

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE *ex rel.*,)
 PAUL CALVARUSO,)
et al.,)
)
 Relators,)
)
 v.)
)
 CHARLES BROWN)
 Akron Police Department)
 217 South High Street)
 Akron, Ohio 44308,)
)
 Respondent.)

CASE NO: 13-0280

MEMORANDUM IN SUPPORT OF WRIT OF QUO WARRANTO

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I. STATEMENT OF THE CASE

The instant case is an original action for Writ of Quo Warranto brought under the Ohio Constitution Article IV, Section 2(B)(1)(a) and Ohio Revised Code Chapter 2733 by Relators Paul Calvaruso, Elizabeth A. Daugherty, Michael G. Prebonick, Martha L. Sullivan, Sylvia D. Trundle and Daniel D. Zampelli.

Relators bring the instant suit in order to oust Mr. Charles Brown, an Assistant to the Mayor, from the position of Acting Police Chief and from his position as *de facto* Police Deputy Chief. As an unclassified, unsworn employee, Mr. Brown may not lawfully hold the office of Acting Police Chief or perform the duties of the Police Deputy Chief. Under the Akron City Charter, Section 105, anyone holding the position of Police Chief or Police Deputy Chief must be a classified civil servant. According to Akron Municipal Ordinance 409-2012 and Mr. Brown's job description, Assistant to the Mayor is as an unclassified civilian position. In order to serve in the capacity of Acting Police Chief or in the position of Deputy Chief, Mr. Brown must be a classified civil servant under the City's Charter. Further, Mr. Brown's service as an unclassified civil servant with the duties of a sworn police officer and his assignment to serve as a part of the Police Department Chain of Command are contrary to law.

Relators are all classified civil servants who possess all of the necessary qualifications for the position of Acting Police Chief, and are all currently employed as Police Captains in the Akron Police Department. Indeed, Captains have regularly served as Acting Police Chief. Therefore, Relators respectfully request this Court issue an order ousting Mr. Brown from the position of Acting Police Chief of the Akron Police Department; ousting Mr. Brown from the position of *de facto* Deputy Police Chief of the Akron Police Department; prohibiting Mr. Brown

from acting as a *de facto* Deputy Chief; prohibiting Mr. Brown from issuing orders in derogation of the rank structure of the Police Department; and, declaring that the Relators are entitled to be considered for the position of Acting Chief.

II. STATEMENT OF THE FACTS

A. MR. BROWN IS AN UNCLASSIFIED CIVIL SERVANT

Sections 67 and 68 of the City's Charter establish a Department of Public Safety and a Division of Police, respectively. (Ex. A, p.1-2).¹ Pursuant to Section 68, "[t]he police force shall consist of a Chief of Police and such officers and employees as may be provided for by City Council." (Ex. A, p. 2). The Chief of the Division of Police

shall be in immediate charge of said Division, shall have jurisdiction over the Police Station and any substation which may be hereafter established, and shall have control over the stationing and transfer of all patrolmen and other employees constituting the Division of Police, under such rules and regulations as the Mayor may prescribe.

(Ex. A, p.2). Section 105 of the City Charter divides all positions into the unclassified and classified service as follows:

- (1) The unclassified service shall include:
 - (a) All officers elected by the people.
 - (b) The Director and Deputy Directors of the Department of Public Service.
 - (c) The Director and Deputy Directors of Finance.
 - (d) The Director of Law, the Deputy Directors of Law and the Assistant Directors of Law.
 - (e) The Director and Deputy Directors of Planning and Urban Development appointed after November 15, 1990.
 - (f) The members of all appointed boards or commissions, and advisory boards.

¹ Exhibits and Affidavits in support of the instant complaint are attached to the pleading titled "Exhibits for Relators' Original Complaint for Writ of Quo Warranto and Relators' Memorandum in Support of Writ of Quo Warranto" and incorporated herein.

- (g) The Secretaries and assistants to the Mayor.
- (h) The Deputies to the Mayor.
- (2) The classified service shall comprise all positions not specifically included by this Charter in the unclassified service.

(Ex. A, p.3).

City Ordinance 409-2012 is an enabling ordinance that creates, establishes, and reorganizes all departments, offices, bureaus, divisions and positions in the classified service of the City. (Ex. B, p.1). The classified ranking positions within the Division of Police consist of the following: Police Chief, Police Deputy Chief, Police Captain, Police Lieutenant, Police Sergeant, Police Officer. (Ex. B, p. 28-29). All other positions with the Division of Police are civilian (non-sworn) positions. No “assistant police chief” position exists within the Division of Police either as a sworn classified officer or an unclassified civilian employee.

