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 ARGUMENT IN SUPPORT OF PENDING MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**
-vs-	)	
DWAYNE WENNINGER,	)	
Respondent/Defendant.	)	

Now comes the Relator, Dennis J. Varnau, by and through counsel, and pursuant to this Court's order of April 15, 2011, submits the following consolidated argument in support of his pending Motion for Summary Judgment and in opposition to that of Respondent Dwayne Wenninger's.

I. Statement of Facts and Procedural Posture

Respondent Wenninger was a candidate for Brown County Sheriff in 2000, won the election, assumed the position January 1, 2001, and appointed himself as Sheriff with the Ohio Peace Officers Training Commission (OPOTC) as of that date. See Relator's Exhibits in Support of Motion for Summary Judgment, filed August 10, 2009, Ex. 2A, pp. 2-3, Wenninger's SF400adm Sheriff Appointment with OPOTC, January 1, 2001. He could not be a valid candidate for Sheriff, and therefore could not lawfully *hold* the office, unless he met all the requirements under R.C. § 311.01(B), specifically (9)(a) and (b), in effect at the time. R.C. § 311.01.

Prior to that appointment, Wenninger *was not* a corporal or higher with an approved agency, therefore was not in compliance with R.C. § 311.01(B)(9)(a). Relator's Exhibits, August 10, 2009, Ex. 6B, Wenninger's Answer to Int. No. 15.

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Wenninger also did not satisfy § 311.01(B)(9)(b), because the only diploma he had was from "Technichron Technical Institute" (TTI). Relator's Exhibits, August 10, 2009, Ex. 8A, Wenninger's Diploma, 1987. TTI was *not* an institution registered and approved by the Ohio Board of Regents (OBR), but a different type of institution operating under R.C. Chapter 3332. See R.C. § 311.01(B)(9)(b) (2000); Relator's Exhibits, August 10, 2009, Ex. 8B, TTI's 1988-90 Certificate of Registration under R.C. Chapter 3332; Relator's Ex. 8C, documents from State Board of Career Colleges and Schools (SBCCS), showing that TTI operated under it, not the OBR, from 1978-1990; Ex. 8, TTI "Catalog," verifying no OBR accreditation. TTI was not authorized by OBR to confer degrees, thus Wenninger's diploma from TTI did not satisfy the statutory requirement. See Relator's Exhibits, August 10, 2009, Ex 9A, subpoenaed documents from OBR; Relator's Ex. 9C, O.R.C. 1713, April 14, 1985; O.R.C. 3332, October 31, 1979; O.R.C. 3332, Nov. 1, 1985.

Wenninger also did not secure any new educational credentials prior to or immediately after taking office on January 1, 2001. Relator's Exhibits, August 10, 2009, Ex. 10A, Wenninger's answer to First Doc. Req. No. 13.

These facts were at least a partial basis for the felony indictment of Wenninger as reported at State vs. Wenninger, 125 Ohio Misc.2d 55, 2003-Ohio-5521.

Due to the lack of credentials Wenninger had a four-year "break in service," from January 1, 2001, to January 1, 2005, by not removing his disqualification, and lost OPOTA certification two days before he assumed his second-term seat, January 3, 2005. Relator's Exhibits, August 10, 2009, Ex. 2A, Wenninger's OPOTC Sheriff Appointment January 1, 2001; O.A.C. § 109:2-1-12-(D)(3) and (E) (2001-05). Since by statute Wenninger lost his peace officer certification after a four-year "break in service," in 2005, prior to the 2008

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election, he was again *not* a qualified candidate to run for the office of Sheriff (not having a valid peace officer certificate). R.C. § 311.01; O.A.C. 109:2-1-12.

Relator Varnau was certified March 28, 2008, by the Brown County Board of Elections (BCBE) as an independent candidate opposing Wenninger in the 2008 election. Varnau was therefore the only *statutorily qualified* candidate running for Sheriff in 2008. After being certified as a valid candidate for the office of Sheriff by the BCBE on March 28, 2008, Varnau then had standing to challenge Wenninger's legitimacy as a valid candidate.

Following the same protocol as a partisan candidate for filing a protest, Varnau sought the BCBE to accept his protest of Wenninger's candidacy. Ohio election laws however only allow protests *of independents* by *partisan candidates*, and deny protest *of a partisan's candidacy* by *an independent*. Thus, Relator's protest filed with the BCBE, on April 11, 2008, was summarily dismissed by the BCBE, because the election law did not "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." Appendix A, "BCBE May 8, 2008, letter to Relator," attached to Wenninger's Brief and Response to Relator's Motion for Summary Judgment, filed August 20, 2009.

