

ORIGINAL

No. 2013-0280

In the Supreme Court of Ohio

STATE, ex rel. PAUL CALVARUSO, et al.,

Relators,

v.

CHARLES BROWN,

Respondent.

FILED
MAR 12 2013
CLERK OF COURT
SUPREME COURT OF OHIO

ORIGINAL ACTION FOR A WRIT OF QUO WARRANTO

**RESPONDENT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

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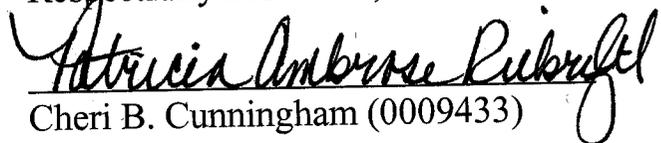
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Attorneys for Respondent

Respondent Charles Brown, pursuant to S.Ct.Prac.R. 10.5(B) and Civ.R. 12(C), respectfully moves this Court for judgment on the pleadings. Brown disputes many of the allegations in Relators' Complaint. Regardless of the truth of the factual allegations made by Relators, Brown is entitled to judgment on the pleadings because those allegations do not state a valid quo warranto claim. Relators do not claim they are entitled to be Acting Chief of Police or Deputy Chief of Police nor do they seek to oust Brown from his current position of Assistant to the Mayor. Since Relators have not adequately alleged either element of a claim for quo warranto relief, and did not give Brown the required security for costs, Brown is entitled to judgment on the pleadings. The grounds for this motion are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Brown is entitled to serve in his position of Assistant to the Mayor, and Relators do not claim otherwise. Relators are six of the nine Police Captains serving the Akron Police Department. (See Exh. H attached to Paul Hlynsky Aff.) Relators' request for an extraordinary writ of quo warranto is rooted in the theory that Brown is a "de facto" holder of some other position (Deputy Chief of Police), and that an individual may seek quo warranto relief to challenge a previous temporary assignment of the duties of Chief of Police during the Chief's absence. This is not so.

As a threshold matter, Brown is entitled to judgment on the pleadings because Relators do not claim they are entitled to be Deputy Chief or Acting Chief, a prerequisite to seeking quo warranto relief, and they have not given the required security for costs to Brown. But even if judgment is not warranted on either of those grounds, Relators' Complaint still fails as a matter of law because Relators' theories concede Brown does not actually hold either title — he has never held, or even claimed to have title to, the office of Deputy Chief and he does not currently hold the designation Acting Chief.

The function of the writ of quo warranto is to inquire by what authority a claimant of any office supports his claim, and the sole circumstance under which

an individual may bring an action in quo warranto is when they claim entitlement to the office. Since Relators do not claim entitlement to any public office, and Brown does not hold either of the “positions” that are the focus of Relators’ Complaint, this action should be dismissed.

II. FACTUAL BACKGROUND

A. The Mayor’s Broad Authority to Hire Assistants.

The Mayor possesses broad powers to hire employees and supervise the Division of Police under the Charter of the City of Akron. Akron City Charter Section 54 specifies that the Mayor “shall be recognized as the official head of the city by the Courts,” and grants the Mayor power to “appoint and remove all employees in both the classified and unclassified service, except elected officials,” and “exercise control over all departments and divisions created by the Charter[.]” Akron City Charter 54(4)-(5).¹ The Mayor has plenary authority over City administrative departments, including the Department of Public Safety, and any department director appointed by the Mayor remains “[s]ubject to the supervision and control of the Mayor in all matters.” Akron City Charter 59-60. Just as a civilian is in charge of the United States Armed Forces (the President of the United States), a civilian is in charge of Akron’s Police Division (the Mayor): Charter Section 67 confirms that the Division of Police is “under the immediate

¹ The Akron City Charter is available online at: <http://library.municode.com/index.aspx?clientID=16028&stateID=35&statename=Ohio>.

supervision of the Mayor, who shall make all rules necessary for the regulation and discipline of the same.” *Id.* at § 60.

The Charter vests the Mayor with power to hire Assistants to the Mayor with authority to act for him in carrying out his broad supervisory powers. *See* Akron City Charter 105(1)(g). An Assistant to the Mayor is an unclassified position not subject to the civil service rules. *Id.* No section of the Charter limits who may be hired as Assistant or the duties the Mayor may assign to such an Assistant.

