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,	)	
-vs-	)	**RELATOR'S REPLY TO RESPONDENT'S MEMORANDUM IN RESPONSE TO RELATOR'S SUPPLEMENTAL AUTHORITY**
DWAYNE WENNINGER,	)	
Respondent/Defendant.	)	

The Respondent's response does not address the supplemental authority, but re-argues the merits of their previous pleadings, but still without factual support, or a legal basis.

This Court will find nowhere in this record any determination by any board of elections as to the qualifications of the Respondent to run for the office he currently purports to hold. This Court will find no evidence and no facts that any contest of those qualifications before any board of elections was ever held or decided on the merits. Respondent, contrary to his attorney's arguments, even admitted that was the case (as was previously cited to the court in his deposition). Without that, even if it were an adjudicative body, it cannot have any preclusive effect. There is no "decision" or "judgment" of any kind for a court to follow as *res judicata* involving this issue. Otherwise, there would never be a *quo warranto* action, because everyone who holds an elective office would had to have gone through a board of elections before being placed on a ballot, and according to Respondent's Counsel, if that happens and is not contested, it is permanent and preclusive.

Further, there is no factual or legal basis to argue that a person who is holding an office illegally, can continue to hold that office illegally, merely because of some other

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remedy that may have been available at some other point in time under different factual and legal circumstances. This Court will find no authority that an elected official was entitled to hold an office illegally merely because a person without standing to do so did not challenge their placement on the ballot to the board of elections. This Court is reminded that this Relator did challenge this respondent's candidacy before the Board of Elections, and by statute was prohibited from doing so because of a party affiliation, which lack of standing to seek that remedy was decided by the Common Pleas Court, and was affirmed by this Court, and in fact this court said that he had other remedies. It cannot now say just the opposite. See State of Ohio ex rel. Dennis J. Varnau v. Brown County Board of Elections, Case No. CA 2008-09-006 (12th Dist., Oct. 29, 2008), ¶ 3, copy attached. The trial court, which this Court explicitly affirmed, said: "[T]here is a legal remedy at law through a quo warranto action." State of Ohio ex rel. Dennis J. Varnau v. Brown County Board of Elections, Case No. CVH 2008-0566 (Brown Co. C. P. Sept. 9, 2008), p.2, copy attached. The merits of the issues before this Court have never been addressed, anywhere, by any one or any adjudicative body.

Respondent's argument ignores the facts and history. Respondent only met the provisions of (8)(a), to have a valid OPOTA certificate, at best only for the 2000 election, but never did for the 2004 or 2008 election because his certificate completely expired January 1, 2005. And, the Board of Elections never "found" Respondent to have satisfied anything, including (9)(b), because no protest ever made it to the Board for their official determination, including this Relator's mandamus action request. Respondent even admitted in his deposition the falseness of the premise his attorneys continue to press, that the Board never did officially rule on the merits of his qualifications for this office. D. Wenninger, p. 24.

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The response also assumes Varnau could have successfully petitioned to prohibit the Board of Elections to prohibit the placement on the ballot -- his actual attempt failed for procedural reasons. He likely could not have satisfied the elements necessary to petition for a prohibition at that time, since the Board had not exercised and were not going to exercise any quasi-judicial authority on anything, as there was nothing pending before the Board to prohibit, other than placing Respondent on a ballot, but that is something they are authorized to do by law - place his name on a ballot. Further, because this Court has said he had "other remedies," (this action), he could not have attempted that action.

And, it relies on inadmissible evidence (the Spievack affidavit) that is pending before the Court as a subject of objection and motion to strike, filed August 21, 2009.

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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, Attorneys for Respondent, by ordinary U.S. mail this 28th day of June 2010.

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO ex rel.
DENNIS J. VARNAU,

Relator-Appellant,

- vs -

BROWN COUNTY BOARD
OF ELECTIONS,

Respondent-Appellee.

CASE NO. CA2008-09-006
(Accelerated Calendar)

JUDGMENT ENTRY

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CVH2008-0566

{¶1} This is an accelerated appeal in which relator, Dennis J. Varnau, appeals the decision of the Brown County Court of Common Pleas dismissing the petition for a writ of mandamus he filed against respondent, the Brown County Board of Elections (the "Board"). Appellant is an independent candidate running for the office of Brown County Sheriff in the November 4, 2008 general election. Dwayne Wenninger is the current Brown County sheriff running for re-election. Appellant's petition sought to compel the Board to accept as valid the protest appellant filed against Wenninger's candidacy.