Varnau then petitioned the Brown County Common Pleas Court for a Writ of Mandamus to force the BCBE to accept the protest of Wenninger's candidacy as being timely and valid on constitutional grounds of being denied due process and equal protection of the law under both the Ohio and U.S. Constitutions. That case was dismissed on procedural grounds, the Brown County Common Pleas Court finding that Varnau had an *adequate future remedy*, and was denied the mandamus writ, stating "that the extraordinary remedy of mandamus is not appropriate in that *there is a legal remedy at law through a quo*

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warranto action." Judgment Entry, Sept. 9, 2008, attached to Relator's Reply to Respondent's Memorandum in Opposition to Relator's Supplemental Authority, filed June 28, 2010, p. 2 (emphasis added). Varnau appealed to the Twelfth District Court of Appeals, which upheld the lower Court ruling on those same grounds: "Should Wenninger be elected and take office, appellant has other legal remedies." Judgment Entry, State ex rel. Varnau vs. Wenninger, Case No. CA2008-09-006 (12th Dist. Oct. 29, 2008), ¶ 3-4, attached to Relator's Reply, filed June 28, 2010.

Since Wenninger's votes did not count (he being statutorily disqualified for the office), Varnau was and is entitled to the office. Relator's Exhibits, August 10, 2009, Ex. 15A, BCBE records.[1] Once the general election results were certified by the BCBE on November 25, 2008, Varnau, having standing then to challenge Wenninger's claim to the office of Sheriff, filed this original action in *quo warranto* in the Twelfth District Court of Appeals on February 27, 2009. The parties filed cross-motions for summary judgment. This Court originally granted Respondent's Motion and dismissed the Petition, on the ground that the BCBE act of placing Wenninger on a ballot was dispositive of his qualifications for the office. That Judgment was reversed by the Ohio Supreme Court. State ex rel. Varnau vs. Wenninger, 128 Ohio St.3d 361, 2011-Ohio-759. The matter was remanded to this Court for a determination on the merits: Was Wenninger *legally or factually* unqualified for the office, requiring the Writ of Quo Warranto to issue? This Court granted Relator's request for re-argument, and also directed the filing of these supplemental written arguments. Entry, April 15, 2011.

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[1]See State, ex rel. Williamson, v. Cuyahoga Cty. Bd. of Elections (1984), 11 Ohio St.3d 90 (where a relator was the only *eligible* candidate, the votes cast for relator in the election are the only ones to be counted).

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II. Law and Argument

A. An opposing qualified candidate for the office of county sheriff is entitled to a writ of *quo warranto* where the elected candidate purported to meet the minimum statutory educational requirements for the office by attendance at an institution that at the time was not accredited by the Ohio Board of Regents.

1. Summary of Argument

Strict Compliance with election laws is required. A person "shall not be elected or appointed unless he meets all the [statutory requirements]." Respondent did not meet 311.01(B)(9)(b), because his school of graduation was under R.C. Chapter 3332, not 1719. The Ohio Administrative Code directs that Respondent's diploma from his school was *less than* 90 quarter hours, or 60 semester hours, whereas the O.A.C. says OBR school diplomas have a *minimum of* 90 quarter hours, or 60 semester hours. Respondent failed to satisfy *all requirements* to be valid, and therefore is not.

He also cannot make a valid appointment of himself with OPOTA as sheriff when he did not meet those requirements, and therefore started a statutory disqualifying break in service on January 1, 2001, causing it to expire four years later. By law, as of January 1, 2005, he would have to go back to a police academy to get a completely new certificate, and he did not. He could not assume a new term as sheriff on January 3, 2005, without a valid OPOTA certificate, because he was no longer a certified police officer in Ohio, by law.

Relator Varnau on the other hand was a qualified valid candidate, certified to be on the ballot by the BOE; got second highest number of votes out of both candidates on ballot, and the highest among qualified candidates. He is therefore entitled to the office. Varnau's evidence in this original action compels the conclusion that Wenninger did not have the minimum statutory qualifications for the office.

