

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel. : Case No. 10-1655
Dennis Varnau :
Relator/Appellant :
Vs : On Appeal from the Brown County
Court of Appeals, Twelfth Appellate District
Dwayne Wenninger :
Respondent/Appellee : Twelfth Appellate District No. 2009-02-10

BRIEF OF RESPONDENT/APPELLEE DWAYNE WENNINGER

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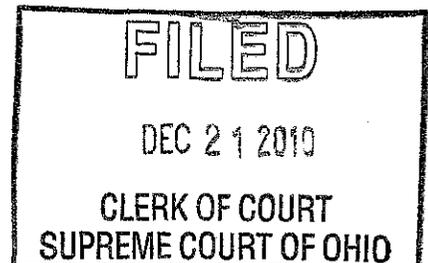


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	4
 <u>RESPONSE TO PROPOSITION OF LAW NO. I:</u>	
A court cannot grant summary judgment in a post-election <i>quo warranto</i> action based on an unproven and disputed presumption in favor of a moving party that a board of elections conducted an investigation of a candidate's qualifications for that office.	4
 <u>RESPONSE TO PROPOSITION OF LAW NO. II</u>	
A board of elections' placing a candidate on the ballot does not establish the candidate's legal qualifications for the office that is binding in a later action in <i>quo warranto</i> to challenge the candidate's legal qualifications to hold the office.	8
 <u>RESPONSE TO PROPOSITION NO. III:</u>	
Allowing action by a board of elections in placing a candidate on a ballot to preclude a candidate who had no right to protest that action or to participate in a protest from challenging the officeholder's qualifications is unconstitutional.	10
 <u>RESPONSE TO PROPOSITION OF LAW NO. IV:</u>	
An opposing qualified candidate for the office of county sheriff is entitled to a writ of <i>quo warranto</i> where the elected candidate purported to meet the minimum statutory educational requirements for the office by attendance at an institution that at that time was not accredited by the Ohio Board of Regents.	12
 <u>RESPONSE TO PROPOSITION OF LAW NO IV:</u>	
An opposing qualified candidate for the office of sheriff is entitled to a writ of <i>quo warranto</i> where the elected candidate had a "break in service" of four or more years which cancels his Ohio Peace Officer Training Academy (OPOTA) certificate.	14
CONCLUSION	15
PROOF OF SERVICE	15

STATUTES

R.C. 311.01 (as eff. 9-29-99)	1
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TABLE OF AUTHORITIES

<i>Allied Stores of Ohio v. Bowers</i> (1957), 393 U.S. 522	11
<i>Clark Cty. Solid Waste Mgt. Dist. V. Danis Clarkco Landfill, Co.</i> (1996), 109 Ohio App.3d 19	4
<i>Dryden v. Dryden</i> (1993, Adams), 86 Ohio App.3d 707	5
<i>Felch v. Hodgman</i> (1900), 62 Ohio St. 312	5
<i>Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.</i> (1998), 81 Ohio St.3d 392	13
<i>Green v. B.F. Goodrich Co.</i> (1993), 85 Ohio App.3d 223	13
<i>Knox Co. v. Ninth Bank</i> , 147 U.S. 91	5
<i>Lippitt v. Cippillone</i> (1971), 337 F.Supp. 1405 (N.D., Ohio), [<i>aff'd</i> , (1972), 404 U.S. 1032]	11
<i>O'Nesti v. DeBartolo Realty Corp.</i> , 113 Ohio St.3d 59, 2007-Ohio-1127	13
R.C. 311.01	2
R.C. 3513.05	10
<i>Ohio Rule of Civil Procedure 56(C)</i>	5
<i>Ohio Rule of Evidence 301</i>	5
<i>State ex rel. Corrigan v. Habarek</i> (1988), 35 Ohio St.3d 150	6
<i>State ex rel. Grisell v. Marlow</i> (1864) 15 Ohio St. 114	9
<i>State ex rel. Janson v. Eschlman</i> (1926), 115 Ohio St. 509	15
<i>State ex rel. Kelly v. Cuyahoga Cty. Bd. Of Elections</i> (1994), 70 Ohio St.3d 413	4
<i>State ex rel Portis v. Summit Cty. Bd. Of Elections</i> (1993), 67 Ohio St.3d 590	9
<i>State ex rel. Ross v. Crawford Cty. Bd. Of Elections</i> 125 Ohio St.3d 438, 2010-Ohio-2167	4

<i>State v. Wenninger</i> (2003), 125 Ohio Misc.2d 55	2
<i>Stetter v. Corman</i> , 125 Ohio St.3d 280, 2010-Ohio-1029	10

STATEMENT OF FACTS

This is an action in *quo warranto* that was commenced on February 27, 2009 in the Twelfth District Court of Appeals (Appellate Court) by Dennis J. Varnau (Varnau), the Relator. Varnau seeks the ouster of the Respondent Dwayne Wenninger (Wenninger), the Brown County Sheriff. In response to the complaint, Wenninger filed a motion to dismiss (to which his affidavit was appended) and the Appellate Court converted the motion to dismiss to a motion for summary judgment. At some point in the proceedings, Varnau filed a motion for summary judgment. Varnau was given ample time to, and did, conduct discovery. The matter was submitted to the Court of Appeals on the cross motions for summary judgment and on August 16, 2010, the Appellate Court issued its Decision (*App. Dec.*) and denied the issuance of the writ as requested by Varnau.