Within the Division of Police, the Chief of Police has broad “control 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.” Akron City Charter 68. The Charter contemplates the need for flexibility in meeting Division needs, permitting the hiring of “special detectives” and “other special officers” for a specified period of time upon “written authority from the Mayor,” which “shall be exercised only under the direction and control of the Chief of Police[.]” *Id.* Nothing in the Charter or the Police Division’s 1991 Manual of Rules and Regulations purports to limit the persons to whom the Chief may temporarily assign his duties when he is absent; at most, the Rules and Regulations suggest that, when the Division employs one or more Deputy Chiefs, those officers “*can* assume the duties of the Chief of Police *if* assigned to do so

during the absence of the Chief of Police.” (See Relators’ Exhibits at Ex. C, Section 3.05, emphasis supplied.)

B. Brown Is Hired as Assistant to the Mayor.

Brown resigned from his classified position as Police Lieutenant in January 2013. (Compl., ¶ 18.) He was then hired as an Assistant to the Mayor, who delegated to Brown the responsibility of assisting the Chief of Police. (*Id.*, ¶¶ 18, 21.) Relators do not challenge Brown’s legal right to hold the position of Assistant to the Mayor (*see* Compl., ¶¶ 30-45), nor do they seek to oust him from it. (*See id.* at Prayer for Relief.)

Rather, Relators’ Complaint focuses on Brown’s “working title ‘Assistant Chief of Police,’” a Summary of Duties forwarded to the Ohio Police & Fire Pension Fund, and the possibility that he may be designated “Acting Chief” by the Chief of Police from time-to-time on an as-needed basis. (Compl., ¶¶ 19-20, Ex. E; Intervenor City of Akron Answer at ¶ 20.) Relators make the conclusory allegation that Brown’s actions as Assistant to the Mayor have “created enormous disruption within the Division of Police,” but cite no facts supporting that allegation. (Compl., ¶ 26.)

C. The Police Chief Designated Brown Acting Chief for One Week in February 2013.

Police Chief James Nice issued Chief’s Directive 2013-CD-11 on February 5, 2013. (*See* Relators’ Exh. I.) This directive specified that, during his brief

absence “from 5:00 p.m. Monday, February 11, 2013 through 5:00 p.m. Friday, February 15, 2013, Assistant Chief Charles Brown will be Acting Chief of Police.” (*Id.*) Brown has not been designated Acting Chief at any time since that directive.

III. LAW AND ARGUMENT

A. An Individual May Institute a Quo Warranto Action Only Under Limited Circumstances.

“Quo warranto is a high prerogative writ of an extraordinary nature.” *State ex rel. Cain v. Kay*, 38 Ohio St.2d 15, 16 (1974). It has a narrow focus: the writ originated in English law as an action “by the crown inquiring by what authority a claimant of any office or franchise supported his claim.” *Id.* This Court has explained that “the function of the writ was to protect the rights of the crown against the usurpation of governmental prerogatives, and thus safeguard the public interests.” *State ex rel. Lindley v. The Maccabees*, 109 Ohio St. 454, 456-57 (1924). Consistent with its unique function and narrow focus, this writ could not be invoked by an individual at common law. *Id.* at 456.

R.C. Chapter 2733 creates a limited statutory right for individuals to bring an action in quo warranto. R.C. 2733.06 governs the filing of such an action:

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.

R.C. 2733.06. An individual seeking quo warranto relief must “set forth the name of the person claiming to be entitled to the office, with averment of his right

thereto.” R.C. 2733.08. “Although R.C. 2733.06 supports the right of an individual claimant to bring an action in quo warranto to question title to a public office, quo warranto has retained its common-law character as a means ‘* * * to be employed to shield the sovereignty of the state from invasion and to prevent the abuse of corporate powers.’” *State ex rel. Cain*, 38 Ohio St.2d at 17.

In short, individuals seeking quo warranto relief must plead: 1) entitlement to a public office that 2) is being unlawfully held or exercised by another. *See generally State ex rel. Annable v. Stokes*, 24 Ohio St.2d 32 (1970); *State ex rel. Buian v. Kadlec*, 56 Ohio St.2d 116 (1978); *City of Parma v. City of Cleveland*, 9 Ohio St.3d 109 (1984). They must also give security for costs. R.C. 2733.06. As explained more fully below, Relators’ Complaint fails to adequately allege any of these elements and Brown is entitled to judgment on the pleadings.