The City has provided Relators with a job description for an “Assistant Chief of Police.” It is unknown where the job description came from, who wrote it, or how it was established. (Ex. E). The “job description” for Assistant Chief of Police requires the employee to assist the Police Chief with the supervision of all Police Department functions, including monitoring the operations of the Police Department and taking police action. (Ex. E). The “job description” expressly states that the Assistant Chief of Police is an unclassified position. (Ex. E).

On or about January 13, 2013, Police Lieutenant Charles Brown resigned from his position as a Police Lieutenant, a sworn civil service position within the Police Department and within the Chain of Command between the ranks of Police Captain and Police Sergeant. Immediately after Mr. Brown’s resignation, and pursuant to Section 105 of the City Charter, the Mayor of Akron appointed Mr. Brown to the unclassified civilian position titled Assistant to the Mayor. (See Aff. Calvaruso, ¶ 7; Aff. Daugherty, ¶ 7; Aff. Prebonick, ¶ 7; Aff. Sullivan, ¶ 7; Aff. Trundle, ¶ 7; Aff. Zampelli, ¶ 7). The City then began to identify Mr. Brown with the

working title “Assistant Chief of Police.” However, no such position exists either in the classified service or the unclassified service, in Akron. In addition, there is no position known as the “Assistant Chief of Police” within the sworn ranks of the Division of Police. (See Aff. Calvaruso, ¶ 8; Aff. Daugherty, ¶ 8; Aff. Prebonick, ¶ 8; Aff. Sullivan, ¶ 8; Aff. Trundle, ¶ 8; Aff. Zampelli, ¶ 8).

Mr. Brown serves the City as an unclassified civilian Assistant to the Mayor. Mr. Brown is not a classified civil servant of the City of Akron and is not a sworn police officer within the Chain of Command.

B. RELATORS—NOT MR. BROWN—MAY LAWFULLY SERVE AS ACTING POLICE CHIEF AND WITHIN THE CHAIN OF COMMAND

Akron’s Police Department Rules and Regulations (“Police Department Rules”) define several terms relevant to the instant proceedings. Police Department Rule 2.01 defines “Chain of Command” as the “unbroken line of authority from the Chief of Police downward through a single subordinate at each level of command to the level of execution.” (Ex. C, p.1). Police Department Rule 3.13 defines “Rank” as the order of positions in the job classifications of the Police Division with the following titles: Chief of Police, Deputy Chief of Police/Major, Captain, Lieutenant, Sergeant, and Police Officer. (Ex. C, p.3). Police Department Rule 2.05 defines an “Order” as “an instruction or directive, either oral or written, given by an officer of higher rank to a subordinate.” (Ex. C, p.2). Police Department Rule 3.01 define the term “Acting” to identify any police officer who serves “temporarily in a position to which a member is not ordinarily assigned, usually in a position of higher rank. All the authority, responsibilities and duties of the position rest with the acting member.” (Ex. C, p.2).

Police Department Rule 500.13 provides that police officers may be subject to discipline for failing to obey lawful orders or deliberately refusing to obey lawful orders. (Ex. C, p.15). In other words, the “Chain of Command” in the Division of Police is clearly delineated to begin with the Chief and move down the ranks of the sworn civil service employees. The Chain of Command does not include “Assistant Chief of Police” or “Assistant to the Mayor.”

According to the Civil Service Job Description for the Police Deputy Chief, the Police Deputy Chief is responsible for “serving as the Acting Police Chief as assigned.” (Ex. D). Currently, the City does not have a Police Deputy Chief. As such, the highest ranking officers in the Divisions of Police, below the Chief, are the Police Captains. Pursuant to the Police Department Rules, the Captains are the only employees authorized to serve in the position of Acting Police Chief.

James Nice is currently the City’s Chief of Police and has held that position since on or about June 6, 2011. (See Aff. Calvaruso, ¶ 5; Aff. Daugherty, ¶ 5; Aff. Prebonick, ¶ 5; Aff. Sullivan, ¶ 5; Aff. Trundle, ¶ 5; Aff. Zampelli, ¶ 5). From on or about June 6, 2011 until on or about February 4, 2013, every time Chief Nice was absent, he would issue a Chief’s Directive to designate one of the Police Captains to be the Acting Chief of Police in his absence. Because there were no Deputy Chiefs in the Division of Police during this time, these Directives complied with the Division of Police Chain of Command. (See Aff. Calvaruso, ¶ 6; Aff. Daugherty, ¶ 6; Aff. Prebonick, ¶ 6; Aff. Sullivan, ¶ 6; Aff. Trundle, ¶ 6; Aff. Zampelli, ¶ 6).

