IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

State of Ohio, ex rel. Dennis J. Varnua : Case No. CA2009-02-10

Relator/Petitioner :

Vs :

RESPONDENT'S REPLY TO RELATOR'S MOTION TO VACATE JUDGMENT

Dwayne Wenninger :

Respondent :

Respondent Dwayne Wenninger (Wenninger) now replies to the motion to vacate judgment as filed herein by Relator Varnau (Varnau).

Distilling Varnau's argument to its essence, Varnau's complaint is that there is insufficient factual support in the record to support this Court's Decision in quo warranto as that Decision was filed in this case on August 16, 2010. *Varnau's Motion to Vacate* at p.9. The following evidence is unrebutted in the record before this Court:

1. The affidavit of Dwayne Wenninger;

2. The affidavit of Lee Spievack, the former owner of Technichron Technical Institute;

3. The affidavit of Jamie Callender, former member of the Ohio House of Representatives and member of the Ohio Board of Regents;

4. The fact that, as required by R.C. 311.01(F)(2), the Brown County Board of Elections certified Wenninger as a candidate meeting the qualifications for the office of Brown County Sheriff in election years 2000, 2004 and 2008 and that Wenninger won the election in each of those years; and

5. The fact that, consistent with its correspondence to Varnau dated May 9, 2008, the Brown County Board of Elections conducted an investigation of Wenninger's qualification(s) to hold the office of Brown County Sheriff and thereafter, as required by R.C. 311.01(F)(2), certified Wenninger's candidacy.

Cutting to the quick, this evidence all stands unrebutted in the record before this Court and was in this record at the time that this Court rendered its Decision. In fact, the last inquiry of the Court at oral argument was to give direction to the Court as to where the aforementioned factual fundaments were in the record.

VARNAU'S EXTREMELY FLAWED POSITION

> It is well established that where an official act is done it is presumed that formal requisites for its validity were complied with. This is but an application of the old maxim omnia praesumuntur rite et solemiter acta esse. *Felch v. Hodgman*, 62 Ohio St. 312 at page 317; *Findlay Brewing Co. v. Brown*, 62 Ohio St. 202; *Freeman v. Miles*, 92 Ohio St. 172, at page 177; *State v. Wirick*, 81 Ohio St. 343; *Hutchinson v. State*, 8 Ohio Cir. Ct., N.S., 313 at page 321.

Village of Mt. Healthy v. Harlow (1943), 11 Ohio Supp. 64, 25 O.O. 416, 420. Stated another way, "As expressed in *Knox Co. v. Ninth Bank*, 147 U.S. 91, 13 Sup.Ct. 267, 37 L.Ed. 93: "Where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act." *Felch v. Hodgman*, supra, at 317.

In the case at bar, the 'latter act' is that of the Brown County Board of Elections placing Wenninger's name on the ballot in any given election year. The 'former act' of the Brown County Board of Elections is the investigation into and certification of his qualifications as required by statute. What this means practically is that Wenninger is entitled to the very strong presumption that he always has been qualified to be elected and hold the office of Brown County Sheriff and Varnau must overcome or otherwise rebut the presumption. Has Varnau done so? The answer is a resounding 'No'.

Varnau filed the complaint in this case on February 27, 2009. Extensive discovery was undertaken. In fact, the Court changed the scheduling order on numerous occasions so

as to accommodate Varnau in his discovery ventures. Nowhere in this record is there a single affidavit or deposition of any member of the Brown County Board of Elections. In the event that Varnau expected to overcome the presumption of regularity of the actions of the Brown County Board of Elections, Varnau should have produced such evidence and he did not. In fact, the only evidence that was produced as to the actions of the Brown County Board of Elections was placed in this record by Wenninger.

THE BALANCE OF VARNAU'S ARGUMENTS

The balance of Varnau's arguments (numbered 2, 3 and 4), urge: (2) that only election protests cause issue preclusion as to challenges to elected officials; (3) that quo warranto is an exclusive and independent remedy; and (4) challenges as unconstitutional the inability of an independent candidate to protest the qualification of a party nominated candidate. Each of these arguments is easily dispatched. These arguments will be addressed in reverse order.

Varnua's argument that the fact that he was unable to pursue a protest of Wenninger's candidacy is resolved either directly or by implication by *Foster v. Cuyahoga Cty. Bd. Of Elections* (1977), 53 Ohio App.2d 213 (*Foster,* and interpreting R.C. 3513.04), a case cited by Varnau in his motion to certify a conflict. *Foster* holds that statutory limitations as to the class of persons who may protest candidacy are constitutional. Varnau chose to run as an independent candidate. As such, he placed himself in a statutory class of persons who could not protest Wenninger's candidacy. See, R.C. 3513.05. Further, contrary to his argument now, Varnau knew when this Court issued the Judgment Entry in Case No. CA2008-09-006 that he would have a remedy (i.e., a 'protest') by bringing this action in quo warranto. Lastly, by failing to raise the issue of the constitutionality of the statute in Case

No. CA2008-09-06, Varnau is precluded by res judicata or collateral estoppel from raising it now.

As to quo warranto as an exclusive and independent remedy, it is just that. Varnau has had every opportunity to fully and fairly develop whether Wenniger was illegally holding the office of Brown County Sheriff and was unable to do so.

Contrary to Varnau's position, actions of boards of elections do have a preclusive effect outside of a protest hearing. Wenninger has cited to this Court a litany of cases throughout these various (and bordering on vexatious) proceedings that Varnau has instituted that so hold. Varnau seems to continue to have difficulty with the concept that boards of elections are quasi-judicial bodies that undertake the fact finding process. *State ex rel. Shumate v. Portage Cty. Bd. Of Elections* (1992), 64 Ohio St.3d 12; *Ross v. Crawford Cty. Bd. Of Elections*, 125 Ohio St.3d 438, 2010-Ohio-2167. Further, as this Court noted in its Decision (at ¶9), a board of elections has an enhanced duty when reviewing and certifying any candidate for the office of sheriff. The action(s) of the Brown County Board of Elections are presumed to be proper and legal and Varnau could not produce evidence of any failure by that Board and certainly could not, as this Court noted in its Decision (at ¶9), produce evidence of any disregard of the applicable statutes and legal provisions. Upon the facts and circumstances of this case, the determination of the Brown County Board of Elections is entitled to precedential effect.

CONCLUSION

In summary, Wenninger met his burden of proof in favor of summary judgment and Varnau produced no evidence in opposition. The Court must overrule Varnau's motion to vacate the judgment in quo warranto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Gary A. Rosenhoffer