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Varnau's evidence, either attached to pleadings in the case or filed in a separate Appendix, is voluminous. Wenninger never timely objected to any of it. A court on summary judgment proceedings can consider any material if not subjected to a specific objection, which if timely made would allow correction, and failure to do so is waiver of any objection. Stegawski vs. Cleveland Anesthesia Group, Inc. (1987), 37 Ohio App.3d 78.[2]

2. Wenninger's lack of eligibility and qualification for the Office.

Wenninger failed to meet all requirements of R.C. § 311.01 to be a valid candidate in the 2000, 2004, and 2008 elections. R.C. § 311.01(B) provides that an unqualified person "shall not be elected or appointed unless they meet *all* the following requirements." (Emphasis added). See also, State ex rel. Wolfe v. Delaware Cty. Bd. of Elections, 88 Ohio St.3d 182, 2000-Ohio-294. Wenninger never legally held the office of Sheriff, beginning in 2001. He then forfeited the office on January 1, 2001, after failing to remove his disqualification "immediately upon assuming the office" as to his lack of education required at that time under R.C. 311.01(B)(9)(b). *Id.*

a. Wenninger's deficient educational qualifications -- no OBR accreditation.

Wenninger's educational credentials did not include a diploma from a school accredited under the Ohio Board of Regents as required at that time under R.C. 311.01(B)(9)(b). Wenninger's diploma was from Technichron Technical Institute (TTI). Ohio Board of Regents (OBR) and Ohio Secretary of State documents proved that neither TTI nor its successor Phoenix Educational Systems ever received accreditation from the OBR. TTI's own material does not claim OBR accreditation, and it *could not* according to the undisputed evidence. The Statute requiring OBR accreditation does not provide for any

[2]See Relator's Reply to "Wenninger's Renewed Motion to Strike," filed with this Court March 29,

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exceptions or alternative; there is no "umbrella" for other unstated agencies under other unstated Revised Code chapters, nor for institutions that don't otherwise meet statutory definitions -- Wenninger's *only argument* ever proffered.

The only factual support provided by Wenninger was an "affidavit" of his political friends to argue points of law contrary to the written words of a statute.[3] Although the affidavits and documents were inadmissible and objection was timely made, they certainly cannot change the written words of the law, and served merely to whitewash an unqualified candidate. If the General Assembly meant to include other boards or proprietary schools it could have done so, but did not. It specified only the Board of Regents.[4] No legislator can unilaterally do so and neither can a court.

The Callender affidavit stating he "reviewed a letter from the Ohio Board of Regents dated October 4, 2002 issued by 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, authorized by the Ohio Board of Regents to confer "two year post secondary education diplomas, certificates or degrees." That October 4, 2002 letter from DeGarmo clearly states in the first two paragraphs that the Technichron Technical Institute does "*not* fall within the jurisdiction of the Ohio Board of

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2011, which is incorporated herein by reference.

[3]Those materials were included in Respondent's Partial Reply to Petitioner's Motion for Summary Judgment, filed on or about August 13, 2009, and are the subject of Relator's pending Objection and Motion to Strike, originally filed August 21, 2009, and renewed March 9, 2011, which are all incorporated herein by reference.

[4]*Expressio unius est exclusio alterius* is the Latin maxim that means that the expression of one or more persons or things implies the exclusion of those not expressed. Bank One, N.A. v. PIC Photo Finish, Inc., 2006-Ohio-5308, ¶23. Typically, this maxim is applied where there is a listing of items in an associated group or series, which "justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co. (2003), 537 U.S. 149, 168.

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Regents." (Emphasis added). DeGarmo's letter essentially reiterates the legal distinction between R.C. Chapters 1713 and 3332.

Wenninger's position requires the Court to add "substantial compliance," or "some other comparable agency in the State," or "within the umbrella or auspices" of the Board of Regents (although that is not factually true, either). "Courts have a duty to give effect to the words used in a statute and not to delete words used or insert words not used." State ex rel. Steele v. Morrissey, 103 Ohio St.3d 355, 360, 2004-Ohio-4960, ¶ 30.

The evidence is factually and legally undisputed that Wenninger's educational credentials did not equate to two years in a school accredited by the Ohio Board of Regents as required at that time by R.C. 311.01(B)(9)(b). The March 13, 2003, communication from DeGarmo to Kris Frost supports that in fact TTI *did not meet the requirements* of R.C. 311.01 to confer degrees, even if it was admissible.