{¶2} Appellant's first assignment of error challenges the common pleas court's decision to accept as accurate a "proposed statement of proceedings" filed by the

Board[1] in connection with its motion to set aside the magistrate's entry (which had denied the Board's motion to dismiss appellant's petition). The assignment of error is overruled. Appellant did not object to the proposed statement below or file anything in response to the statement; rather, appellant challenges the statement for the first time on appeal. Despite appellant's claim to the contrary, the proposed statement does not constitute "facts;" rather, it is merely a summary of the parties' respective positions and arguments during the hearing before the magistrate, positions which mirrored the parties' arguments in their pleadings following appellant's petition for a writ of mandamus. There was no testimony or evidence given at the hearing. Appellant does not state how the proposed statement resulted in an erroneous decision by the common pleas court or how he was prejudiced by the lower court's decision to accept the statement.[2]

{¶3} Appellant's second assignment of error challenging the dismissal of his petition for a writ of mandamus is overruled. Should Wenninger be elected and take office, appellant has other legal remedies.

{¶4} Judgment affirmed.

{¶5} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this judgment entry shall

1. In its proposed statement of proceedings, the Board (1) explained that the hearing held before the magistrate on its motion to dismiss appellant's petition could not be transcribed as the recording was unintelligible; (2) stated that there was no testimony or evidence given at the hearing, and (3) subsequently summarized the parties' respective positions as they had been argued during the hearing.

2. Under the assignment of error, appellant cites *Music Express Broadcasting Corp. v. Aloha Sports, Inc.*, 161 Ohio App.3d 737, 2005-Ohio-3401, for the proposition that the Board was required to submit a transcript or a sworn affidavit to document the hearing before the magistrate. We find that *Music Express* does not apply here as that case dealt with objections to a magistrate's decision under Civ.R. 53 (D)(3), and not a motion to set aside a magistrate's decision under Civ.R. 53(D)(2) which does not require that a transcript or affidavit be filed.

constitute the mandate pursuant to App.R. 27.

{¶6} Costs to be taxed in compliance with App.R. 24.

H.J. Bressler, Presiding Judge

William W. Young, Judge

Stephen W. Powell, Judge

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IN THE COURT OF COMMON PLEAS
BROWN COUNTY, OHIO

FILED
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CLERK OF COURTS

STATE OF OHIO, ex rel DENNIS J. VARNAU	:	Case No. CVH 2008-0566
Relator	:	
vs.	:	JUDGMENT ENTRY GRANTING RESPONDENT'S MOTION TO SET ASIDE MAGISTRATE'S ORDER AND GRANTING AMENDED MOTION TO DISMISS
BROWN COUNTY BOARD OF ELECTIONS	:	
Respondent	:	

This matter was before the court on September 8, 2008, for a decision on the Respondent's Motion to Set Aside Magistrate's Order. Julie D. Steddom, Attorney for Relator Dennis J. Varnau, and Mary McMullen, Attorney for Respondent, Brown County Board of Elections, were present.

On May 23, 2008, Relator Varnau filed a Petition for a Writ of Mandamus against the Brown County Board of Elections. On June 23, 2008, Respondent Board of Elections filed an Amended Motion to Dismiss. On August 11, 2008, Magistrate Nathan A. Thompson filed a Journal Entry of Order Denying Respondent's Amended Motion to Dismiss Mandamus Action Pursuant to Civil Rule 12(B) and (D) and Local Rule 9(C)(1)(a) and (3). On August 18, 2008, Respondent filed a timely Motion to Set Aside Magistrate's Order. Also on August 18, 2008, the Respondent filed Respondent's Proposed Statement of Proceedings. Because no response was filed to the Proposed Statement of Proceedings, the court accepts the proposed statement as accurate.

The court carefully reviewed all filings in the case, arguments made on behalf of both parties, and the applicable law. For the reasons stated on the record, this court finds that the arguments made by Respondent in its Motion to Set Aside Magistrate's Order and the Amended Motion to Dismiss are well taken, including that the extraordinary remedy of mandamus is not appropriate in that there is a legal remedy at law through a quo warranto action. Additionally, the court finds that Relator's protest was not timely filed nor was it filed by a "qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate whose declaration of candidacy the elector objects to," pursuant to R.C. 3513.05.

The court hereby orders that the Motion to Set Aside Magistrate's Order is granted.

The court further orders that the Amended Motion to Dismiss is granted.

The September 11, 2008 non-oral hearing on the merits is vacated.

This matter is hereby dismissed. Costs to Relator.

SO ORDERED.

David Deuce Wilson, Judge

Have seen:

Julie D Steddom
Attorney for Relator Dennis J. Varnau

Mary McMullen
Assistant Prosecuting Attorney
Attorney for Brown County Board of Elections