The Division of Police always has a seniority list of all sworn officers in the Police Department, in conformity with the Chain of Command. The seniority list is known as the “S-List”, and is modified as needed. All sworn officers in the Division of Police have a specific “S-Number” which identifies them within the Chain of Command. The civilian employees within

the Division of Police are never given S-Numbers and never listed in the S-List. However, unfilled sworn positions are included in the S-List, without names. (See Aff. Calvaruso, ¶ 9; Aff. Daugherty, ¶ 9; Aff. Prebonick, ¶ 9; Aff. Sullivan, ¶ 9; Aff. Trundle, ¶ 9; Aff. Zampelli, ¶ 9).

On January 17, 2013, the Division of Police issued a revised S-List. (Ex. F). Even though Mr. Brown was employed as a civilian employee in the unclassified position of Assistant to the Mayor, he was included in the new S-List under the title of Assistant Chief of Police with an S-Number of S-2. (Ex. F). This meant that Mr. Brown, as a civilian employee in the unclassified service, was placed within the Division of Police Chain of Command after the Police Chief and before the positions of Police Deputy Chief and Police Captain. (See Aff. Calvaruso, ¶ 10; Aff. Daugherty, ¶ 10; Aff. Prebonick, ¶ 10; Aff. Sullivan, ¶ 10; Aff. Trundle, ¶ 10; Aff. Zampelli, ¶ 10). On January 18, 2013, the attorney for the Fraternal Order of Police, Akron Lodge #7 sent a letter to the City's Director of Labor Relations, with a copy to the City's Law Director, objecting to the placement of Mr. Brown on the S-List and within the Police Chain of Command. (Ex. G). On January 22, 2013, the City issued a revised S-List. Mr. Brown was not listed on the revised S-List. (Ex. H).

However, since his appointment as Assistant to the Mayor, and even after January 22, 2013 when he was removed from the S-List, Mr. Brown has been working in the Division of Police and assuming the authority of a ranking sworn police officer, below the rank of Chief and above the ranks of Police Captain, Police Lieutenant, Police Sergeant, and Police Officer. This has created enormous disruption within Akron's Division of Police because it means that an unclassified civilian employee, who was hired as an Assistant to the Mayor, has been inserted within the Police Chain of Command. (See Aff. Calvaruso, ¶ 11; Aff. Daugherty, ¶ 11; Aff. Prebonick, ¶ 11; Aff. Sullivan, ¶ 11; Aff. Trundle, ¶ 11; Aff. Zampelli, ¶ 11).

On or about February 5, 2013, Police Chief Nice issued a Directive officially assigning Mr. Brown to be the Acting Chief of Police from 5:00 p.m. Monday, February 11, 2013 through 5:00 p.m. Friday, February 15, 2013. (Ex. I).

Mr. Brown cannot perform the duties of a sworn police officer allegedly within the Chain of Command. Further, Relators possess the necessary qualifications for the position of Acting Police Chief; Mr. Brown does not. (See Aff. Calvaruso, ¶ 12; Aff. Daugherty, ¶ 12; Aff. Prebonick, ¶ 12; Aff. Sullivan, ¶ 12; Aff. Trundle, ¶ 12; Aff. Zampelli, ¶ 12).

III. LAW AND ARGUMENT

A. WRIT OF QUO WARRANTO

A Writ of Quo Warranto is the appropriate remedy to oust Respondent, Charles Brown, from the office of Acting Chief of Police, from his position as *de facto* Deputy Police Chief and from any position within the Chain of Command of the City's Division of Police because he is not a classified civil servant and because he is a civilian.

Writs of Quo Warranto are governed by the Ohio Constitution and Revised Code Chapter 2733. The Ohio Supreme Court has original jurisdiction over Writs of Quo Warranto. Ohio Constitution, Article IV, Section 2(B)(1)(a). Pursuant to R.C. 2733.01:

A civil action in quo warranto may be brought in the name of the state:

(A) Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state.

R.C. 2733.06 states:

A person claiming to be entitled to a public office unlawfully held and exercised by another may bring an action therefor by himself or an attorney at law, upon giving security for costs.