The affidavit also otherwise contradicts itself as to what year the diploma was granted or issued, and what Statute TTI operated under at that time. During that time (when the diploma was issued), in fact from Respondent's high school diploma, June 8, 1986, to TTI "graduation," October 23, 1987, was *a summer and one-year* of school. When Wenninger received his diploma from TTI the Board of Regents *was not involved.* Even in December of 1999, TTI was under the Board of Proprietary School Registration; and when Wenninger got his TTI diploma, on October 23, 1987, TTI was under the State Board of School and College Registration.

It is clear from the 1985-89 Revised Code that TTI was not associated with OBR in any way and *could not legally have been.* Chapter 3332 of the Revised Code *does not apply* to the following categories of courses, schools, or colleges "(B) Institutions with certificates

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of authorization issued *pursuant to section 1713.02 of the Revised Code*; (C) Schools, colleges, technical colleges, or universities established by law or chartered by the Ohio board of regents." R.C. 3332.02 (emphasis added).

Further, the affidavit claims at the time that Wenninger received his "two year" diploma from TTI, proprietary schools were authorized to confer two-year post secondary education diplomas and associate degrees. This conclusion (not a statement of fact) conflicts with the actual written materials from the OBR and otherwise. See Relator's Exhibits in Support of Motion for Summary Judgment, filed August 10, 2009, Ex. 8B. Wenninger's affiant though claims, in conclusory fashion, that Wenninger's education met the educational standards set by R.C. 311.01(B)(9)(b) to run for Sheriff *in 2000*, although *he graduated from TTI in 1987*, and the law providing what a sheriff had to have was written, as applicable to the 2000 election, in 1990, then creating the requirements to allow schools, institutes, etc., *under Chapter 3332*, to apply to the OBR for a certificate of authorization for a particular course, taught at a particular location, *if*, the school, institute, etc., had been teaching that course for a minimum of 10 years or more at that location. TTI started business on October 27, 1978. See Relator's Ex. 8B. Wenninger got his diploma on October 23, 1987. That is nine years, not the minimum to even apply to the OBR for a certificate of accreditation. And, if any school or institute, etc., was granted a certificate of accreditation by the OBR that certificate had to be filed with the Secretary of State per Chapter 1713, and the subpoenaed documentation from the Secretary of State shows that didn't happen, either.

In addition, TTI was not such an "institution" that even could have been accredited by the Ohio Board of Regents. Since TTI was a for-profit school, it would not even qualify

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under R.C. Chapter 1713 to be OBR approved. Prior to 1990 TTI would have had to have been a not-for-profit/nonprofit school or institute to even approach the Board of Regents for any kind of approval. R.C. 1713.01(A).

b. Wenninger's deficient educational qualifications -- too few hours/years.

R.C. § 311.01(B) provides that an unqualified person "shall not be elected or appointed unless they meet *all* the following requirements." (Emphasis added). See also, State ex rel. Wolfe v. Delaware Cty. Bd. of Elections, 88 Ohio St.3d 182, 2000-Ohio-294.[5] Wenninger's protestations of an "umbrella" of authority for TTI under the OBR ignores that he was still required, wherever it was, to get *two-years of post-secondary* education. 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* or the comparable agency of another state in which the college or university is located." *Id.* (emphasis added).

First, a two-year degree was *impossible* since Wenninger's own materials reflect he graduated from high school in 1986 and got his TTI diploma in 1987. By his own admission he did not *start* any post-secondary education until *August 1986*, and got his one and only degree of any kind 14 months later, October 1987. D.Wenninger p. 4, 7. That reduces the total time from start to finish to absolutely no more than a total of 14 months of schooling. Even then, Wenninger testified that he attended school for *half a day* minimum, so his actual hours attended could be *even less*. D.Wenninger, p. 7. Fourteen months divided by 3 (a

[5]The cases Respondent cites were decided before the laws applicable here were enacted. Even Wenninger knows that if he doesn't meet the statutory requirements, initially or at any time during a claimed tenure, he becomes an invalid peace officer. Wenninger p. 11.

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"quarter" being a 3-month term), times a full-time credit schedule of 15 credit hours per quarter; equals 69 *maximum quarter credit hours*.[6] Wenninger's claim to office is dependent upon him having received a two-year "diploma," authorized under R.C. § 3332. O.A.C. 3332-1-16(C)(2) dictates that such diploma issued to him had less than 90 quarter credits or 60 semester credits. A two-year degree under the OBR, O.A.C. 3333-1-04(C)(6), dictates a *minimum* of 90 quarter hours or 60 semester hours are required for a two-year degree.

