IN THE TWELFTH DISTRICT COURT OF APPEALS BROWN COUNTY, OHIO

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State ex rei Varnau

Case No. CA2009-02-10

Relator-Patitioner

Vs.

Dwayne Wenninger

Respondent-Defendant

BRIEF OF RESPONDENT SHERIFF DWAYNE WENNINGER
AND RESPONSE TO RELATOR'S MOTION FOR SUMMARY JUDGMENT
(with proof of service)

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STATEMENT OF THE ISSUES PRESENTED

This is a quo warranto action brought by the Plaintiff-Relator Dennis J. Varnau (Varnau) that seeks the ouster of the Defendant-Respondent Dwayne Wenninger (Wenninger) who holds the office of Sheriff of Brown County, Ohio. The two issues presented in this matter are: (1) is Varnau eligible to hold the office of Brown County Sheriff? and (2) is Wenninger eligible to hold the office of Brown County Sheriff.

STATEMENT OF THE CASE

On or about March 16, 2009, Wenninger filed a motion to dismiss this action. By an entry dated May 1, 2009, the Court converted Wenninger's motion to dismiss to one for summary judgment since Wenninger's motion had an affidavit appended to it. Discovery has occurred and will be discussed in the Statement of the Facts. Discovery was closed by order of the Court effective August 10, 2009. At or about August 10, 2009, Varnau filed a motion seeking summary judgment in his favor. The issue presented is: Who is entitled to hold the office of Brown County Sheriff?

STATEMENT OF FACTS

At the outset, materials gathered during from public records during discovery are in the appendices hereto. Pertinent Brown County Board of Elections materials are in Appendix A. Pertinent records from the Ohio Attorney General are found in Appendix B. The office it of Jamie Guitar Lands found at Appendix C. records form the Ohio Board of Regents. For ease of reading, references to the appendices are not made in this binet.

There is no dispute that, as alleged in paragraph 3 of his complaint, Varnau was an unsuccessful candidate for the office of Brown County Sheriff (Sheriff) in the general election held in November of 2008 as Wenninger won that election. There is no dispute that Wenninger has held the office of Brown County Sheriff since 2001. See, affidavit of Wenninger as incorporated by reference in his motion to dismiss. There appears to be no dispute that both Varnau and Wenninger complied with the statutory process to become candidates for Sheriff so as to have their names placed on the

ballot in the November, 2008 general election. Both Varnau and Wenninger had to undergo the process where their respective qualifications were passed upon by the administrative judge of the Brown County Common Pleas Court and the Brown County Board of Elections (BCBE).

See See, BCBE records.

Paragraph 3 of Varnau's complaint alleges that Wenninger was "...lacking all proper statutory criteria for eligibility for the Office of Brown County Sheriff, including, but not limited to the tack of a proper certification to be a law enforcement officer, and/or tack of educational requirements, and potentially others, which are statutory requirements to hold office." Varnua's subpoens duces tacum as returned by the Ohio Attorney General contains the following materials; (1) a copy of Wenninger's certificate of completion of the Peace Officer Basic Training Program as that certificate was awarded on May 24, 1989. There can be no dispute that as of the november 2000 general electron.

Wenninger had a min place officer and first as of the november 2000 general electron.

In the event that Varnau has some theory that he can reach back to the general election of 2000 to attack Wenninger's qualifications on some educational basis, it is clear that when Wenninger first ran for the office of Sheriff, he held a valid peace officer curtificate and had the control of the office of Sheriff, he held a valid peace officer curtificate and had the control of the office of Sheriff, he held a valid peace officer curtificate and had the control of the office of Sheriff and the office of Sh

Varnau's complaint is not verified. The is a side of the state of the

ARGUMENT

Wenninger's Entitlement to the Office of Sheriff

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Ohlo Revised Code (R.C.) 311.01 sets forth the standards for election and qualification of a county sheriff. The version of R.C. 311.01 as that statute became effective on December 9, 2003 controls the review of this analysis. The 'checklist' for eligibility to be a cendidate for sheriff, to be elected sheriff or to be appointed sheriff is as follows:

