

SUPREME COURT OF OHIO

STATE EX REL. GARY D. ZEIGLER,
STARK COUNTY TREASURER

CASE NO. 10-1570

Relator

vs.

ALEXANDER A. ZUMBAR

Respondent

ORIGINAL ACTION IN *QUO*
WARRANTO

* * * *

REPLY BRIEF OF RELATOR GARY D. ZEIGLER

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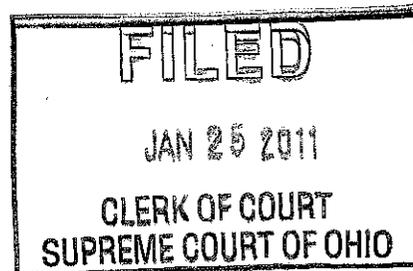


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I. LAW AND ARGUMENT

A. **R.C. 321.38 Cannot Survive a Facial Constitutional Challenge.**

Article II, Section 38 of the Ohio State Constitution addresses removal from office and provides as follows:

Laws shall be passed providing for the prompt removal from office, *upon complaint and hearing*, of all officers, including state officers, judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment and other methods of removal authorized by the Constitution.

Art. II, Section 38 (emphasis added).

R.C. 321.38, which presents the sole issue in this case, provides in its entirety:

Immediately on the institution of the suit mentioned in section 321.37 of the Revised Code, the board of county commissioners *may remove such county treasurer and appoint some person to fill the vacancy created.* The person so appointed shall give bond and take the oath of office prescribed for treasurers.

R.C. 321.38 (emphasis added).

It is simply impossible to read R.C. 321.38 and find it compatible with the constitutional mandates of Article II, Section 38 of the Ohio Constitution, as no language in R.C. 321.38 even suggests that the constitutionally mandated complaint and hearing are required. A statute must be declared unconstitutional where it appears “beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at syllabus. Such is the case here.

1. Subsequent Actions Cannot Remedy a Statute's Constitutional Deficiencies.

Respondent's suggestion that actions can remedy a statute's facial constitutional deficiencies is wholly without merit.¹ Respondent cites *American Power & Light Co. v. S.E.C.* (1946), 329 U.S. 90 and *Cleveland Bd. of Education v. Loudermill* (1985), 470 U.S. 532 for the proposition that a party's actions surrounding the application of the statute should be considered when addressing the statute's constitutionality. Respondent's Brief at pp. 6-7. It is important to remember that Relator has made a facial constitutional challenge. Thus, as this Court has explained, "only the test of the statute itself may be considered when evaluating a 'facial' challenge." *Global Knowledge Training, LLC v. Levin* (2010), 2010-Ohio-4411, citing *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 231. However, since Respondent raised the issue of subsequent actions, Relator will address the arguments allegedly supported by *American Power* and *Loudermill*.

In both *American Power* and *Loudermill* the statutes at issue contained some provision for a complaint setting forth the matter to be addressed at the hearing. *American Power*, 329 U.S. 90; *Loudermill* 470 U.S. 532. In those cases, the issue addressed was whether the mandated complaint and hearing was carried out in a procedurally constitutional manner. To the contrary, here, absolutely no language in R.C. 321.38 requires or even suggests that a complaint for Relator's dismissal had to be issued or that a hearing regarding his dismissal had to be held.² Moreover, contrary to Respondent's contentions, under no set of circumstances is it

¹ This point has been addressed at length in Relator's Merit Brief (pp. 21-23); therefore, rather than restating those arguments herein, Relator will provide a summary and respectfully refers this Court to his Merit Brief for additional support.

² Respondent has repeatedly asserted that the word "may" in R.C. 321.38 indicates that a hearing was necessary. See Respondent's Brief at pp. 10-11. The word "may" in no way mandates or specifically permits that Relator be provided with an opportunity to be heard. The

constitutionally acceptable to construe the complaint to recoup funds filed under R.C. 321.37 as a “complaint” for the removal of Relator. In the Recoupment Action, the County Commissioners filed a complaint to recover money, not to remove Relator. Thus, even taking into account the subsequent actions of the County Commissioners, which is not appropriate in a facial challenge, no complaint satisfying the constitutional mandate was provided to Relator. There is simply no set of fact under which R.C. 321.38 can pass constitutional muster.

2. *Hoel v. Brown* Requires R.C. 321.38 to be Found Unconstitutional.