In 2008, Varnau unsuccessfully ran against Wenninger for the office of Brown County Sheriff (sheriff). Varnau claims that Wenninger did not possess the qualifications to run for sheriff in 2008 due to “a lack of proper certification to be a law enforcement officer and/or a lack of educational requirements”. *Varnau Complaint*. As this case progressed, Varnau’s theory of entitlement to the office of sheriff evolved to the following: “The crux of Varnau’s argument is that Wenninger did not have “the educational credentials qualifying him to be an Ohio Sheriff” upon taking office on January 1, 2001, that his alleged deficiency caused Wenninger to have a “break in service” from January 1, 2001 to January 1, 2005, thereby disqualifying him from holding the office following the 2004 election, and that, as a result of his “break in service,” he “did not possess a valid peace officer certificate” prior to the 2008 general election making his current term a continuation of the “illegality.”. *App. Dec., fn 2*.

In 2000, Wenninger filed petitions of candidacy for the office of sheriff with the Brown County Board of Elections (BCBE). The BCBE reviewed his petitions and certified his candidacy. Wenninger was elected and assumed the office of Sheriff on January 1, 2001, a point conceded by Varnau. *Varnau brief, first sentence*. In 2002, Wenninger was indicted by a Brown County grand jury for one count of election falsification and one count of falsification with regard to his 2000 petitions for

candidacy for sheriff. Specifically, as to the criminal proceedings, the State of Ohio contended that Wenninger had not 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 as required by the then effective provisions of R.C. 311.01 (qualification statute).¹ Wenninger filed a motion to dismiss the election falsification count and the trial court overruled the motion stating that whether Wenninger met the educational requirements of the qualification statute was for the trier of fact to determine. The election falsification count went to trial and Wenninger was acquitted. *State v. Wenninger* (2003), 125 Ohio Misc.2d 55 (*Wenninger*). It is important to note at this juncture that, contrary to Varnau's assertion in the first paragraph of his statement of facts, R.C. 311.01(B)(9) as effective in 2001 is in the disjunctive: it requires one of the following either: (a) two years of supervisory experience or (b) satisfactory completion of two years of post-secondary education.

Varnau does not dispute that, subsequent to graduating from high school, Wenninger attended and completed a post-secondary course of training at Technichron Technical Institute (TTI). *Varnau Brief*, p.1. Likewise, Varnau has not disputed that at the time of the 2000 general election and when he took office in 2001, Wenninger possessed a valid peace officer training certificate. *Wenninger App. Brief as filed on August 20, 2009, Appendix B*, (certificate awarded May 24, 1989).

As to Wenninger's motion for summary judgment in this case, Wenninger submitted the matter upon his affidavit (as appended to his motion to dismiss); selected certified records of the BCBE as will be discussed hereinafter; a copy of Wenninger's Peace Officer Training Certificate as issued in 1989; and affidavits of Lee Spievack (Spievack) and Jamie Callender (Callender). *Wenninger App. Brief as filed August 20, 2009* and appendices thereto. These materials establish factual issues that are unrebutted.

¹ The Court will find the qualification statute as it was in effect in 2000 appended to this brief. Varnau has appended the qualification statute as it became effective in December of 2003. The 2003 version of the statute [at R.C. §311.01(B)(9)(b)] made it clear that two years of post-secondary education in career colleges met the requirement of the statute.

Wenninger's affidavit is appended to the motion to dismiss that was filed in March of 2009 in the Appellate Court. The affidavit clearly sets forth and establishes that Wenninger met/meets the requirements of the qualification statute including the fact that he possessed the Peace Officer Training Certificate issued by the Ohio Peace Officer Training Commission found at appendix B of the Appellate Brief.

The certified records of the BCBE contain Wenninger's January of 2004 response to a protest filed with the BCBE by Sandy Martin. Clearly, in January of 2004, the BCBE was called upon to (once again) review Wenninger's qualifications. The BCBE records also contain the affidavit of Spievack (Spievack is the former owner of TTI). Spievack establishes that Wenninger's attendance at TTI constituted more than two years of post-secondary education and explains the relationship of TTI to the Ohio Board of Regents. The BCBE records also contain that board's response to Varnau's 2008 election protest. The Appellate Court refers to this letter in the Decision.

