

## STATEMENT OF THE CASE

### A. Procedural Posture

Relator Varnau (Varnau) instituted this action for quo warranto. In response to Varnau's complaint, Respondent Wenninger (Wenninger) filed a motion to dismiss with supporting evidentiary material, the affidavit of Wenninger. The Court converted Wenninger's motion to dismiss to a motion for summary judgment.<sup>1</sup> Extensive discovery was undertaken and, as a result of the discovery, the record has been supplemented with additional evidence. After discovery was closed, Varnau filed a motion for summary judgment. This case is now before the Court on cross-motions for summary judgment.

### B. Statement of Facts

Varnau is a Brown County resident who ran as an independent candidate and sought the office of Brown County Sheriff in the November 4, 2008 general election. Wenninger, the Republican nominee in that election and who has served as Brown County Sheriff since January 1, 2001, won the election by receiving 62.92% of the vote.<sup>2</sup> Varnau thereafter filed this action in quo warranto. Throughout the pendency of this matter, Varnau insists that Wenninger failed to meet the requirements found in R.C. 311.01 (B) and (C) to be a valid candidate in the 2000, 2004 and 2008 elections and that, as a result, Wenninger is not legally entitled to hold the office. The crux of Varnau's argument is that Wenninger did not then have the educational credentials qualifying him to be an Ohio Sheriff upon taking office on January 1, 2001, that this alleged deficiency caused Wenninger to have a break in service from January 1, 2001 to January 1, 2005, thereby disqualifying Wenninger from holding the office following the 2004 election, and that, as a result of Wenninger's "break in service," Wenninger did not possess a valid peace officer certificate prior to the 2008 general election making Wenninger's current service a continuation of an "illegal" holding of the

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<sup>1</sup> 12<sup>th</sup> App. Entry of May 1, 2009

<sup>2</sup> 12<sup>th</sup> App. Decision filed August 16, 2010, ¶2.

office.<sup>3</sup> Hereinafter, Wenninger will provide the Court with unrefuted facts present in this record that establish that he met the educational qualifications as required to become a candidate prior to his election in 2000.

Attached to Wenninger's motion to dismiss is his affidavit that establishes that he met the requirements of R.C. 311.01 at the time of the 2000 general election and when he took the office of Brown County Sheriff. R.C. 311.01

[REDACTED]

<sup>3</sup> 12<sup>th</sup> App. Decision filed August 16, 2010, ¶ 5 and the footnote thereto.

[R.C. 311.01(B)(8)(a)]. Varnau contests that section of the qualifying statute that states as follows

[R.C. 311.01(B)(9)]:

The person meets at least one of the following conditions:

(b) Has satisfactorily completed 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.<sup>4</sup>

Varnau does not dispute that Wenninger attended Technichron Technical Institute (TTI) and obtained a diploma from TTI.<sup>5</sup> TTI was registered with the State Board of School and College Registration (formerly known as the State Board of Proprietary School Registration) and TTI was authorized to offer diploma programs under " ...Section 311.01.9B of the Ohio Revised Code."<sup>6</sup>

See the two letters also attached to the e-mail to see where this 311.01.9B came from.

[REDACTED]

int [REDACTED]

<sup>4</sup> The qualifying statute was amended effective December 9, 2003. The amendment added the following language: "...or in a school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code." A copy of qualifying statute as amended is appended to this brief.

<sup>5</sup> Wenninger's diploma as appended to this brief was obtained pursuant to a subpoena duces tecum issued by Varnau. TTI was registered with the State Board of Career Colleges and Schools during Wenninger's attendance. Wenninger also testified in his deposition as to attending and receiving a diploma from TTI.

<sup>6</sup> Letter of Sevy as found in the records of the State Board of Proprietary School Registration as obtained pursuant to the subpoena duces tecum of Varnau. The letter is appended to this brief.

<sup>7</sup> Affidavit of Spievack, found in the records of the Brown County Board of Elections and obtained by Varnau pursuant to a subpoena duces tecum. The Brwon County Board of Elections were certified. The affidavit is appended to this brief.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Wenninger's deposition testimony is clear that he continuously held the necessary Peace Officer Training Certificate and met the experience requirement of the qualifying statute and that testimony stands likewise stands unrefuted.

C. Quo Warranto

[REDACTED]

<sup>8</sup> Callender's affidavit was obtained by Varnau pursuant to a subpoena duces tecum issued to the Ohio Board of Regents. Callender's affidavit is found in the records of the Ohio Board of Regents. Callender's affidavit is appended to this brief.

[REDACTED]

#### D. The Summary Judgment Standard

[REDACTED]

<sup>9</sup> R.C. 2733.01, et seq.

<sup>10</sup> See also R.C. 2733.03

<sup>11</sup> *State ex rel. Corrigan v. Habarek*, 35 Ohio St.3d 150

<sup>12</sup> R.C. 2733.35.

<sup>13</sup> The majority of this paragraph has been extracted from *Anderson's Ohio Civil Practice* (2007), §118. Quo Warranto

<sup>14</sup> R.C. 2733.08 Query: Is an earlier election opponent of Wenninger's a necessary party to this proceeding as Varnau's theory, if successful, relates to election year 2000?

<sup>15</sup> R.C. 2733.14 "When a defendant in an action in quo warranto *is found guilty* of...unlawfully...holding office..."

<sup>16</sup> *In Re Sugar Creek Local School District* (1962), 21 Ohio Op.2d 16

<sup>17</sup> *Wilson v. Kennedy* (1949), 151 Ohio St.485

<sup>18</sup> *State ex rel Felder v. McVay* (1926), 23 Ohio App. 418

<sup>19</sup> *State ex rel. Janson v. Eschliman* (1926), 115 Ohio St. 509

[REDACTED]

ARGUMENT

By his affidavit that was filed with his motion to dismiss (now a motion for summary judgment) [REDACTED] Wenninger has clearly established that he qualified to be elected and hold the office of Brown County Sheriff in general election year 2000 and every election thereafter. [REDACTED]

[REDACTED] The Court need only 'check list' the qualification statute as set forth in the statement of facts [REDACTED] to see that Wenninger has always qualified to hold (and continue to hold) the office of Brown County Sheriff.

[REDACTED]

Varnau's claim that Wenninger does not hold a proper peace officer certificate and/or suffered a break in service

Varnau's argument is swiftly dispatched. [REDACTED]

[REDACTED]

<sup>20</sup> *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107

<sup>21</sup> See *Ward v. Cent. Inv. L.L.C.*, 2010-Ohio-6114 (1<sup>st</sup> App., ¶11, et seq.).

[REDACTED] the Ohio Supreme Court reinforced the point that some peace officer training was required, not

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Varnau's argument is meritless.

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. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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 2008. By the 2008 general election, Wenninger met the experience qualification of the alternatives set forth in *R.C. 311.01(9)*. The inquiry ends there.

CONCLUSION

[REDACTED]

[REDACTED] Wenninger has established his qualification to

<sup>22</sup> Wenninger deposition, p. 10, 11, 39  
<sup>23</sup> Wenninger deposition, p. 13, 42, 47

hold office beyond doubt. The Court should issue an order that Sheriff Wenninger is entitled to retain his position as Brown County Sheriff, denying Varnau's motion for summary judgment in the process. The Court, based upon the evidence before it, should specifically find that Varnau has not produced current 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.

  
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Attorneys for Respondent Sheriff Dwayne Wenninger

CERTIFICATE OF SERVICE

I certify that on May 10, 2011, 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.

  
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Attorney for Respondent Wenninger