- (1) Must be a citizen of the United States:
- (2) One year residence in the county where the office is sought;
- (3) Must be a qualified elector:
- (4) Must have a high school diploma or equivalency:
- (5) May not have convictions for a felony, offense of moral turpitude or a misdemeanor of the first degree or equivalent offenses of this state, the United States or another state:
- (6) Under the direction of the administrative judge of the common pleas court, must be fingerprinted and been the subject of search of local, state and national fingerprint files to disclose any criminal history. The administrative judge is required to disclose the findings in this instance to the BCBE;
- (7) Must have obtained or held, within the preceding four your period prior to the qualification date, a valid peace officer certificate of training issued by the Ohio peace officer training commission and must have been employed as a fulfilme peace officer performing duties related to the enforcement of statutes, ordinances or codes; or obtained or held within the three year period prior to the qualification date a valid peace officer training certificate and been employed fulfilme for three years performing duties related to the enforcement of statutes, ordinances or codes; and
- (8) Meet one of the following conditions: (a) have at least two years of supervisory experience at the rank of corporal or above or (b) completed two years of post secondary education or 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 the another state in which the college or university is located or in a school that holds a certificate of registration by the state board of career colleges and schools under Chapter 3322. Of the Onio Revised Code.

The date of qualification is defined at R.C.311.01(h)(1) and, for the purposes of this argument, it is assumed that each candidate timely filed their respective nominating petitions in order to become a candidate for Sheriff.

Wenninger's affidavit as incorporated by reference into the motion to dismiss establishes each requirement of R.C. 311.01. No affidavit has been filled that rebuts Wenninger's sworn statement. There simply can be no serious doubts that Wenninger's switch to held and return the statement.

is Varnau eligible and qualified to be Sheriff?

The undersigned understand that this Court is well familiar with actions in *quo warranto*.

However, a friendly reminder is in order; not only must Varnua establish that Wenninger is not antitled to hold the office of Sheriff but Varnau must affirmatively establish that he is eligible and qualified to hold the office of Sheriff. R.C. 2733,06 and 2733.08. Varnas is consistently providing. In the standard of the first of the findings of the description of the standard of the first of the findings of the source of the next point to be made.

RESPONSE TO VARNAU'S MOTION FOR SUMMARY JUDGMENT

Varnau is attempting to "turn back the hands of time" in his motion for summary judgment.

The essence of Varnau's allegations are that Wanninger was not qualified and eligible to be elected and hold the office of Sheriff as of January 1, 2001 and, therefore, two quadrennial elections later, as the sole opponent to Wenninger in November, 2008, Varnau is entitled to the office of Sheriff.

Varnau's various claims are as claims as follows: (1) prior to 2000, Wanninger did not hold an office

of corporal or higher and did not qualify under the experience section of the then effective version of R.C. 311.01; (2) Wenninger did not meet the post secondary education aspect of the version of R.C. 311.01 in effect in 2000; and (3) because of some perceived "gap in service" Wenninger was not eligible to run for Sheriff in 2008. Reading Varnau's claims is like trying to solve an irresoluble 'connect the dots' game.

A. A court may not substitute its judgment for that of a board of elections.

Qualification to be seen Should and 2000. As the 2000 index in the May 0, 2000 tons. In Young

B. Legal and equity defenses apply to this case

Legal and equitable defenses apply to election matters. Carver v. Stanklewicz (2004), 101

Ohio St.3d 256 (laches applies to elections matters); See also, Justice Taft's dissent in the quo warranto case of Ethell v. Hendricks, supra, (Justice Taft clearly believed that legal and equitable defenses applied to quo warranto actions). The sames that the post and are judicate collaborate.

expeditionally, fromminger suggests that attempting to turn the humbs of time to the year 2000 to