Further, R.C. 2733.08 provides:

When an action in quo warranto is brought against a person for usurping an office, the petition shall set forth the name of the person claiming to be entitled to the office, with an averment of his right thereto. Judgment may be rendered upon the right of the defendant, and also on the right of the person averred to be so entitled, or only upon the right of the defendant, as justice requires.

A Writ of Quo Warranto is an extraordinary remedy, which will only be granted if there is no adequate remedy in the ordinary course of the law. *State ex rel. Deiter v. McGuire*, 119 Ohio St.3d 384, 2008-Ohio-4536, ¶ 19. In the instant matter, an action for declaratory and injunctive relief is not an adequate remedy at law because it does not result in the ouster of an office holder illegally holding his or her position. *Id.* at ¶ 19-20. This Court has recognized that “it is well settled that ‘quo warranto is the exclusive remedy by which one’s right to hold a public office may be litigated.’” *Id.* at ¶ 20 (quoting *State ex rel. Battin v. Bush*, 40 Ohio St.3d 236, 238-239, 533 N.E.2d 391 (1988)).

For a Writ of Quo Warranto to issue, “a relator must establish (1) that the office is being unlawfully held and exercised by respondent, and (2) that relator is entitled to the office.” *State ex rel. Varnau v. Wenninger*, 131 Ohio St. 3d 169, 2012-Ohio-224, 962 N.E.2d 790, ¶ 12; *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶ 23; *State ex rel. Newell v. Jackson*, 118 Ohio St. 3d 138, 2008-Ohio-1965, 886 N.E.2d 846, ¶ 6. However, even if a relator is unsuccessful in a claim for entitlement to a public office, “judgment may still be rendered on the issue of whether respondent lawfully holds the disputed office.” *Deiter* at ¶ 22; *State ex rel. Ethell v. Hendricks*, 165 Ohio St. 217, 226, 135 N.E.2d 362 (1956). As such, even if Relators are unsuccessful in their claim to serve as Acting Police Chief or to perform the duties of Deputy Police Chief, Mr. Brown may still be ousted from office.

Relators aver that Respondent, Charles Brown, does not have the legal right to hold the public office of Acting Police Chief² and unlawfully acts as the *de facto* Deputy Chief of Police. As such, Relators request the ouster of Mr. Brown from the position of Acting Police Chief and request the ouster of Mr. Brown from acting as the *de facto* Deputy Police Chief, as well as from any position in the Chain of Command of the Akron Police Department. Further, Relators claim entitlement to the office of Acting Police Chief and entitlement to perform the duties of the Deputy Police Chief.

1) Respondent Unlawfully holds the Office of Acting Police Chief

A municipality must comply with its own charter, ordinances and corresponding rules and regulations. In the instant matter, Mr. Brown's assignment as Acting Police Chief is directly adverse to the City's Charter and corresponding ordinances and civil service rules and regulations.

A City may not appoint an unclassified civil servant to a position required to be filled by a classified civil servant. *See Jonovich v. E. Cleveland*, 8th Dist. No. 88272, 2007-Ohio-1984, ¶14. In *Jonovich*, the plaintiffs successfully restrained the defendant city from appointing a non-classified employee to the position of fire chief. The Eighth District Court of Appeals affirmed a trial court's decision determining that the Mayor had no authority to appoint an unclassified, civilian civil servant to the classified fire chief position. The Mayor's actions were contrary to the requirements of that city's charter and codified ordinances. *Id.*

² This Court has explained "A chief of police occupies a 'public office' within the meaning of R.C. Chapter 2733 relative to quo warranto actions. *State ex rel. Hanley v. Roberts*, 17 Ohio St.3d 1, 4, fn 5, 476 N.E.2d 1019 (1985).

Akron's City Charter requires that the Chief of Police be a classified civil servant. (See Ex. A, p.3). Further, the City's Charter requires that "[t]he police force shall consist of a Chief of Police and such officers and employees as may be provided for by City Council." (Ex. A, p.2). In compliance with the City's Charter, City Ordinance 409-2012 establishes that the Division of Police consists of the following *classified* positions: Police Chief, Police Deputy Chief, Police Captain, Police Lieutenant, Police Sergeant, Police Officer. (Ex. B, p. 28-29). Pursuant to Ordinance 409-2012 and the City's Charter, Mr. Brown is not a member of the Police Department's classified service and is not a member of the classified civil service.

In fact, the City admits that Mr. Brown is employed as an unclassified civil servant. Mr. Brown's job description expressly states Mr. Brown serves in an "unclassified position." (Ex. E). Indeed, Mr. Brown resigned from his sworn Civil Service Position as a Police Lieutenant prior to his appointment to his current position.