Hoel v. Brown (1922), 105 Ohio St. 479 mandates a finding that R.C. 321.38 is unconstitutional. Regardless of changes made to the statutory scheme, the same deficiency found in the statute at issue in *Hoel* — namely failure to provide for and require a complaint and hearing for removal — is present in R.C. 321.38. The constitutionally fatal statutory flaw has not been remedied. As explained at length in Relator’s Merit Brief (pp. 9-14), it is condemnation followed by a penalty to allow the ousting of “*a man from public office by three men, servants of the people it is true, but hardly qualified to put out of office without a hearing a public official who has been put into office by the majority of votes of the sovereign people.*” *Id.* at 487 (emphasis added). This is consistent with a subsequent Ohio Attorney General Opinion surmising that under the provisions of Article II, Section 38, laws may be passed providing for the removal of a county officer only upon complaint and hearing, and *a statute providing for the summary removal of a county officer without a complaint and opportunity to be heard, would*

word "may" only suggests that removal is entirely within the discretion of the County Commissioners. By not specifically providing for the constitutional safeguards of complaint and hearing, R.C. 321.38 allows for a public official to be removed, without complying with constitutional mandates and allows for the removal of an elected public officer, upon the unchecked whim of the County Commissioners. The statute is irreconcilably in conflict with the Ohio Constitution.

be unconstitutional. 1928 OAG 2167. Thus, any statutory provision enacted subsequent to the enactment of Article II, Section 38, which fails to provide for complaint and hearing is unconstitutional on its face.³

Moreover, *Stebbins v. Rhodes* (1978), 56 Ohio St.2d 239 does not change this analysis. In *Stebbins*, this Court found no constitutional error in a statute that allows removal of a gubernatorial appointee by his appointing officer. *Id.* It appears in *Stebbins* that this Court's determination was limited to the unique facts in that case. This Court stated "the power to remove is ordinarily concomitant of the power to appoint." *Id.* at 243. In addition, the appellant in *Stebbins* was removed ***only after cause was found to exist***, namely inefficiencies in office, neglect of duty in office, malfeasance, misfeasance and nonfeasance in office. *Id.* *Stebbins* should not be applied to the facts of the case at bar, where Relator: (1) ***did not*** engage in any wrongdoing; (2) ***did not*** consent to any subsequent attempts to cure the constitutional deficiencies of the enabling statute at issue; (3) was a duly elected official, rather than a political appointee; and (4) the authority that removed him did not have the concomitant power to do so.

B. Public Policy Requires A Finding That R.C. 321.38 Is Unconstitutional.

It is important to remember that "Ohio law disfavors the removal of duly elected officials" and as such ***elected officials should not be removed from office absent substantial reason and the conclusion that their continued presence harms the public welfare.*** *In re Removal of Sites et al.* (2006), 2006-Ohio-6996 (internal citations omitted). R.C. 321.38 does not require any of these safeguards. In fact, here, Relator was specifically found to have engaged in no wrong, and committed no act of malfeasance.

³ In Respondent's Brief, historical information regarding R.C. 321.38 is provided. Respondent's Brief at pp. 9-10. Similar information is likewise provided in Relator's Merit Brief and the Court is respectfully referred thereto. See, Relator's Merit Brief at 10-14.

From a public policy standpoint, R.C. 321.38's use to remove Relator is particularly troubling. R.C. 321.38 does not contemplate the finding of cause for removal, nor does it require any finding by county commissioners whatsoever. Unlike the removal procedure in *Stebbins*, R.C. 321.38 does not require any finding of wrongdoing. Despite Respondent's latest assertion that Relator "lost" taxpayer money, the facts establish and Respondent acknowledges that Relator did not engage in any wrongdoing, but rather, was, like the other citizens of Stark County, a victim of the thefts committed by Vincent Frustaci. Respondent's own resolution removing Relator specifically removes Relator from office despite recognizing that he "committed no crime or malfeasance." (See JT Stip. Ex. G-2).

If R.C. 321.38 passes constitutional muster, once a suit is filed to recover money, the County Commissioners have complete and unchecked discretion to remove a public official, *even without cause*. The dangerous and damaging effect of this unconstitutional statute is clear as here, *the County Commissioners removed an official they found to have committed no wrong or act of malfeasance*. Such an act is not consistent with the public policy of this State that public officers should be removed only when their continued presence represents harm to the citizenry.