He can't have it both ways, and didn't have it the way the law requires, in substance or letter. OBR standards for two-year degrees require the 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) for diploma programs are only required to "generally 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(C)(2) (emphasis added).

Wenninger could not have physically or legally accumulated between those two dates, the minimum 90 credit hours required by the OBR and the O.A.C. for a required two-year associate program. Not only does he want the statutory requirement of "Board of Regents" not to mean "Board of Regents," but "two years" also to mean "14 months." Because Ohio election statutes are mandatory and require strict compliance, see State ex rel. Steele v. Morrissey, *supra*, and this Argument, *supra*, these Statutes do not allow the variance Wenninger requires to hold the office, or the *made up* interpretation of the Statutes

[6]See O.A.C. 3333-1-08 as to the methods of calculating class hours; and O.A.C. 3333-1-02(B)(1)

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here that Wenninger requires.

Even if he was qualified under a new version of the law unconstitutionally enacted specifically for him, or under the "corporal or higher section," to be a valid candidate for the 2004 *election*, he still could not take the seat without a valid peace officer certificate on *January 3, 2005*. His certificate though expired on January 1, 2005, and whether he was qualified or not under the supervisory or educational provisions at that time he cannot sit as a sheriff without a current, valid peace officer certificate. Any qualifications acquired under "supervisory experience" could not take effect, or have any affect, until after he started his January 3, 2005 term. He was still in his first (illegal) term in office that he vacated on January 1, 2001, by not removing his disqualification under the 2000 election laws in § 311.01(B). A sheriff candidate cannot illegally be on the ballot, even if having garnered 99.99% of the votes cast, and claim to legally hold the office when by law no valid appointment or election of such candidate is possible unless that candidate's disqualification is immediately removed upon assuming office -- just because he kept the office long enough before anyone with a right to do so formally challenged it.

The Supreme Court recently decided State ex rel. Knowlton vs. Noble County Board of Elections, 125 Ohio St.3d 82, 2010-Ohio-1115 (Knowlton I). The challenged sheriff candidate argued his OPOTA training, which he received college credit for (along with other "life experience" credits), met both the OPOTA requirements and the educational requirements, at the same time. The Board of Elections agreed, and denied a protest. The Supreme Court denied the mandamus (for procedural reasons), but *granted* the writ of prohibition (against the BOE), essentially saying the candidate can't count the same classes

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defines a "full-time" student as one carrying a minimum of 15 hours/quarter.

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to meet two separate requirements, *strictly enforcing* the statutory words and requirements, and not implying exceptions and provisos that do not appear in the legislation. The dissent -- a position obviously rejected by the majority -- argued that by the time of the election, he would have been actual Sheriff for more than two years anyway, and that should count toward his "supervisory" experience, an argument similar to what Wenninger makes here.

The opinion implicitly (if not explicitly) rejects Wenninger's argument that the requirements can be "fudged," that is, "close enough is good enough," and rejects the additional argument that being in office, even if not *legally*, counts for "service." Knowlton I denies "work experience as Sheriff" to be used to make that candidate, or Wenninger here, qualified under (9)(a) (corporal or higher requirement). There, as here, even if the candidate (or office holder) could be considered as satisfying (9)(a), he was originally not qualified under (9)(a) or (b), and therefore not "the sheriff" legally, could not appoint himself with OPOTA as Sheriff, and four years later under the O.A.C. his certificate expired completely, whether or not he qualified under either (9)(a) or (b) in the 2004 election.

Even if Wenninger were qualified to run in 2004 as a valid candidate, his OPOTA certificate expired before he could assume the seat he was elected to in that 2004 election. He has no legally valid supervisory experience of corporal or higher to satisfy R.C. 311.01(B)(9)(a) either. Relator's Exhibits, August 10, 2009, Ex. 6B, Wenninger's Answer to Int. No. 15. He was in all ways ineligible for the office. Wellington vs. Mahoning Cty. Bd. of Elections, 117 Ohio St.3d 143, 2008-Ohio-554.

c. The ministerial function of the Common Pleas Court to approve a petition is irrelevant to qualifications to hold office.