Like the fire chief in *Jonovich*, Mr. Brown is an unclassified civilian civil servant unlawfully serving in a classified position. As such, Mr. Brown unlawfully holds the position of Acting Police Chief.

2) Respondent Unlawfully Acts as the de facto Deputy Police Chief

a. Respondent is the de facto Deputy Police Chief

The term "de facto" is defined as "having effect even though not formally or legally recognized." *Black's Law Dictionary* 427 (7th ed. 1999). Mr. Brown is the *de facto* Deputy Police Chief because 1) his job description matches the job description for Deputy Police Chief; 2) the City's actions show he has been assigned to perform the work of the Deputy Police Chief; and, 3) Mr. Brown is, in fact, performing the work of the Deputy Police Chief.

First, a comparison of job descriptions shows that Mr. Brown is the *de facto* Deputy Chief. The job description for the classified rank of Deputy Police Chief defines the position to include “assisting in the formulation of department policy” and directing “the activity of one or more subdivisions of the Akron Police Division.” (Ex. D). The characteristics of the Police Deputy Chief include assisting the Police Chief; assisting with the creation of goals objectives and departmental policies; working closely with the Mayor and City Council; representing the Police Chief at public and private functions; responding to emergencies and incidents as need; and, among other responsibilities, serving as Acting Police Chief. (Ex. D). When asked for Mr. Brown’s job description, the City provided a “Summary of Job Duties” for an “Assistant Chief of Police.” (Hlynsky Aff. ¶ 7; Ex. E). The title “Assistant Chief of Police” appears to be the City’s working title: no such position previously existed either in the classified service or the unclassified service, in the City of Akron. (See Aff. Calvaruso, ¶ 4; Aff. Daugherty, ¶ 4; Aff. Prebonick, ¶ 4; Aff. Sullivan, ¶ 4; Aff. Trundle, ¶ 4; Aff. Zampelli, ¶ 4). The job description states that Mr. Brown will “assist the Police Chief in the supervision and direction of all police functions.” (Ex. E). As if they were copied from the Deputy Police Chief job description, Mr. Brown’s duties include: assisting the Police Chief; developing policies to improve the Police Department; representing the Police Chief and City at public and private functions; and, among other responsibilities, taking police action. (Ex. E). Of course, Mr. Brown has also been assigned to serve as Acting Police Chief. (Ex. I). Clearly, Mr. Brown has been informally assigned to perform the duties of the Deputy Chief.

Second, the City’s actions provide clear evidence that Mr. Brown is in fact the *de facto* Deputy Chief. Of course, Mr. Brown has been assigned to serve as Acting Police Chief, (Ex. I), a duty of the Deputy Chief as described in the Deputy Chief’s job description. (Ex. D). In

addition, shortly after hiring Mr. Brown, the City revised its S-List, assigning Mr. Brown the rank of “S-2,” the rank reserved for Deputy Chiefs. (See Ex. H (noting there are four (4) authorized Deputy Chiefs which would be ranked S-2 through S-5)). S-2 is the second-highest rank in the Police Department—immediately below Chief Nice and above all other classified officers. Indeed, Mr. Brown was placed inside the Chain of Command after the Police Chief and before the positions of Police Deputy Chief and Police Captain. (See Aff. Calvaruso, ¶ 10; Aff. Daugherty, ¶ 10; Aff. Prebonick, ¶ 10; Aff. Sullivan, ¶ 10; Aff. Trundle, ¶ 10; Aff. Zampelli, ¶ 10). The modification of its S-List is evidence that the Mr. Brown has been assigned to the position of Deputy Chief.

Third, Relators’ personal knowledge shows that Mr. Brown is acting as *de facto* Police Deputy Chief. Relators state that since his appointment as Assistant to the Mayor, and even after January 22, 2013 when he was removed from the S-List, Mr. Brown has been working in the Division of Police and assuming the authority of a ranking sworn police officer, immediately below the rank of Police Chief. (See Aff. Calvaruso, ¶ 11; Aff. Daugherty, ¶ 11; Aff. Prebonick, ¶ 11; Aff. Sullivan, ¶ 11; Aff. Trundle, ¶ 11; Aff. Zampelli, ¶ 11). In fact, Mr. Brown’s insertion into the Chain of Command has created enormous disruption within the Akron Police Department because a civilian, unclassified service employee, who was hired as an Assistant to the Mayor, has been inserted within the Police Chain of Command. (See Aff. Calvaruso, ¶ 11; Aff. Daugherty, ¶ 11; Aff. Prebonick, ¶ 11; Aff. Sullivan, ¶ 11; Aff. Trundle, ¶ 11; Aff. Zampelli, ¶ 11).