C. Varnau's claim that Wenninger does not hold a proper peace officer certificate

Varnau's argument is swiftly dispatched. Wanninger sizes the Court to be appropriated to account a sample for should be accounted by the board of th

D. Varnau's contention that Wenninger has failed to meet an educational requirement of R.C. 311.01

Varnua's argues that Wenninger failed to meet the post secondary education requirement under the version of R.C. 311.01 as effective in 2000. This leaves as long ago resolved in four rooms (1) and united in the Rep. Jamile Callendar as round in the materials as separated from the Quasi-Board of Regundary plans on note the date on that officerity, (2) the utilities in the Callendary Callendary (2) the utilities as Spiceral, the formation of Technical institute as found in the materials subpromised from the Doot (3) the 2005 amountment of Rec (3.1.0.1.0), and (4) the 2005 amountment of Rec (3.1.0.0.0).

Beyond all of Varnau's legal and factual impediments set forth in the previous paragraph,

Wannings: had been the Brown Should for second provious to the sensidate

positive from data in 2006. By the 2000 general election, Wanninger met the excedence qualification of the observations and for in the 3225 LSF. The inquiry ends there.

CONCLUSION

The Court should issue an order that Sheriff Wenninger is entitled to retain his position at Brown County Sheriff. The Court, based upon the evidence before it, should specifically find that.

Varnau has not produced proof of his eligibility to hold the office of Sheriff. This Court should dismiss Varnau's action in quo warranto and order Varnau to pay costs herein including attorney fees.

Patrick L Gregory

Gary A. Rosenhoffer

Attorneys for Respondent Sheriff Dwayne Wenninger

CERTIFICATE OF SERVICE

I certify that on August 12, 2009, a copy of this brief was served by ordinary mail, postage prepaid on Thomas Eagle, Esq., Attorney for Relator Varnau, 3386 North State Route 123, Lebanon, Ohio 45036.

Attorney for Respondent Wenninger

APPENDIX A

SELECTED RECORDS FROM THE BROWN COUNTY BOARD OF ELECTIONS

BROWN COUNTY BOARD OF ELECTIONS GEORGETOWN, OHIO

In Re: Protest as to the Candidacy of Sheriff Dwayne Wenninger

MEMORANDA ON BEHALF OF SHERIFF DWAYNE WENNINGER

Sandra Martin has filed a "...formal protest of Dwayne Wenninger to file a petition for the office of Sheriff of Brown County, Ohio." As the Board of Elections (hereinafter Board) should be aware, one may not protest the filing of a petition. Sheriff Wenninger assumes that Ms. Martin mistakenly protests the mere filing of a petition and that Ms. Martin's true point of contention is that Sheriff Wenninger does not meet the statutory qualifications to become sheriff.

Between materials filed for the previous quadrennial sheriff election and those materials filed with his petition for the upcoming election, Sheriff Wenninger has supplied the Board with sufficient materials to show that he meets the criteria to qualify to hold the office should he be re-elected. Ms. Martin's specific complaint stated in her protest is that Sheriff Wenninger does not meet the criteria set forth in *...ORC 311.01(B)(9)(a) or (b).* Initially, the Board should note that Ohio Revised Code Section 311.01 was amended effective December 9, 2003 (copy attached).

In dealing with the substance of Ms. Martin's protest, clearly Sheriff Wenninger assumed his office more than two years ago and thus has more than two years of supervisory experience at the rank of corporal or above as required by Ohio Revised Code 311.01(8)(9)(a). With regard to any protest Ms. Martin makes that Sheriff Wenninger does not meet the specific criteria of Ohio Revised Code 311.01(8)(9)(b), the Board should note that the Legislature has changed the criteria under that section to include proprietary schools. This Board has on file from the previous quadrennial petition of Sheriff Wenninger the two year post secondary diploma from the technical school that Sheriff Wenninger attended (as well as the other materials that he filed that supported his nominating petition four years ago). Sheriff Wenninger also attaches hereto the affidavit of Lee Splevack, the former owner of the technical school. Clearly, Sheriff Wenninger meets the statutory criteria that is the subject to Ms. Martin's protest and is qualified to return to the office that he presently holds.