The affidavit of Callender, a lawyer, former member of the Ohio House of Representatives (and, while a member of the House, an *ex officio* member of the Ohio Board of Regents), establishes a number of facts. First, at ¶6, Callender states that consistent with qualification statute [§(B)(9)(b)], the Ohio Board of regents had oversight of TTI and TTI was in good standing with the Board of Regents. Second, TTI was in good standing with agencies comparable to the Ohio Board of Regents and that two of the comparable agencies with which TTI had good standing had standards equal to or more stringent than the standards of the Ohio Board of Regents (the State Board of School and College Registration and the National Association of Trade and Technical Schools). The third thing that Callender's affidavit established (¶7) is Wenninger's post-secondary education met the substance of the requirements of the qualification statute. Lastly, Callender (¶4) had reviewed a letter dated October 4, 2002 authored by Shane DeGarmo, an employee of the Ohio Board of Regents. At ¶6 of his affidavit, states that DeGarmo's letter to then Prosecutor Grennan is deceiving in that it does not answer the question posed: during the time periods posed (1999, 2000 and 2001), was TTI able to confer two year degrees? Callender answered that question in the affirmative.

This statement places DeGarmo's letter as relied upon by Varnau in a position of having no evidentiary value.

ARGUMENT

VARNAU'S FIRST PROPOSITION OF LAW

A Court cannot grant summary judgment in a post-election *quo warranto* action based on an unproven and disputed presumption in favor of a moving party that a board of elections conducted an investigation of a candidate's qualifications for that office.

Wenninger would state this proposition in a different way: In summary judgment proceedings, a non-moving party has the burden of producing evidence so as to overcome a presumption in favor of a moving party. The essence of Varnau's argument under this proposition of law in this *quo warranto* action is that the lower court (the Appellate Court) applied R.C. 311.01(F)(2) [requires a board of elections to certify the qualifications of a candidate for sheriff] so as to impose a presumption that the BCBE made a finding that Wenninger met the statutory qualifications to be elected Brown County Sheriff in general election years 2000, 2004 and 2008. What Varnau is asking this Court to do (as he asked the Twelfth District to do) with regard to Sheriff Wenninger's qualification(s) to become sheriff, is to go behind the fact finding function required of a board of elections pursuant to R.C. 311.01(F)(2) and substitute its judgment for that of the fact finder, something that both this Court and the Twelfth District may not do. *State ex rel. Kelly v. Cuyahoga Cty. Bd. Of Elections* (1994), 70 Ohio St.3d 413; *State ex rel. Ross v. Crawford Cty. Bd. Of Elections*, 125 Ohio St.3d. 438, 2010-Ohio-2167 (at ¶ 15, 25, et seq.). Interestingly, one might take the position that the complaint of Varnau in *quo warranto* presents issues that are purely matters of law and, as such Varnau may be limited in this appeal to error of law, not a *de novo* review of summary judgment. See, *Clark Cty. Solid Waste Mgt. Dist. V. Danis Clarkco Landfill, Co.* (1996), 109 Ohio App.3d 19. However, for the sake of addressing Varnau's proposition, Wenninger will attempt to review the law of presumptions as applied in the summary judgment setting.

What is a presumption and the effect of a presumption? As Gianelli & Snyder note, ² *Ohio Rule of Evidence 301 (Ev. R.)*, [Presumptions in general in civil actions and proceedings], does not define the term 'presumption'. In the authors' comments upon Ev. R. 301, Gianelli & Snyder observe as follows:

A presumption is a procedural rule that defines the relationship between two facts—a basic fact and a presumed fact. If the basic is proved, the presumed fact must be accepted as established unless and until rebutted. Thus, a presumption is mandatory.

The authors then offer that civil presumptions are (1) generally rebuttable and (2) creations of the legislature or decisional law with the Evidence Rule merely governing their effect.

In this case, the basic fact that has been proven is that (in election year 2000, 2004 and 2008) Wenninger qualified to be placed on the ballot and he was elected sheriff. ¶2, *App. Dec.* The presumed fact, that Varnau has not rebutted, is that the BCBE carried out the mandate of R.C 311.01(F)(2) and found Wenninger to be statutorily qualified to become sheriff. This leads to a second presumption that is at work in this case: where an official act is done it is presumed that the formal requisites were complied with. *Felch v. Hodgman* (1900), 62 Ohio St. 312 (quoting as follows, at 317: As expressed in *Knox Co. v. Ninth Bank*, 147 U.S. 91, 13 Sup.Ct. 267, 37 L.Ed.93: "Where an act is done that can be done legally only after the performance of some prior act, proof of the latter carries with it the presumption of due performance of the prior act"). The fact that he BCBE placed Wenninger on the ballot means that his qualifications were certified. As to summary judgment, a proponent may have the benefit of a statutory presumption that the adverse party must overcome. See, *Dryden v. Dryden* (1993, Adams), 86 Ohio App.3d 707. What might Varnau have done to overcome these presumptions?