C. A Writ of Quo Warranto is an Appropriate Remedy for Relator.

Respondent's argument that the present action in quo warranto cannot lie is wholly without merit. This argument was already addressed by this Court in its December 1, 2010 Order denying Respondent's Motion for Judgment on the Pleadings. In his Merit Brief, Respondent again raises the same previously asserted arguments. Respondent contends that Relator has other available remedies; therefore, this present action in quo warranto should be

dismissed. In making this argument, Respondent misapplies the cited cases and overlooks the recognized futility exception to the doctrine of exhaustion of administrative remedies.

In *State ex rel. Jackson v. Allen* (1992), 65 Ohio St.3d 37, the first case cited by Respondent, this Court dismissed a quo warranto action finding that a defendant was trying to quash an indictment by way of a quo warranto action. This Court noted that the remedy sought by the defendant in his appeal of the trial court's denial of his motion to dismiss the indictment was the same as that sought by means of the quo warranto — i.e. that the special prosecutor filing the indictment was improperly holding office; therefore, the indictment was improper and had to be dismissed.

Here, Relator acknowledges that he appealed the trial court's ruling in the Declaratory Judgment Action. It is worth noting that the Court of Appeals stayed that action pending this Court's ruling in this matter. However, even if the Court of Appeals were to find that the challenged statute (R.C. 321.38) is unconstitutional, that court cannot reinstate Relator to office. Moreover, had Relator not appealed the same, Respondent would be contending that the trial court's decision was binding, as the same would not have been appealed. While the constitutionality of R.C. 321.38 is implicated both here and in the appeal of the Declaratory Judgment Action, the available remedies differ. Furthermore, even caselaw cited by Respondent recognizes that in order to defeat a quo warranto action, there must be an alternative “adequate remedy in the ordinary course of law.” *State ex rel. Fogel v. Carlisle* (2003), 2003-Ohio-2460 (emphasis added).

Any appeal of the County Commissioners' removal of Respondent to the Stark County Court of Common Pleas would have undoubtedly been assigned to Judge Inderlied — the same judge whose ruling on the constitutionality of R.C. 321.38 allowed the County

Commissioners to go forward with their meeting and remove Relator. Appealing to the Court of Common Pleas would have been an act of pure futility. Such futility is one the recognized exceptions to the rule that administrative remedies must be exhausted. “First, if there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required.” *Karches v. City of Cincinnati* (1988), 38 Ohio St.3d 12 (emphasis added), citing *Glover v. St. Louis-San Francisco Ry. Co.* (1969), 393 U.S. 324, 89 S. Ct. 548, 21 L.Ed.2d 519, *MacDonald, Summer & Frates v. Yolo Cty.* (1986), 477 U.S. 340, at 352, fn. 8, 106 S.Ct. at 2568, fn. 8, and 358-359, 106 S.Ct at 2573 (White, J., dissenting).⁴

Similarly, Respondents reliance on *State ex rel. Meachum v. Preston* (1932), 126 Ohio St. 1 and *Mobil Oil Corp. v. City of Rocky River* (1974), 38 Ohio St.2d 23 is misguided. In *Meachum*, this Court held that a decree in an injunction suit (which was not appealed and not reversed) that resulted in the ouster of officers, was res judicata in a quo warranto proceeding to restore the ousted officers. *Meachum*, 126 Ohio St. at 8. In that case, the ousting of the officers occurred through court proceedings, in which the ousted officers appeared and submitted to the Court’s jurisdiction. *Id.* Here, there is an ongoing appeal of the trial court’s Order in the Declaratory Judgment Action⁵ (which paved the way for Relator’s ouster); therefore, unlike in *Meachum*, there is no final order in full force and effect. Moreover, here, Relator was ousted

⁴ In the interest of brevity, Relator will not reiterate verbatim the arguments on these points raised in his Brief in Opposition to Respondent’s Motion for Judgment on the Pleadings, but rather respectfully refers the Court to that document and incorporates the same by reference herein. See Relator’s Brief in Opposition to Respondent’s Motion for Judgment on the Pleadings at pp. 8-20.