Ms. Martin's conclusion that the jury that acquitted Sheriff Wenninger found the Sheriff not guilty of "...intentionally falsifying his application..." is pure speculation as it is as likely that the jury found that Sheriff Wenninger, in fact, met the qualifications to become sheriff and determined his prosecution to be a political witch hunt.

Under the circumstances, this Board has no choice but to deny the protest and maintain its certification of Sheriff Wennninger's candidacy.

Sue McIatoch, Director Brown County Board of Blackions

Respectfully submitted.

Patrick L Gregory 0001147

717 West Plane Street Bethel, Ohio 45106

(513) 734-0950

fax (513) 734-7958

and

Gary A. Rosenhoffer 190 E. Main Street Batavia, Ohlo 45103 (513) 732-0300

fax (513) 732-0648

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon Sandra L. Martin, 5891 Tracy Road, Sardinia, Ohio 45171 by ordinary mall, postage prepaid on January 16 2004.

GA Bagr

INADMISSIBLE RULES OF EVIDENCE

AFFIDAVIT OF LEE SPIEVACK

- I am an adult and not under legal disability. I have been sword and cautioned as to the import of this affidavit. A copy of my resume' is altached hereto and accorporated herein by reference.
- 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.
- 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. Dwayno 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 repotics and received a diploma. Dwayne Wenninger, by his full time attendance at Technichron attained more than two years of post secondary education.

INADMISSIBLE RULES OF EVIDENCE

ffiant further sayeth naught.

Spievack

FEBRUARY

Sworn to and subscribed before me on

Notary Public

Taming L. Dillinger
Notary Public State of Ohlo
My Commission Expire 103-24-2003
Recorded in Brown County

BROWN COUNTY BOARD OF ELECTIONS 800 Mt Orab Pike Georgetown OH 45121 937-378-3008 1-866-368-3598 Fax 937-378-6457 www.electionsonthe.net brown@sos.state.oh.us

Bill Herdman, Chairman Linda Ondre, Board Member Paul E. Hall II, Board Member Raiph Quallen, Board Member

Sue McIntosh, Director
Kathy Long, Deputy Director

May 9, 2008

Dennis Varnau 7561 White Swan Rd Georgetown, Oh 45121

Dear Dennis,

The law states the Board has to look at a protest to see if it is timely filed and filed by a member of the appropriate party. Which, in this instance, neither occurred. Therefore, we must deny the protest. However, we as members of the Board of Elections of Brown County, feel that this law is unconstitutional in that it doesn't allow non-party affiliated persons to challenge the qualifications of a party candidate and essentially disenfrenchises independent voters from challenging the qualifications of a party candidate.

The Board further believes that it has been put on notice that the qualifications of Dwayne WermInger have been challenged under 311.01, Stere decisis and the Board of Elections is tasked with determination of the sheriff's qualifications and this Board by necessity will conduct an independent investigation into Dwayne Werninger's qualifications to run for the office of county sheriff.

Sincerely.

Bill Herdman, Chairman

Bir Hadman

Linda Ondre, Board Member

Paul Hall II, Board Member

Raiph Quallen, Board Member

Ralph 6. Toeller

APPENDIX B

SELECTED RECORDS FROM THE OHIO ATTORNEY GENERAL

This is to certify that

Dwayne L. Wenninger

has completed the Ohio Peace Officer Basic Training Program

Conducted by

Brown County Peace Officer Academy

Awarded on

May 24, 1989

Rulas Condra

Richard Cordray Attorney General

Non Ferrell, Executive Director Onto Peace Officer Training Commission

Duplicate # 890569 School # BAS88-070

Vernon P. Stanforth, Chaliperson Ohio Peace Officer Training Commission

James C. A.L. Conto

APPENDIX C

SELECTED RECORDS FROM THE OHIO BOARD OF REGENTS

COURT OF COMMON PLEAS BROWN COUNTY, OHIO

State of Ohio

Case No. CRI 2020 2234

INADMISSIBLE : RULES OF EVIDENCE (Judge Ringland)