Wenninger's lack of qualifications is not saved by the ministerial function of a

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Common Pleas Court (as Wenninger argued). A Common Pleas Court judge only reviews the submissions under R.C. 311.01(B)(6) and (7) for accuracy and reports such to the Board of Elections. Such duty has no bearing or purpose whatsoever on whether a candidate *actually* meets the requirements necessary under (B)(8) and (B)(9) to hold the office (no more than a BOE determination does). See State ex rel. Snider vs. Stapleton (1992), 65 Ohio St.3d 40; O.A.G. Op. 2001-026. The fact that Wenninger was never eligible to be a Sheriff is in fact not disputed -- at least not by other *facts*.

B. An opposing qualified candidate for the office of county sheriff is entitled to a writ of *quo warranto* where the elected candidate had a statutory "break in service" of four or more years which cancels his Ohio Peace Officer Training Academy (OPOTA) certificate.

Wenninger also never legally held the office of Sheriff *after* the 2004 election. Wenninger, upon legally forfeiting the office on January 1, 2001, for lack of educational/supervisory credentials, started an administrative "break in service" on his Ohio Peace Officer Training Academy (OPOTA) police certificate that same day. Wenninger, not legally holding office as Sheriff from January 1, 2001 through January 1, 2005, could not appoint himself as Sheriff with the Ohio Peace Officer Training Commission (OPOTC). Therefore four years later, January 1, 2005, Wenninger's OPOTA certificate completely expired to the point where Wenninger would have to re-take the entire OPOTA police academy course from scratch to obtain a new police certificate. O.A.C. § 109:2-1-12(A)(2), and (D)(3) ("Breaks in service.") provides:

> (A)(2) No person shall, after January 1, 1989, shall be permitted to perform the functions of a peace officer or to carry a weapon in connection with peace officer duties unless such person has successfully completed the basic course and has been awarded a certificate of completion by the executive director.

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> (D) Breaks in service/requirements for update training evaluations: (3) All persons who have previously been appointed as a peace officer and have been awarded a certificate of completion of basic training by the executive director or those peace officers described in paragraph (A)(3) of this rule *who have not been appointed as a peace officer for more than four years shall, upon re-appointment as a peace officer, complete the basic training course prior to performing the functions of a peace officer.*
>
> (Emphasis added).

Wenninger's break-in-service is not saved by his appointment as a police officer with the Ripley Police Department after January 1, 2001. Per Ohio Atty. Gen. Op. 1996-017, a peace officer cannot be employed by a Sheriff's Office *and* a municipal police department at the same time, because that would be a direct legal conflict of interest. When Wenninger filed the SF400adm form with OPOTC, appointing himself as Sheriff January 1, 2001, his appointment with Ripley P.D. would have had to terminate that same date to prevent any legal conflicts. Any other conclusion allows the use of an illegal appointment to legitimize another illegal appointment.[7]

Wenninger has not held a valid OPOTA peace officer certificate, issued by the OPOTC, since January 2, 2005, because his commission expired completely, per O.A.C., on January 1, 2005. Wenninger assumed the same legal status as that of a civilian on January 2, 2005, one day before usurping a second term as Sheriff on January 3, 2005. Wenninger had not held a valid peace officer certificate for over four years.

Wenninger's argument that a change in the law (after he allegedly met his "qualifications") cures his deficiency is moot since his break-in-service exacerbates the same

[7] Wenninger also swore in his Certification (Relator's Ex. 2A, p. 4-5) that the information on his termination of his prior peace officer employment was correct, but now says it wasn't.

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deficiency, by creating a new one -- no valid peace officer certificate. Even if subsequent changes in the law applied to retroactively validate his credentials, which would be the unconstitutional retroactive application of a new law,[8] Wenninger still could not take the seat without a valid peace officer certificate on January 3, 2005, the day he took that term. In fact, his peace officer certificate was invalid at the time of his qualification as a candidate for Sheriff in 2004 because of the "break in service" that started on his certificate on January 1, 2001, based on the difference between R.C. 311.01(B)(8)(a) and/or (b) and the O.A.C. relating to the status of peace officer certificates – the legal definition of what constitutes a "valid certificate."[9] Wenninger "had" a certificate between January 1, 2001, and January 1, 2005, but it was deficient for all of the above reasons, not just the absence of OBR authorization to TTI.