B. Relators Fail to State a Claim For Which a Writ in Quo Warranto May Be Granted.

1. Relators failed to give security for costs.

Relators cannot maintain an action for quo warranto relief because they have not given Brown security for costs. (*See generally* Compl.) R.C. 2733.06 makes clear that an individual may file a complaint for quo warranto relief only “upon giving security for costs.” Thus, it is well established that a “complaint by a private relator *must show affirmatively* that security for costs, as required by statute, has been given.” 79 Ohio Jurisprudence 3d, Quo Warranto, Section 43

(2004), citing *State ex rel. Gusman v. Emely*, 8 Ohio Law Abs. 602 (2d Dist. 1930). Relators simply ignore this threshold requirement. Nowhere does Relators' Complaint even refer to security for costs, much less allege that this condition precedent has been satisfied. The Complaint should be dismissed for this reason alone.

2. **Relators do not claim they are entitled to be Acting Chief or Deputy Chief of Police.**

The Complaint also fails to state a claim for quo warranto relief because Relators do not claim they are entitled to any office they claim Brown holds. R.C. 2733.06 permits an individual to bring a quo warranto action "only when he *personally* is claiming title to a public office." *State ex rel. Annable v. Stokes*, 24 Ohio St.2d at 32; *see also State ex rel. E. Cleveland Fire Fighters' Assn., Local 500, Intl. Assn. of Fire Fighters v. Jenkins*, 96 Ohio St.3d 68, 2002-Ohio-3527, ¶ 10 ("[A]s we have consistently held, for persons other than the Attorney General or a prosecuting attorney, 'an action in quo warranto may be brought by an individual as a private citizen only when he personally is claiming title to a public office.'") (internal citation omitted, emphasis supplied).

(a) **No allegation of entitlement to be Acting Chief.**

Relators first claim that Brown has held, and may someday in the future hold, the title of Acting Chief of Police during temporary absences of Chief Nice and at the discretion of Chief Nice. (Compl., ¶ 33.) Relators' own filings

demonstrate that Acting Chief is not a separate public office within the City's Division of Police. Relators' Complaint does not identify Acting Chief as a separate job classification within the Division (Compl., ¶ 13), and their sworn Affidavits do not list Acting Chief as a separate position. (See Paul Calvaruso Aff., ¶ 4; Elizabeth A. Daugherty Aff., ¶ 4; Michael G. Prebonic Aff., ¶ 4; Martha L. Sullivan Aff., ¶ 4; Sylvia D. Trundle Aff., ¶ 4; Daniel D. Zampelli Aff., ¶ 4.) Nor do Relators cite any authority suggesting that a temporary assignment of duties during an absence somehow creates a separate public office. (See *infra*, p. 14.)

Even if Acting Chief were a separate public office, however, Relators do not claim they are entitled to it. They allege only that "they are entitled to be considered for the position of Acting Chief for the City of Akron." (Compl., ¶ 44; *see also* Mem. in Supp. of Writ at 15-16 (claiming that "Relators may lawfully be assigned to serve as Acting Chief").) Relators' affidavits do not even go that far. Rather, Relators' sworn statements claim only that they "believe [they] possess the necessary qualifications for the position of Acting Police Chief[.]" (See Paul Calvaruso Aff., ¶ 12; Elizabeth A. Daugherty Aff., ¶ 12; Michael G. Prebonic Aff., ¶ 12; Martha L. Sullivan Aff., ¶ 12; Sylvia D. Trundle Aff., ¶ 12; Daniel D. Zampelli Aff., ¶ 12.) Relators cannot pursue a quo warranto claim relating to that title because they do not allege they are entitled to be Acting Chief.

(b) **No allegation of entitlement to position of Deputy Chief.**

Relators next claim that Brown holds the title of Deputy Chief of Police “de facto.” (Compl., ¶ 34.) Even assuming that “de facto” Deputy Chief is a public office, no Relator claims to be entitled to that position. Their Complaint alleges only that they “are able to fulfill the duties of the Police Deputy Chief * * * for the City of Akron.” (Compl., ¶ 45.) Relators do not claim they are entitled to the position of Deputy Chief (“de facto” or otherwise) in their Affidavits. (See generally Paul Calvaruso Aff.; Elizabeth A. Daugherty Aff.; Michael G. Prebonic Aff.; Martha L. Sullivan Aff.; Sylvia D. Trundle Aff.; Daniel D. Zampelli Aff.) Because Relators do not claim they are entitled to the office they claim Brown holds, their Complaint fails to state a claim for quo warranto relief with respect to that position.²

(c) **The absence of any such allegations is fatal to Relators’ claims.**

In short, Relators’ Complaint and Affidavits do not comport with the statutory requirement that a complaint for a writ of quo warranto “set forth the name of the person claiming to be entitled to the office, with averment of his right thereto.” R.C. 2733.08. That failure is fatal to their quo warranto claim and

² No provision of the Charter requires the Mayor to fill a vacancy in the position of Deputy Chief of Police, and Relators cite none. (Mem. in Supp. of Writ at 10-15.)

entitles Brown to judgment on the pleadings. *State ex rel. Annable*, 24 Ohio St.2d at 32-33; *Jenkins*, 2002-Ohio-3527, ¶ 10.