First and foremost, it is beyond debate that Civil Rule 56(C) requires that the non-moving party produce evidence in opposition to a motion for summary judgment. While inappropriately treating inferences and presumptions synonymously (See, *Author's comments to Ev. R. 301*, Gianelli

² Paul C. Gianelli & Barbara Rook Snyder, *Rules Of Evidence Handbook*, Baldwin's Ohio Practice, p. 80 (2009).

& Snyder), Varnau states in his brief that "...there is no default summary judgment under Ohio law". *Varnau Brief, p. 11*. As a matter of practice, when a non-moving party fails to create an issue of fact (i.e., defaults in production of evidence), summary judgment will be entered against that party. While Varnau's basic complaint is that Wenninger lacked the appropriate educational qualification to become sheriff in election year 2000, Varnau has produced no evidentiary material as contemplated by Civ. R. 56(C) that rebuts the finding of the BCBE as to Wenninger's educational qualification. Varnau did not produce a deposition or an affidavit of a member of the BCBE, the Ohio Board of Regents or any other person with the knowledge or expertise able to swear or affirm that Wenninger did not possess the educational qualification to seek and become sheriff in election year 2000. Despite Varnau's position that there is no evidence in the record that Wenninger met the educational requirement of the qualifying statute (See, *Varnau Brief, p. 10*), there are in this record the affidavits of Spievack (the owner of TTI during Wenninger's matriculation) and Callender (a lawyer and then member of the Ohio House of Representatives and, during the time period pertinent to this case, an *ex officio* member of the Ohio Board of Regents), which are independent of the action of the BCBE and wholly support the finding that Wenninger had met the statutory educational requirement when he was placed on the ballot in 2000 (and thereafter 2004 and 2008). These affidavits independently establish the fact that Wenninger's post secondary education was sufficient to qualify him to run for and hold the office of sheriff.

In his brief (at p.7), Varnau also makes much ado that there is nothing in the record to affirmatively prove that the BCBE investigated Wenninger's educational and other qualifications to run for and hold the office of sheriff. This Court has held that a board of elections, as a quasi-judicial and deliberative body, has no obligation to deliberate or otherwise undertake evaluations and resolve justiciable disputes in a public setting. *Ross, supra*, (at ¶ 25, *et seq.*). Likewise, a public body is presumed to have conducted the business required of it. *Flech v. Hodgman, supra*. Varnau, as the office seeker in this action, must prove that either the BCBE did not review Wenninger's qualifications or that Wenninger is not qualified to hold the office. *State ex rel. Corrigan v. Haberek*

(1988), 35 Ohio St.3d 150. Varnau has the affirmative duty to establish that the BCBE wrongfully certified Wenninger as a candidate or that Wenninger is otherwise unqualified. Wenninger does not have to prove that that BCBE did its job in assessing his qualification for office. Further, contrary to Varnau's assertion in his brief (at p. 9) that there is no proof in the record that the BCBE undertook any investigation as to Wenninger's qualifications, the Appellate Decision noted (at ¶ 7 & 8):

In fact, following Varnau's unsuccessful protest of Wenninger's candidacy, the Board sent Varnau a letter dated May 9, 2008 that states, in pertinent part, the following:

"The Board further believes that it has been put on notice that the qualifications of Dwayne Wenninger have been challenged under [R.C.] 311.01, *Stare decisis* and the Board of Elections is tasked with the determination of the sheriff's qualifications and this Board by necessity will conduct an independent investigation into Dwayne Wenninger's qualifications to run for the office of county sheriff." (sic)

The use of the term *stare decisis* by the BCBE wholly refutes Varnau's position. *Black's Law Dictionary (5th Ed.)* defines *stare decisis* as follows: "to abide by, or adhere to, decided cases. Policy of courts to stand by precedent and to not disturb a settled point". The use of the term *stare decisis* connotes that the BCBE had reviewed Wenninger's qualifications prior to 2008. Consistent with its correspondence, the BCBE did so again in 2008, thereafter placing Wenninger's name on the ballot.

In summary, Wenninger, through his affidavit and the affidavits of Spievack and Callender, carried his burden as to summary judgment (with or without) a presumption that the BCBE certified his qualification to run for and hold the office of sheriff. Varnau did not produce any evidentiary material as required and set forth in Civ. R. 56(C) to create a genuine issue of material fact so as to establish that Wenninger is a usurper to the office of sheriff.

PROPOSITION OF LAW NO. II

A board of elections' placing a candidate on a ballot does not establish the candidate's legal qualifications for the office that is binding in a later action in *quo warranto* to challenge the candidate's legal qualifications to hold the office.