Clearly, Mr. Brown acts as *de facto* Deputy Police Chief.

b. Mr. Brown Unlawfully Serves as *de facto* Police Deputy Chief

Mr. Brown cannot lawfully act as *de facto* Deputy Police Chief in his capacity as an unclassified civilian civil servant with the title “Assistant to the Mayor.” Because Mr. Brown is not a classified civil servant, he cannot legally serve as Deputy Police Chief. Akron’s City Charter requires that the Police Deputy Chief be a classified civil servant. (See Ex. A, p.3) As stated, Mr. Brown is an unclassified civilian civil servant unlawfully serving in a classified position. As such, Mr. Brown unlawfully holds the position of Police Deputy Chief.

Mr. Brown is an unclassified civilian position with the working title of “Assistant Chief” but the duties and responsibilities of the Deputy Chief. Mr. Brown’s actions as *de facto* Police Chief illegally circumvent the City’s Charter and related civil service rules. See *Local 330, Akron Firefighters Assn., AFL-CIO v. Romanoski*, 68 Ohio St. 3d 596, 629 N.E.2d 1044 (1994). In *Romanoski* this Court addressed whether the Akron City Charter authorized Akron’s Fire Chief to assign *classified* employees as acting officers in vacant promotional positions. *Id.* at 598. The City argued that the City’s civil service provisions were inapplicable because the fire chief only “assigned” officers to vacant positions and did not make “appointments” because no vacancies were actually filled. *Id.* at 601. This Court held that the City’s analysis misconstrued its municipal charter and circumvented the purpose and rules of the civil service commission. The City should have promoted qualified classified employees through its civil service commission rather than selecting classified officers to serve in an acting capacity in vacant classified positions because the purpose of Akron’s Civil Service Commission is to promote fair competition and ensure only qualified individuals serve in classified positions. *Id.* at 601-602.

In the instant matter, the City's actions are far more egregious than they were in *Romanoski*. In *Romanoski*, the City "assigned" *classified* civil servants to vacant positions. Here the City has unlawfully assigned Mr. Brown—an *unclassified* civilian—the duties and responsibilities of the Police Deputy Chief. Mr. Brown's assignment clearly circumvents Charter Section 105 which requires that the City's Deputy Police Chief be a member of the classified civil service.

The City clearly created the title "Assistant Chief of Police" in order to circumvent the City Charter and related Civil Service Rules. As such, Mr. Brown illegally serves as *de facto* Police Deputy Chief and must be ousted from his position.

3) Respondent Unlawfully holds a Position within the Chain of Command

Pursuant to the City Charter, the Police Chief has jurisdiction and control over all patrolmen and employees within the Division of Police. (Ex. A, p.2). Correspondingly, the Police Department Rules establish an "unbroken line of authority from the Chief of Police downward through a single subordinate at each level of command to the level of execution." (Ex. C, p.1). Police Department Rules include only the following ranks: Chief of Police, Deputy Chief of Police/Major, Captain, Lieutenant, Sergeant, and Police Officer. (Ex. C, p.3). As stated, in contravention of Police Department Rules, Mr. Brown has unlawfully inserted himself into the Chain of Command both as Acting Police Chief and as Police Deputy Chief. (See Aff. Calvaruso, ¶ 11; Aff. Daugherty, ¶ 11; Aff. Prebonick, ¶ 11; Aff. Sullivan, ¶ 11; Aff. Trundle, ¶ 11; Aff. Zampelli, ¶ 11). However, the Chain of Command does not include "Assistant Chief of Police" or "Assistant to the Mayor." As such, Mr. Brown cannot lawfully act within the Chain of Command.

In response to the Relators' Writ of Quo Warranto, it is expected that the City will argue Mr. Brown's assignment to serve within the Chain of Command as Acting Chief and as *de facto* Deputy Police Chief is not unlawful because Mr. Brown holds a police commission. Relators concede Mr. Brown recently resigned from his sworn position as a Police Lieutenant. (See Aff. Calvaruso, ¶ 7; Aff. Daugherty, ¶ 7; Aff. Prebonick, ¶ 7; Aff. Sullivan, ¶ 7; Aff. Trundle, ¶ 7; Aff. Zampelli, ¶ 7). However, this argument does not hold merit.