State ex rel. Deiter v. McGuire, 119 Ohio St.3d 384, 2008-Ohio-4536, is not to the contrary. Relators cite *Deiter* for the proposition that, “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.’” (Mem. in Supp. of Writ at 8.) To be sure, a claimant who adequately *alleges* entitlement to an office may seek the remedy of ouster, even if he does not prevail on the entitlement claim. *Deiter*, 2008-Ohio-4536, at ¶ 22. But *Deiter* did not address the requirements for pleading a quo warranto claim,³ much less dispense with the rule that a relator *allege* entitlement to the office. R.C. 2733.08; *State ex rel. Annable, supra*; see also *State ex rel. Ethell v. Hendricks*, 165 Ohio St. 217, paragraph three of the syllabus (1956) (R.C. 2733.06 “empowers an individual, *claiming in good faith to be entitled to* a public office held and exercised by another, to expeditiously bring an action in quo warranto upon his own initiative in the name of the state”). Because Relators have failed to do so, Brown is entitled to judgment on the pleadings.

³ Unlike this case, the relators in *Deiter* alleged they were “private persons *with a claim of entitlement to* the FPD Chief of Police Position[.]” See Appellants’ Reply Br. at 3, *State ex rel. Deiter v. McGuire*, Case No. 2008-0720, available at: <http://www.supremecourt.ohio.gov/Clerk/ecms/resultsbycasenumber.asp?type=3&year=2008&number=720&myPage=searchbycasenumber%2Easp>.

3. **Brown is not Acting Chief or Deputy Chief.**

Relators' Complaint fails to state a claim for the additional reason that it does not allege that Brown actually holds the title Acting Chief or the position of Deputy Chief. Key to establishing a quo warranto claim is showing "that another is actually holding office." *City of Parma v. City of Cleveland*, 9 Ohio St.3d 109, 112 (1984). If the respondent is not in actual possession of a disputed office, dismissal is appropriate. *See State ex rel. Mikus v. Chapla*, 1 Ohio St.2d 174, 175 (1965); *Klick v. Snavely*, 119 Ohio St. 308, 309-10 (1928) (dismissing quo warranto action where stay entered in separate proceeding prevented respondent from possessing office at the time of filing).

(a) **Brown has never been a Deputy Chief.**

Relators do not allege that Assistant to the Mayor is a public office nor do they dispute Brown's ability to hold that position. (*See generally* Compl.) Rather, Relators' primary claim appears to be that Brown should be "ousted" from a role of "de facto" Deputy Chief of Police. (*Id.* at ¶¶ 34, 37.) But, on its face, that claim concedes Brown is *not* "actually holding" the position of Deputy Chief — in the opinion of Relators, he is only "de facto" exercising certain duties of that position.⁴

⁴ Even a cursory examination of the job description of Deputy Chief of Police shows that the duties of that position are not identical to the "Summary of Job Duties" on which Relators' claim is based. Unlike Brown, a Deputy Chief (among other things) assists the Chief "in all aspects of management of the Police Division," participates "in the development and administration of the division

(*Id.*) Since Relators concede Brown is not “actually holding” the position of Deputy Chief, they fail to state a claim for quo warranto relief with respect to that position. *City of Parma*, 9 Ohio St.3d at 112.

Indeed, far from supporting their claim, Relators’ citation to *Local 330, Akron Firefighters Assn., AFL-CIO v. Romanoski*, 68 Ohio St.3d 596 (1994), actually illustrates the flaws in Relators’ quo warranto claim. For one thing, *Romanoski* was an appeal from a trial court judgment on a complaint for declaratory and injunctive relief, not an original action for a writ of quo warranto. The declaratory and injunctive relief sought there — and echoed in Relators’ requests for declarations that an Assistant to the Mayor “may not assume the duties of a sworn peace officer,” etc. — is unavailable in an original action in quo warranto, the sole purpose of which is to try title to a public office. *State ex rel. Cain v. Kay*, 38 Ohio St.2d 15, 16 (1974). Relators’ arguments that the Mayor is somehow “circumventing” the civil service system (Mem. in Supp. of Writ at 14) thus have no place in this quo warranto action.⁵

budget,” and “administers Akron Police Department Rules, Regulations and Procedures.” (See Relators’ Exhibits at Ex. D; *cf.* Ex. E.)