Wenninger notes that, should this Court, in its *de novo* review of the record, determine that Wenninger is (and has always been) a properly qualified candidate and otherwise legally holds the office of sheriff, Varnau's second proposition of law is moot. Wenninger also notes that a board of elections acts in a quasi-judicial capacity and, as such, finds facts. *Ross, supra*, at ¶ 15, 25, et seq.

A. Actions by a board of elections outside of a protest hearing have no preclusive effect on later challenges to the elected official.

Wenninger has difficulty following Varnau's position that Varnau has somehow been precluded from factual development in this *quo warranto* action. The question that should be presented is: In this *quo warranto* action, was Varnau denied the opportunity to develop facts so as to support or prove his position? The answer is: No.

This case is replete with the voluminous discovery that Varnau undertook. Each time that Varnau sought additional time from the Appellate Court (for whatever reason), he was given additional time to seek discovery and otherwise develop facts that he believed supported his position. Varnau could have taken any deposition that he desired, whether that be the deposition of current or former members of the BCBE, voters, members of the Board of Regents, Affiants Spievack or Callender or taken any other act to establish facts to support his claim that Wenninger is not qualified to hold the office of sheriff. For whatever reason, Varnau simply chose not to go behind the certificates of candidacy or election certificates of Wenninger. Perhaps the bottom line is that Varnau explored these various avenues and realized that they were dead ends. In any event, Varnau had the opportunity to go behind the action of the BCBE and chose not to do so. He can not now complain that the actions of the BCBE had any preclusive effect on his development of facts in this case.

B. *Quo Warranto* is the exclusive procedure to challenge an elected officeholder's qualifications and right to the office and is independent of any action by any board of elections

Though Varnau accurately states that *quo warranto* is the exclusive remedy by which title to office may be contested, it is not the exclusive manner to challenge the qualification to run for and, if elected thereafter, take and hold office.

There is no dispute that Wenninger has won every election in which he was a candidate for sheriff and has held the office of sheriff since 2001. Varnau concedes this point in his brief. *Varnau Brief*, statement of facts, p.1. Once Wenninger was in office, as it is oft stated, the loser (Varnau) may, (in appropriate circumstances) seek the remedy of an election contest. *State ex rel. Grisell v. Marlow* (1864), 15 Ohio St. 114 (*Grisell*). A synopsis of the facts of *Grisell* follow.

The relator, Grisell, was the attorney for Ingerson who ran against Marlow with each seeking to be elected sheriff of Wyandot County. After the election, the election officials certified Marlow as having won election and Marlow obtained his commission and assumed the office of sheriff. Grisell, on behalf of Ingerson, commenced a *quo warranto* action alleging that the election officials illegally or improperly certified Marlow as the victor in the election as Ingerson had obtained the majority of the votes. This Court (p. 136, 137) rejected Ingerson's petition in *quo warranto* noting that if Marlow was eligible to become sheriff, Ingerson's remedy was an election contest under the statutes as they then existed. Certainly, the case turns, in part, on the supposition that Marlow was eligible to become sheriff. However, the case clearly stands for the proposition that where a statutory mode for contesting an election is available, that mode is the exclusive remedy. *Grisell*, sole syllabus. This proposition is important as it dovetails with other holdings of this Court that have consistently held that where a remedy is available under the election statutes, the statutory remedy should be pursued.

The vehicle for contesting a candidate's qualifications is a protest. *State ex rel. Portis v. Summit Cty. Bd. Of Elections* (1993), 67 Ohio St.3d 590. Varnau did attempt to protest Wenninger's

qualifications and was rebuffed as he lacked standing. *Varnau's statement of facts, p. 2, et seq.* In fact, Varnau's inability to protest Wenninger's candidacy is argued in his third proposition of law and will be addressed therein. Varnau has availed himself of his opportunity to seek *quo warranto*, a remedy that stands on at least an equal basis to the (statutory) election protest.

Though *quo warranto* is available to contest the title to office, it is not, as Varnau states in his proposition, the only way to challenge a candidate's qualifications.

PROPOSITION OF LAW III

Allowing action by a board of elections in placing a candidate on a ballot to preclude a candidate who had no right to protest that action or to participate in a protest from challenging the officeholder's qualifications is unconstitutional.

Cut to the essence, Varnau posits that he was left without redress as a result of the inability to participate in the protest process established by R.C. 3513.05. Wenninger suggests that this issue is moot as Varnau commenced and continues to prosecute this *quo warranto* action, a quite obvious quest for redress. Wenninger will now address the substance of Varnau's proposition.