Mr. Brown's assignment to serve as Acting Police Chief and *de facto* Deputy Chief is not lawful merely because he was once a police officer and still maintains his police commission. It is as if the City assigned an Akron City Councilperson who is a recently retired police officer in the neighboring jurisdiction of Cuyahoga Falls to serve as Acting Police Chief and *de facto* Deputy Chief. Neither the councilperson nor Mr. Brown is a member of the Division of Police. Neither the councilperson nor Mr. Brown is a member of the City's classified civil service. Neither the councilperson nor Mr. Brown may lawfully exercise authority within the Chain of Command of the Division of Police. Both Mr. Brown and the councilperson would create an enormous disruption in the rank structure of the Police Department.

Mr. Brown—an unclassified civilian—unlawfully exercises authority within the Chain of Command of the Akron Police Department.

4) Relators are entitled to serve as Acting Police Chief and assume the duties of Deputy Police Chief

The City's charter requires that the Acting Police Chief and Police Deputy Chief both be classified civil servants. (See Ex. A, p.3). Relators—Captains Paul Calvaruso, Elizabeth A. Daugherty, Michael G. Prebonic, Martha L. Sullivan, Sylvia D. Trundle and Daniel D. Zampelli—are classified civil servants. As such, Relators may lawfully be assigned to serve as

Acting Chief and may lawfully be assigned the duties of the Deputy Chief. (*See* Aff. Calvaruso, ¶ 12; Aff. Daugherty, ¶ 12; Aff. Prebonick, ¶ 12; Aff. Sullivan, ¶ 12; Aff. Trundle, ¶ 12; Aff. Zampelli, ¶ 12).

The City's Charter requires that the Division of Police consist of officers and employees as provided for by City Council. (Ex. A, p.2). City Council has passed legislation establishing that the police force consists of the following positions: Police Chief, Police Deputy Chief, Police Captain, Police Lieutenant, Police Sergeant, Police Officer. (Ex. B, p. 28-29). Relators—Police Captains—are employees of the Division of Police and may serve as Acting Police Chief and execute the duties of Police Deputy Chief.

Serving as Acting Police Chief is part of the job description of Deputy Chief, a classified civil service position. (Ex. E). Of course, in the absence of a Deputy Chief, the City has regularly assigned Captains to serve as Acting Police Chief. (*See* Aff. Calvaruso, ¶ 6; Aff. Daugherty, ¶ 6; Aff. Prebonick, ¶ 6; Aff. Sullivan, ¶ 6; Aff. Trundle, ¶ 6; Aff. Zampelli, ¶ 6). The assignment of one Relator to the position of Acting Police Chief would comply with the Civil Service Rules and Regulations.

The Police Department Rules establish an unbroken line of authority from Police Chief through Police Officer. No civilians are included in the rank structure of the Division of Police. The assignment of one Relator to the position of Acting Police Chief does not break the rank structure of the Division of Police. If a Relator is assigned to the position of Acting Chief the integrity of the Chain of Command will be consistent and the operations of the Akron Division of Police will not be disrupted.

B. RELATORS' CLAIM IS NOT MOOT

In part, Relators request that this court 1) oust Mr. Brown from serving as *de facto* Deputy Police Chief; and, 2) oust Mr. Brown from serving as Acting Police Chief. Even after Mr. Brown's assignment as Acting Police Chief concludes, Mr. Brown will continue to serve as *de facto* Deputy Chief. The City may claim that Mr. Brown does not serve as *de facto* Deputy Police Chief because he has been removed from the S-List. However, this semantic argument is not persuasive. Relators have stated that Mr. Brown has acted as *de facto* Deputy Police Chief since his appointment as Assistant to the Mayor on January 13, 2013, including after his name was removed from the S-List on January 22, 2013. (See Aff. Calvaruso, ¶ 11; Aff. Daugherty, ¶ 11; Aff. Prebonick, ¶ 11; Aff. Sullivan, ¶ 11; Aff. Trundle, ¶ 11; Aff. Zampelli, ¶ 11).

The City may allege that Relators' claim regarding Mr. Brown's term as Acting Police Chief is moot because Mr. Brown's term concludes on Friday, February 15, 2013 at 5 p.m. However, the Union's claim to oust Mr. Brown from serving as Acting Police Chief is not moot because Mr. Brown's unlawful assignment as Acting Police Chief is capable of repetition, yet evading review. It is well-settled that an event which is capable of repetition, yet evading review is not moot. This Court has explained that this principle applies when two (2) factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration; and, (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St. 3d 229, 729 N.E.2d 1182 (2000) (citing *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998)). Mr. Brown's appointment is too short in duration to be fully litigated; likewise, there is reasonable cause to believe the City will continue to assign Mr. Brown to serve as Acting Police Chief because he is acting as *de facto* Deputy Chief.

