis added). They are not "comparable" but opposites.

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Wenninger appears to claim to have two or more years of experience as corporal or higher (from his *illegal* time as Sheriff from January 1, 2001 to the 2004 election cycle), giving him the credentials to be a valid candidate under R.C. 311.01(B)(9)(a). Even under after-the-fact amendments to R.C. 311.01(B)(9)(b), and in addition to the fact that those years were illegal, he ignores that because his certificate expired *prior to taking office* (January 3, 2005) he was not in compliance even with R.C. 311.01(B)(8)(a) or (b) and/or O.A.C. § 109:2-1-12(A)(2) and (D)(3) at that time, either.

According to Respondent's deposition, the notary and other signatures for his certification were dated wrong, and he said he joined Ripley P.D. the same day he left the sheriff's office. His actual break-in-service therefore *started* 12/19/1999 and his certificate expired four years later, a couple of days before he turned in his election petition for the 2004 election. See Relator's Argument, May 11, 2011, p. 15 n.7. The filing deadline for sheriff candidates in the 2008 election was January 4, 2008. Respondent did not hold a valid certificate for more than four years prior to that filing deadline. As opposed to having "no expiration" as he argues, the certificates are rendered invalid *as a matter of law* after the four-year break-in-service. See Relator's Argument, p. 14-15. The break-in-service was not because of a "lack of continuous employment" but the lack of a *valid appointment*, without which the break-in-service started. Respondent presents no facts that he had a *valid* appointment from January 1, 2001 through January 1, 2005. That indisputable *fact also* ends his claim to the office.

CONCLUSION

Pursuant to R.C. § 2733.06, Varnau brought this action for a writ of *quo warranto*

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against Wenninger whom Varnau claims is unlawfully *holding* the office of Sheriff. R.C. § 2733.14 states that if a defendant in an action in *quo warranto* is found guilty of unlawfully *holding* or *exercising* an office, judgment shall be rendered that he (Wenninger) be ousted and excluded therefrom. The only thing guaranteeing the integrity of elections, or the preventing a few local partisans to up-end State law on who can hold an office, is uniform, strict, and statewide application of the Statutes, and by use of the writ of *quo warranto*. The applicable burden of proof, although there is no known authority for Respondent's stated hope that it is anything more than a preponderance, is inapplicable on summary judgment.

It is therefore respectfully requested that the Motion of Respondent be denied; Relator's Motion should be granted; and the requested Writ of *quo warranto* should issue forthwith, removing Respondent Wenninger from office and instating Relator Varnau 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, by ordinary U.S. mail this 16th day of May 2011.

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