Dwayne Wenkinger

AFFIDAVII OF IA ME

Defendant

I, Jamie Callender being first duly sworn and caudoned, do depose and state as follows:

- I was admitted to the Bar of Ohio on November 9th, 1992 and I have practiced law in this State since that date;
- I am a member of the Ohio House of Representatives representing the 62nd House District and I am presently earing my fourth term;
- During the period from January 2001 to December 2003, I was the House of Representatives member of the Ohio Board of Regents serving ex officio;
- 4. I have reviewed the indistment and billiof particulars filed in this matter and I am generally familiar with the allegations made against Dwayne Wenninger through those documents. I have also reviewed a letter from the Ohio Board of Regents dated October 4, 2002 issued by Shane Dwarmo as well as the affidavit of Lee Spievacly as it is filed in this case. I have also reviewed Ohio Revised Code Section 311.01(B)(9)(b). I offer this affidavit based from the totality of my experience, that is, as a Member of the Ohio House of Representatives; a former member of the Ohio Board of Regents; and as an attorney at law licensed to practice in the State of Ohio;
 - 5. During the periods of time applicable to the facts of this case, that is

INADMISSIBLE

from 1987 when Dwayne Wenninger received his two year diploma from To hnichron Technical Institute through December of 1999, the Board of Proprietary School Registration (formerly known as the State Board of Thool and College Registration) was under the umbrella of the Ohio Board of Regents. Further, al the time that Dwayne Wenninger received his two year diploma from Technichron Technical Institute, proprietary schools were authorized to confer two year post sa ondary education diplomas and associate degrees. In reviewing the Certificate of Registration of Technichron Technical In titute, Inc. as effective from August of 1986 brough August of 1987; the Affid vit of Lee Spievack; and the diploma of Dwayne Wenninger, it appears to my that Dwayne Wenninger's education met the educational standards set by R _ 311.01(B)(9)(b) to run for Sheriff in 1999 at the time that he received his diploma from Technichron Technical Institute as having two years of post secondary education at an institution then authorized to confe degrees and diplomas by the Ohio Board of College Registration functioned under Regents as the State Board of School a the umbrella of the Ohio Board of Regen at the time that Dwayne Wenninger received his two year diploma.

the Board of Regents dated October 4, 2002 over the signature of Shane DeGarmo is deceiving in that nowhere does that piece of correspondence address the question presented: was Technichron Technical Institute, Inc. at the time periods applicable to this dispute, able to confer two year post secondary education diplomas, certificates or degrees. The fact is, at the time that Dwayne Wenninger obtained his diploma from Technichon Technical Institute, Inc. that Institution not only was in good standing with the State Board of School and College Registration but was also accredited by the National Association or Trade and Technical Schools (NATTS), a national accrediting body. NATTS was Asted by the V.S. Department of Education and, as such was a nationally recognized astrediting agency that complies with R.C. 311.09(B)(9)(b) as a comparable

egency to the Ohio Board of Regents. The NATTS standards would meet of exched requirements of the Ohio Board of Regents both at the time that Dwayne Wenninger received his diploma as well as at present.

Thelieve that Dwayne Wenninger met the substance of R.C.
 311.10(B)(9)(b) at the time that he circulated his petitions for candidacy as well as at the time that the petitions were presented to the Brown County Board of Elections.

Affiant further sayeth saught.

amie Callender

Sworn to and subscribed before the this 28 day of February, 2003.

Notary Public

KATHERINE A SPUGGS Notary Public - State Office My Contribution Expires June 20, 2005 Pancerted in Gesuppe Country

INADMISSIBLE RULES OF EVIDENCE