With decisional citations in support, Varnau states that R.C. 3513.05 violates his right to due process and right to redress under provisions of the U.S. and Ohio Constitutions. Wenninger can find no Ohio decisional law that addresses the precise issue: Is R.C. 3513.05 unconstitutional because it fails to provide an independent candidate with the right to protest the qualification of a party candidate? Though this Court has not addressed this precise issue, it has, on numerous occasions, undertaken analysis of similar claims.

This Court recently had the opportunity to decide right to redress and due process claims of unconstitutionality in the context of Ohio's intentional tort statutes. *Stetter v. R. J. Corman Derailment Srvs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029 (*Stetter*). Initially, the Court noted that it must interpret a statute consistent with the legislative purpose for enactment of the statute or the statutory scheme. *Stetter*, ¶23, *et seq.* The inquiry of the Court is guided by familiar and well established principles of constitutional adjudication including the strong presumption of constitutionality. *Stetter*, ¶32. The Court thereafter (*Stetter*, ¶40 *et seq.*) addresses certified

questions as whether the intentional tort statute violates the constitutional right to redress or right to a remedy provisions and (*Stetter*, ¶ 69, *et seq.*) whether the statute violates the constitutional provisions providing for the right to an open court and due process. Absent an impingement of a fundamental right, the review as to constitutionality is pursuant to a rational basis test.

There can be no real dispute that the right to vote is a fundamental right. However, how one becomes a candidate and the election process are creatures of statute. In enacting legislation with regard to the election process, a legislature is presumed to act within its constitutional authority despite some inequities resulting from their enactments. See, *Allied Stores of Ohio, Inc. v. Bowers* (1957), 393 U.S. 522, 79 S.Ct. 437, 3 L.Ed. 480. Absent invidious discrimination offensive to constitutional standards, State regulation of election procedures will not be disturbed. The legislative purpose of R.C. 3513.05 (and related statutes) is to prevent 'party raiding'. (*cit. om.*). *Lippitt v. Cippolone* (1971), 337 F. Supp. 1405 (N.D., Ohio, *aff'd* (1972), 404 U.S. 1032, *Lippitt*). The *Lippitt* court held portions of Ohio's election statutes (including the protest statute) to be constitutional under the First and Fourteenth Amendments of the U.S. Constitution. The *Lippitt* court also found that the stated purpose of the protest statute was to protect against party raiding, a matter that bears a real and substantial relationship to the public's general welfare. Given such, the protest statute passes constitutional muster.

Varnau, who is a law school graduate, chose to run for sheriff without party affiliation. By doing so, he made a conscious choice and should have known he would be unable to use the protest statute (R. C. 3513.05) to contest Wenninger's qualification(s). Varnau should not now be able to complain that the protest statute is unconstitutional.

Proposition of Law No. IV

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 that time was not accredited by the Ohio Board of Regents.

In this proposition of law and its related multiple part arguments, Varnau submits that, prior to becoming sheriff in 2000, Wenninger never possessed the educational qualification to be elected and hold the office of sheriff. If any part of this case is entitled to issue preclusion, *i.e.*, the matter has been decided, this aspect is.³

Varnau has exerted every effort to “unseal” (perhaps the term should be ‘open’) the sealed record in the matter of *State v. Wenninger*, Brown County Common Pleas Case No. 2002 2234. Throughout the multiple proceedings that Varnau has prosecuted or attempted to prosecute against Wenninger, Varnau has cited to *State v. Wenninger* (2003), 125 Ohio Misc.2d 55 (*Wenninger*). A review of *Wenninger* is warranted.

Wenninger was indicted for election falsification related to his first candidacy for sheriff. *Wenninger, supra*, ¶2. The State claimed that Wenninger did not have the requisite qualifications to hold office and that his candidacy was a falsification to the board of elections. The State contended that Wenninger did not qualify to become sheriff pursuant to the version of R.C. 311. (the qualification statute) then in effect and specifically alleged that Wenninger did not comply with R.C. 311.01(B)(9)(a) or (b) because he [under (a)] did not have the required supervisory experience or that [under (b)] Wenninger had not satisfactorily completed at least two years of post-secondary education or the equivalent semester or quarter hours in a college or university authorized to confer degrees by the Ohio Board of Regents. *Wenninger, supra*, ¶3. Wenninger had moved to dismiss the

³ Wenninger has argued that defenses at law and equity apply to matters in *quo warranto*. In fact, at page 5 and following of Wenninger’s brief as filed in the Court of Appeals on August 20, 2009, issue preclusion as a result of the application of the principles of *res judicata* or collateral estoppel is argued. Further, in a filing of June 24, 2010, Wenninger urges the matter of issue preclusion in his reply to supplemental authority filed by Varnau.

count of election falsification and offered various arguments in support of the motion. Specifically, Wenninger argued that he met the educational requirements of the qualification statute and appended the affidavit of Callender to his motion. *Wenninger, supra*, ¶4. Judge Ringland (now a member of the Twelfth District Court of Appeals and then sitting by assignment) overruled Wenninger's motion indicating "...this (whether Wenninger had met the educational requirements of the qualification statute) is an issue best left to the trier of fact". *Wenninger*, ¶5. As the reporter of opinions notes, on October 9, 2003, Wenninger was acquitted upon the count of election falsification. *Wenninger, supra, end note*. In *Wenninger*, the State of Ohio vigorously prosecuted the exact same theories that Varnau pursues. Wenninger's acquittal should have ended the inquiry.