⁵ Again, it is important to recognize that while the Court of Appeals could reverse the trial court and find R.C. 321.38 is unconstitutional, such a ruling cannot provide Relator with the relief available to him via this quo warranto action.

from office by the County Commissioners, not the Court. The removal was accomplished by way of an unconstitutional action by the County Commissioners in which Relator did not participate, nor submit to jurisdiction. Thus, *Meachum* is inapplicable.

Respondent's reliance on *Mobil Oil Corp. v. City of Rocky River* (1974), 38 Ohio St.2d 23 is likewise misplaced. In *Mobil Oil Corp.*, this Court found that it is not fatal to an appeal that the constitutional claim was not initially argued before the administrative officer or board, *for the issue of constitutionality can never be administratively determined.* *Id.* at 26. The issue of constitutionality could never be adjudicated by the County Commissioners, yet is central to this action in quo warranto. As a determination of the constitutionality of R.C. 321.38 is an absolute necessity in this action, was never addressed and could not be addressed by the County Commissioners, and as explained above, any attempt to appeal the County Commissioners' decision to the Stark County Court of Common Pleas would have been an exercise in futility.

Boiled down to its simplest procedural terms, only an action in quo warranto can provide Relator with the remedy of returning him to his position as Stark County Treasurer and a determination on the merits of that action requires a ruling on the constitutionality of R.C. 321.38. Presently, this Court is properly in a position to address all of these questions.

D. The Appointment and/or Election of Individuals to Fill the Position of Stark County Treasurer Does not Defeat this Action.

It is somewhat unclear what argument Respondent is attempting to assert by raising the fact that three individuals have thus far filled Relator's unexpired term as Stark County Treasurer. It appears Respondent would like this Court to find that since three individuals have subsequently held the position, Relator is not entitled to be reinstated to the position of Stark County Treasurer — even if this Court finds that he was unconstitutionally

removed from that position. In making this argument, Respondent first states the proposition of law that an action in quo warranto is not timely where the sought-after term of office has expired. Respondent's Brief at p. 15. This argument and the case cited to support this proposition have no application here, as Relator's term would not have expired until September 2013. Respondent recognizes that he was "elected to the position of Stark County Treasurer for the unexpired term. . . ." Respondent's term has not expired. Accordingly, a quo warranto action is proper.

In addition, Respondent contends that simply because three individuals have held the position in the five months since Relator's unconstitutional removal from office, that fact somehow supersedes Relator's legal right to the office. If such were the case, a party could summarily defeat any quo warranto action by simply appointing and then replacing the individuals holding an office in rapid succession. This cannot possibly serve as a basis to defeat a quo warranto action for an unexpired term of office. Furthermore, Respondent argues that granting the writ of quo warranto would nullify the action of the electors of Stark County. Respondent's Brief at p. 15. *This point is interesting since that is exactly what the Stark County Board of Commissioners did when they removed Relator from office.* So apparently, Respondent believes it is acceptable to nullify the voice of the electors when the County Commissioners are acting with unchecked discretion, but not when ordered to do so after deliberation and consideration by this state's highest Court.

Respondent next contends that Relator "sought to stand on ceremony" while the position of Stark County Treasurer was filled by others. Respondent's Brief at p. 15. Respondent makes this argument by citing *State ex rel. Newell v. Jackson* (2008), 2008-Ohio-1965 (holding that a quo warranto action filed eight (8) months after an individual as appointed to the position of fire chief pursuant to Ohio's civil service statutes and the probationary period

for the appointed employee had expired). Here, *Jackson* is inapplicable as Respondent is not a civil service appointee and Relator pursued legal action to be reinstated to his position within days of being removed from office. Relator appealed the trial court's order in the Declaratory Judgment Action on August 27, 2010 (four days after the trial court's order) and filed the present quo warranto action on September 7, 2010 (a mere fifteen days after Relator's removal from office). Relator has vigorously pursued both this action and the appeal ever since.

Finally, during the pendency of this action, Civ. R. 25(D)(1) provides that any individual who holds the office of Stark County Treasurer is automatically substituted as Respondent. Here, this has occurred without argument or opposition from Respondent. Thus, it is disingenuous and without merit for Respondent to now claim that his subsequent election to the office of Stark County Treasurer renders this action moot.

II. CONCLUSION

For the foregoing reasons and any reasons asserted at any hearing or argument on this matter, Relator Gary D. Zeigler respectfully requests that the Court grant the requested writ of quo warranto.

Respectfully submitted,



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