First, Mr. Brown's assignment as Acting Police Chief is far too short to be fully litigated. Mr. Brown has been assigned Acting Chief for ninety-six (96) hours: from 5:00 p.m. Monday February 11, 2013 until 5:00 p.m. Friday February 15, 2013. This short time-frame does not allow sufficient time for the Respondent to file an Answer pursuant to the Supreme Court Rules of Practice, let alone allow sufficient time for the issue of whether Mr. Brown legally holds title to the office of Acting Police Chief to be fully litigated. *See* S.Ct.Prac.R. 12.04. Clearly, the duration of Mr. Brown's assignment is far too short to be litigated.

Second, there is a reasonable expectation that Mr. Brown will again unlawfully hold the position of Acting Police Chief because, in part, Mr. Brown to serve as *de facto* Deputy Chief. The job description for the Police Deputy Chief states that the Deputy Chief is responsible for serving as the Acting Police Chief as assigned. However, the City has not promoted any of the Captains to Police Deputy Chief. Instead, the City has attempted to circumvent the civil service process by appointing Mr. Brown—an unclassified civilian—as Acting Police Chief. Past practice shows that in lieu of appointing the non-existent Deputy Chief to serve as Acting Chief, Chief Nice has issued a Chief's Directive to designate one of the Police Captains to be the Acting Police Chief in his absence. (*See* Aff. Calvaruso, ¶ 6; Aff. Daugherty, ¶ 6; Aff. Prebonick, ¶ 6; Aff. Sullivan, ¶ 6; Aff. Trundle, ¶ 6; Aff. Zampelli, ¶ 6). Rather than comply with civil service rules and continue past practice the City has appointed its *de facto* Deputy Chief—an unclassified civilian—to serve as Acting Police Chief. It is reasonable to expect that the City will continue to assign Mr. Brown to the Chief's civil service position unless and until this court determines whether Mr. Brown unlawfully serves as *de facto* Police Chief and whether Mr. Brown unlawfully holds title to the Acting Chief Position.

The City may allege that the Relators' claim is moot based on precedent which explains that a quo warranto claim may only challenge the title to a "current term of office rather than an expired one." *State ex rel. Varnau v. Wenninger*, 131 Ohio St. 3d 169, 2012-Ohio-224, 962 N.E.2d 790, ¶ 15; *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶ 14. The City may claim that Mr. Brown's "term" in office expires at 5:00 p.m. February 16, 2013. However, the instant matter is clearly distinguishable from this line of case law. In *State ex rel. Varnu*, the relator claimed that the respondent was not entitled to hold elected office because the respondent allegedly did not meet a statutory prerequisite to run for and hold the office of sheriff when he first ran for office in the year 2000. *State ex rel. Varnu* at ¶ 14. This Court dismissed the relator's claim based on the defenses of laches and mootness: a relator may only challenge a current term of office—not an expired term. *Id.* at ¶ 15. Unlike the relator in *State ex rel. Varnu*, the Relators challenge Mr. Brown's right to hold the office of Acting Chief as well as Mr. Brown's continuing service as the *de facto* Deputy Chief.

Relators' claim for Writ of Quo Warranto is not moot.

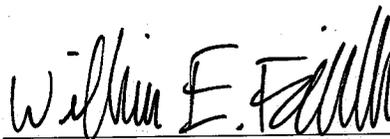
IV. CONCLUSION

Mr. Brown unlawfully holds the position of Acting Police Chief, unlawfully acts as *de facto* Police Deputy Chief and unlawfully serves within the Chain of Command of the City of Akron's Division of Police. Relators respectfully request that Mr. Brown be ousted from the position of Acting Police Chief and be ousted from serving as *de facto* Police Deputy Chief. Relators further request that Mr. Brown be ordered not to assume the duties of a sworn police officer in the Chain of Command. Further, Relators believe they possess the necessary qualifications to serve as Acting Police Chief and respectfully request a declaration that they are

entitled to be considered for the position of Acting Police Chief. Relators respectfully request this Court grant their Writ of Quo Warranto with attorney fees, costs, and any other relief this Court deems appropriate.

Respectfully submitted,

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