Issue preclusion serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*(1998), 81 Ohio St.3d 392 (as cited at ¶6 et seq. in *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1127). A criminal action is brought in the name of the state for the benefit of the citizenry. The same is true of *quo warranto*. As such, Varnau is precluded from relitigating the issues related to Wenninger's qualification(s) to hold office as those qualifications were resolved in Wenninger's favor in *State v. Wenninger, supra*. Wenninger will, however, address Varnau's various positions under this proposition. Prior to doing so, Wenninger is compelled to address the issue of what materials are properly considered in ruling upon summary judgment.

In his argument(s), Varnau cites to numerous unsworn and uncertified documents. Contrary to Varnau's position, no objection need be made to these documents as they have no evidentiary value and may not be considered by a court in deciding whether a genuine issue of fact remains for trial. *Green v. B.F. Goodrich Co.* (1993), 85 Ohio App.3d 223. In this *de novo* review, in the event that it is necessary to move to strike references to unsworn, uncertified or unauthenticated materials, Wenninger now so moves. Materials submitted by Wenninger were certified (BCBE materials) or were in the form of sworn statements.

Varnau argues that Wenninger did not meet the educational requirements since his two year post-secondary diploma was not conferred by a school accredited by the Ohio Board of regents. This is a matter of law and is resolved by the affidavit of Callender. See, *Affidavit of Callender and Statement of Facts, supra*.

Varnau next argues that Wenninger's post-secondary education did not comply with the qualification statute in that it was of insufficient hours or years. Whether this issue is deemed a matter of law or mixed law and fact, the issue is resolved by the unrebutted affidavits of Callender and Spievack. The essence of Varnau's argument is that one who completes a two year course in one year should be punished. If such is true, an absurd result occurs.

To the extent that Varnau suggests that, under the qualification statute, the role of a common pleas judge is ministerial, Wenninger agrees. However, contrary to Varnau's position, Wenninger has always met the requirements of the qualification statute and legally holds the office of sheriff.

Lastly, Varnau argues that Wenninger should be ousted from office. Wenninger, of course, has always been qualified to hold the office of sheriff and Varnau has not proven to the contrary.

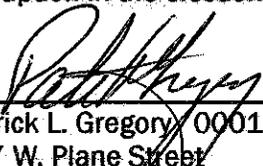
Proposition of Law No. V

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

In this proposition, Varnau takes a 'connect the dots' position: if Varnau's basic premise is correct, that is, that Wenninger was not qualified to be elected and hold the office of sheriff in 2000, then Wenninger had a break in service as a law enforcement officer and he could not be elected and hold the office of sheriff in the subsequent elections. If Varnau has failed in his basic premise, then this proposition is moot.

CONCLUSION

The Appellate Court properly granted summary judgment to Wenninger as Varnau did not produce facts that would allow that Court (or this Court) to decree the writ in quo warranto that he seeks. All issues related to Wenninger's qualifications to run for and hold the office of sheriff were long ago resolved by some of the same electors in *State v. Wenninger, supra*. Varnau's requested writ should be denied and he should be assessed all costs. *State ex rel. Janson v. Eschliman* (1926), 115 Ohio St. 509. This Court has long held that the will of the voters is to be upheld absent fraud or corruption in the election process.



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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served upon Thomas G. Eagle, 3386 N. State Rt. 123, Lebanon, Ohio 45036 by ordinary mail, postage prepaid on December 17, 2010.



CHAPTER 311: SHERIFF

§ 311.01 Qualifications for sheriff; basic training course; continuing education.

(A) A sheriff shall be elected quadrennially in each county. A sheriff shall hold office for a term of four years, beginning on the first Monday of January next after the sheriff's election.

(B) Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

(1) The person is a citizen of the United States.

(2) The person has been a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date.

(3) The person has the qualifications of an elector as specified in section 3503.01 of the Revised Code and has complied with all applicable election laws.

(4) The person has been awarded a high school diploma or a certificate of high school equivalence issued for achievement of specified minimum scores on the general educational development test of the American council on education.

(5) The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state.

(6) The person has been fingerprinted and has been the subject of a search of local, state, and national fingerprint files to disclose any criminal record. Such fingerprints shall be taken under the direction of the administrative judge of the court of common pleas who, prior to the applicable qualification date, shall notify the board of elections, board of county commissioners, or county central committee of the proper political party, as applicable, of the judge's findings.