The after-the-fact change in O.R.C. 311.01(B)(9)(b) in December 2003 is a moot issue in light of his OPOTA certificate completely expiring as a matter of law. Assuming as Wenninger argued that he was a legitimate candidate in 2004 under that amendment and winning the election, he still could not assume the position of Sheriff without having that valid OPOTA peace officer certificate as required by O.A.C. 109:2-1-12(E). He was not initially qualified by not meeting the requirements of either (9)(a) or (b) *in 2000*, and thus, started that "break in service," on January 1, 2001. Then his OPOTA certificate completely expired four years later, under the relevant O.A.C. provisions, on January 1, 2005, two days

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(D.Wenninger p. 43-47, claiming the chief of police of his subsequent peace officer appointment falsely notarized his official oath of office, without which he could not be a valid peace officer.).

[8] Ohio Const. Art. II, § 28; U.S. Const., Art. I, § 1, 9.

[9] In State ex rel. Hayburn v. Kiefer (1993), 68 Ohio St.3d 132, 133, "valid" was not defined for the purpose of R.C. 311.01. The Court employed the ordinary meaning of the term, which is "having legal force." Wenninger's certificate had none.

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before he assumed his second-term seat.[10] Following that same reasoning again, he would also not qualify to be a valid candidate in 2008, failing to satisfy (8)(a) and/or (b), plus O.A.C. 109:2-1-12(E), without that OPOTA certificate he lost on January 1, 2005. Since Varnau was the only other valid candidate running for Sheriff, he is the only legitimate holder of the office.

Nonetheless, to the extent he wants to allege his time with Ripley P.D. counts toward any service, there is no evidence Wenninger ever worked a day or hour during his entire appointment with the Ripley P.D. A mere allegation that he has been acting and performing as Sheriff of Brown County, albeit illegally, does not comply with any legal requirement. There is no known authority under R.C. 311.01(B)(9)(a) or otherwise that illegal service qualifies one to continue the illegality, or cure it; much less why a person should be able to profit or benefit from conduct that is not in accordance with the law. The argument has no direct bearing or effect on the actual legal expiration date of Wenninger's OPOTA police certificate, January 1, 2005. The O.A.C. provides that one cannot be a sheriff without a valid peace officer certificate in Ohio, and Wenninger did not obtain another police certificate after his preexisting one lapsed or expired due to the "break in service."

Varnau is therefore entitled to the writ. See this Argument, *infra.*

C. Varnau is entitled to the Office and the Writ.

State ex rel. Battin v. Bush (1988), 40 Ohio St.3d 236, states that a writ of *quo warranto* is a high prerogative writ and is granted, as an extraordinary remedy, where the legal right to hold an office is successfully challenged. See also, State ex rel. St. Sava Serbian Orthodox Church v. Riley (1973), 36 Ohio St.2d 171, 173; State ex rel. Cain v. Kay

[10] Cases relied upon to suggest "substantial compliance" were decided under prior versions of the law

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(1974), 38 Ohio St.2d 15, 16-17. The remedy afforded is that of ouster from the public office. R.C. 2733.14. Furthermore, *quo warranto* is the exclusive remedy by which one's right to hold a public office may be litigated. State ex rel. Hogan, v. Hunt (1911), 84 Ohio St. 143, syl. 1.

To obtain such a writ, one must demonstrate that he "is entitled to the [public] office and that the office is unlawfully held by the respondent in the action." State ex rel. Cain, *supra*, at 17. State, ex rel. Williamson, v. Cuyahoga Cty. Bd. of Elections (1984), 11 Ohio St.3d 90, states that where a relator was the only *eligible* candidate, the votes cast for relator in the election are the only ones to be counted. The evidence of Varnau's qualifications for the office and therefore this Writ is specific and factually supported and undisputed. Relator's Motion for Summary Judgment, August 10, 2009, p. 3; Relator's Ex. 15A (Board of Election Records). All of that was without any timely evidentiary objection. The fact that Varnau was the successful and only legally eligible candidate is not disputed -- at least not by other *facts* -- and was not challenged, as Wenninger's is.

Wenninger does not now legally hold the office of Sheriff, due to the lack of statutory qualifications. See this Argument, *supra*. Because Wenninger did not satisfy the requirements prior to the 2008 election, and therefore was not a valid candidate for Sheriff in the November 4, 2008 election, he could not and cannot act or perform or be appointed as a peace officer in any capacity or the office of Sheriff. He is disqualified, and Varnau is entitled to the office, and the writ. State ex rel. Vana v. Maple Hts. City Council (1990), 54 Ohio St.3d 91.

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that no longer exist, and did not when he first, or most recently, ran for the office.

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CONCLUSION

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

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 11th day of May 2011.

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