

IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

State ex rel Varnau : Case No. CA2009-02-10
Relator-Petitioner :
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 affidavit of James Gulland is found at Appendix C.~~ records from the Ohio Board of Regents. For ease of reading, references to the appendices are not made in this brief.

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

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 Ohio 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 filed that rebuts Wenninger's sworn statement. ~~There simply can be no serious debate that Wenninger is entitled to hold and retain the office of Sheriff.~~

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 Varnau establish that Wenninger is not entitled 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. ~~Varnau's conclusory pleadings do not and do not establish his entitlement to office at this preliminary stage of proceedings. Wenninger may not rest on the findings of the administrative judge of the Brown County Common Pleas Court and the ODCB, then neither may Varnau. Conversely, if Varnau is entitled to rely on the findings of the administrative judge of Brown County Common Pleas Court and ODCB, then as ~~Wenninger~~ the inquiry is over: Wenninger retains the office of Sheriff. This leads to 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 Wenninger 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, Wenninger did not hold an office

~~expeditiously. Wenninger suggests that attempting to turn the hands of time to the year 2000 is~~
~~unconstitutionally binding this action.~~

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

Varnau's argument is swiftly dispatched. ~~Wenninger cites the Court in his own warrants~~
~~cases where a candidate for sheriff was seeking office based upon a theory that the applicant failed~~
~~to possess a valid peace officer training certificate. State ex rel Hayden, infra (1999), 69 Ohio~~
~~St.3d 432 (Hayden) and State ex rel Yeagley, supra (1999), 69 Ohio St.3d 436 (Yeagley). As the~~
~~Ohio Supreme Court noted in Hayden, infra, (at 435) most peace officer training certificates have an~~
~~expiration date and, therefore, have continued validity and utility. Further, in Yeagley, infra (at 439),~~
~~the Ohio Supreme Court reaffirmed the point that "peace officer training" was required, not~~
~~necessarily that established by R.C. 311.04. Wenninger asks the Court to note that the certificate~~
~~that he obtained from the Ohio Peace Officer Basic Training Course has no expiration date. Varnau's~~
argument is meritless.

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

Varnau'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 issue was long ago resolved in four ways:~~
~~(1) the affidavit of the Rep. Jamie Schenker as found in the materials subpoenaed from the Ohio~~
~~Board of Regents (please note the date on that affidavit); (2) the affidavit of Stephen, the former~~
~~owner of Technicians Technical Institute as found in the materials subpoenaed from the BODE~~
~~(please note the date on Stephen's affidavit); (3) the 2000 amendment of R.C. 311.01(3)(b); and (4)~~
~~the BODE rejection of the protest of one Martin who, in 2004, made essentially the same allegations~~
~~as Varnau now makes (See, subpoenaed records of BODE).~~

Beyond all of Varnau's legal and factual impediments set forth in the previous paragraph, ~~Wenninger had been the Brown County Sheriff for over seven years previous to the candidate~~

~~qualification date in 2009. By the 2009 general election, Wenzinger met the experience qualification of the sheriffs set forth in R.C. §21.01(B). The inquiry ends there.~~

CONCLUSION

The Court should issue an order that Sheriff Wenzinger is entitled to retain his position as 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 C. Gregory



Gary A. Rosenhoffer

Attorneys for Respondent Sheriff Dwayne Wenzinger

CERTIFICATE OF SERVICE

I certify that on August 19, 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.

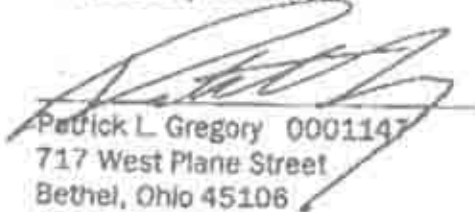


Attorney for Respondent Wenzinger

APPENDIX A


SELECTED RECORDS FROM THE BROWN COUNTY BOARD OF ELECTIONS

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, Ohio 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 mail, postage prepaid on January 16, 2004.



**INADMISSIBLE
RULES OF EVIDENCE**

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.

**INADMISSIBLE
RULES OF EVIDENCE**

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

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
Ralph 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 disenfranchises 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 Weninger have been challenged under 311.01, State 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 Weninger's qualifications to run for the office of county sheriff.

Sincerely,



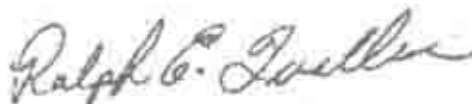
Bill Herdman, Chairman



Linda Ondre, Board Member



Paul Hall II, Board Member



Ralph Quallen, Board Member

EXHIBIT 2

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

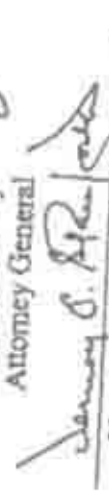
Conducted by

Brown County Peace Officer Academy

Awarded on

May 24, 1989


Richard Cordray
Attorney General


Vernon P. Stanforth, Chairperson
Ohio Peace Officer Training Commission



Ron Ferrell, Executive Director
Ohio Peace Officer Training Commission

Duplicate # 890569
School # BAS88-070

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 Wenninger

AFFIDAVIT OF JAMIE
CALLENDER

Defendant

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

1. I was admitted to the Bar of Ohio on November 9th, 1992 and I have practiced law in this State since that date;
2. I am a member of the Ohio House of Representatives representing the 62nd House District and I am presently serving my fourth term;
3. 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 indictment and bill of 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 DeGarmo as well as the affidavit of Lee Spievack 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 upon 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

EXHIBIT B

**INADMISSIBLE
RULES OF EVIDENCE**

from 1987 when Dwayne Wenninger received his two year diploma from Technichron Technical Institute through December of 1999, the Board of Proprietary School Registration (formerly known as the State Board of School and College Registration) was under the umbrella of the Ohio Board of Regents. Further, at the time that Dwayne Wenninger received his two year diploma from Technichron Technical Institute, proprietary schools were authorized to confer two year post secondary education diplomas and associate degrees. In reviewing the Certificate of Registration of Technichron Technical Institute, Inc. as effective from August of 1986 through August of 1987; the Affidavit of Lee Spievack; and the diploma of Dwayne Wenninger, it appears to me that Dwayne Wenninger's education met the educational standards set by R.C. 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 confer degrees and diplomas by the Ohio Board of Regents as the State Board of School and College Registration functioned under the umbrella of the Ohio Board of Regents at the time that Dwayne Wenninger received his two year diploma.

6. I would observe that the letter that Prosecutor Grennan received from 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 Technichron 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 of Trade and Technical Schools (NATTS), a national accrediting body. NATTS was listed by the U.S. Department of Education and, as such was a nationally recognized accrediting agency that complies with R.C. 311.09(B)(9)(b) as a comparable

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

7. I believe 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 naught.



Jamie Callender

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


Notary Public

KATHERINE A. BRUGGS
Notary Public - State of Ohio
My Commission Expires June 30, 2005
Recorded in Geauga County

**INADMISSIBLE
RULES OF EVIDENCE**