(7) The person has prepared a complete history of the person's places of residence for a period of six years immediately preceding the qualification date and a complete history of the person's places of employment for a period of six years immediately preceding the qualification date, indicating the name and address of each employer and the period of time employed by that employer. The residence and employment histories shall be filed with the administrative judge of the court of common pleas of the county, who shall forward them with the findings under division (B)(6) of this section to the appropriate board of elections, board of county commissioners, or county central committee of the proper political party prior to the applicable qualification date.

(8) The person meets at least one of the following conditions:

(a) Has obtained or held, within the four-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued

by the Ohio peace officer training commission or has been issued a certificate of training pursuant to section 5503.05 of the Revised Code, and, within the four-year period ending immediately prior to the qualification date, has been employed as an appointee pursuant to section 5503.01 of the Revised Code or as a full-time peace officer as defined in section 109.71 of the Revised Code performing duties related to the enforcement of statutes, ordinances, or codes;

(b) Has obtained or held, within the three-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission and has been employed for at least the last three years prior to the qualification date as a full-time law enforcement officer, as defined in division (A)(11) of section 2901.01 of the Revised Code, performing duties related to the enforcement of statutes, ordinances, or codes.

(9) The person meets at least one of the following conditions:

(a) Has at least two years of supervisory experience as a peace officer at the rank of corporal or above, or has been appointed pursuant to section 5503.01 of the Revised Code and served at the rank of sergeant or above, in the five-year period ending immediately prior to the qualification date;

(b) Has 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.

(C) Persons who meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, may take all actions otherwise necessary to comply with division (B) of this section. If, on the applicable qualification date, no person has met all the requirements of division (B) of this section, then persons who have complied with and meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, shall be considered qualified candidates under division (B) of this section.

(D) Newly elected sheriffs shall attend a basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code. A newly elected sheriff shall complete not less than two weeks of this course before the first Monday in January next after the sheriff's election. While attending the basic training course, a newly elected sheriff may, with the approval of the board of county commissioners, receive compensation, paid for from funds established by the sheriff's county for this purpose, in the same manner and amounts as if carrying out the powers and duties of the office of sheriff.

Appointed sheriffs shall attend the first basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code within six months following the date of appointment or election to the office of sheriff. While attending the basic training course, appointed sheriffs shall receive regular compensation in the same manner and amounts as if carrying out their regular powers and duties.

Five days of instruction at the basic training course shall be considered equal to one week of work. The costs of conducting the basic training course and the costs of meals, lodging, and travel of appointed and newly elected sheriffs attending the course shall be paid from state funds appropriated to the commission for this purpose.

(E) In each calendar year, each sheriff shall attend and successfully complete at least sixteen hours of continuing education approved under division (B) of section 109.80 of the Revised Code. A sheriff who receives a waiver of the continuing education requirement from the commission under division (C) of section 109.80 of the Revised Code because of medical disability or for other good cause shall complete the requirement at the earliest time after the disability or cause terminates.

(F)(1) Each person who is a candidate for election to or who is under consideration for appointment to the office of sheriff shall swear before the administrative judge of the court of common pleas as to the truth of any information the person provides to verify the person's qualifications for the office. A person who violates this requirement is guilty of falsification under section 2921.13 of the Revised Code.

(2) Each board of elections shall certify whether or not a candidate for the office of sheriff who has filed a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate meets the qualifications specified in divisions (B) and (C) of this section.

(G) The office of a sheriff who is required to comply with division (D) or (E) of this section and who fails to successfully complete the courses pursuant to those divisions is hereby deemed to be vacant.

(H) As used in this section:

(1) "Qualification date" means the last day on which a candidate for the office of sheriff can file a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate, as applicable, in the case of a primary election for the office of sheriff, the last day on which a person may be appointed to fill a vacancy in a party nomination for the office of sheriff under Chapter 3513, of the Revised Code, in the case of a vacancy in the office of sheriff; or a date thirty days after the day on which a vacancy in the office of sheriff occurs, in the case of an appointment to such a vacancy under section 305.02 of the Revised Code.

(2) "Newly elected sheriff" means a person who did not hold the office of sheriff of a county on the date the person was elected sheriff of that county.

HISTORY: RS § 1202; S&C 1403; 55 v. 150; 93 v. 351; CC § 2823; 116 v. P.H. 184; Bureau of Code Revision, 10-1-53; 141 v. H 683 (Eff 3-11-87); 146 v. S 2 (Eff 7-1-96); 146 v. H 670 (Eff 12-2-96); 146 v. H 351 (Eff 1-14-97); 148 v. H 283. Eff 9-29-99.

The effective date is set by section 162 of HB 283.