⁵ Relators repeatedly assert that the Mayor improperly “created” a new “rank” of Assistant Chief of Police within the Police Division’s “chain of command.” (*E.g.*, Mem. in Supp. of Writ at 14-15.) But as the above discussion makes clear, that allegation cannot give rise to a claim for quo warranto relief. Such relief exists to “test the actual right to an office,” *City of Parma*, 9 Ohio St.3d at 112, not explore how one office may interact with another position. Further, no Relator claims entitlement to be Assistant to the Mayor with a working title of Assistant Chief of Police. (See *generally* Compl.) Finally, as Relators acknowledge, the only “fact”

Additionally, *Romanoski* involved the City utilizing “acting” lieutenants and “acting” captains to fill existing vacancies in both positions in the Fire Department, not claims that duties performed by an unclassified civil servant made them the “de facto” holder of a different office. The distinction is critical, because a person may be deemed a “de facto” office holder only where they *claim title* to a particular office, not where they are alleged to perform duties similar to that office. *E.g.*, *State ex rel. Huron Cty. Prosecutor v. Westerhold*, 72 Ohio St.3d 392, 396 (1995) (“A de facto officer is one who *enters upon and performs the duties of his office* with the acquiescence of the people and the public authorities and *has the reputation of being the officer he assumes to be* and is dealt with as such.”) (emphasis added); *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 710 (1947) (“In other words, a person may, irrespective of any question of appointment or election, become an officer de facto where he has *acted under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke his action in the supposition that he is in truth the officer he assumes to be.*”) (emphasis added). Brown never claimed to be a Deputy Chief of Police, and Relators’ Complaint does not suggest otherwise. (*See generally* Compl.)

offered to support this claim — Brown’s inclusion as Assistant Chief of Police on an internal Division of Police seniority list known as the “S-List” — has since been revised. (*See* Compl., ¶¶ 24-25.)

(b) Brown currently is not Acting Chief.

For similar reasons, Relators cannot “oust” Brown from his prior designation as Acting Chief of Police. As explained above, Acting Chief is not a separate public office within the Division of Police. (*See supra*, pp. 7-8.) Moreover, Relators do not claim Brown currently holds this designation. (Compl., ¶¶ 27, 33.) Since Relators concede Brown is not “actually holding” the designation of Acting Chief, their claim for quo warranto relief would be moot even if Acting Chief were a separate public office — which it is not. *See City of Parma*, 9 Ohio St.3d at 112.

Relators attempt to avoid mootness by arguing in their Memorandum in Support that Brown’s “assignment as Acting Police Chief is capable of repetition, yet evading review” because the assignment “is far too short to be litigated.” (Mem. in Supp. of Writ at 17-18.) Relators cite no case law applying this doctrine to an action in quo warranto, which only permits ouster from an office currently held. The argument merely reinforces the conclusion that Acting Chief is not a separate “public office” subject to quo warranto relief. *See State ex rel. Buian v. Kadlec*, 56 Ohio St.2d 116, 120 (1978) (quo warranto action “does not lie unless the person against whom it is brought is exercising a public office”).

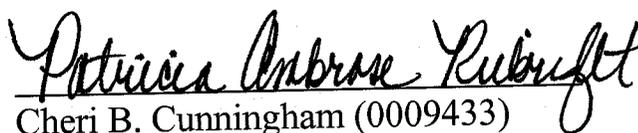
Relators cite no authority holding that a temporary assignment of short duration of the duties of a public office creates a separate “acting” public office, subject to a claim for a writ of quo warranto. Indeed, the authorities relied on by

Relators suggest the opposite. For instance, in *Romanoski*, the assignments of “acting” captains and lieutenants were deemed “appointments” subject to the civil services charter provisions because there were “vacant classified positions for which appointments are required” and the employees held the “acting positions for more than one year.” 68 Ohio St.3d at 597, 602. That is not so here. Relators concede the office of Chief of Police is properly occupied (Compl., ¶ 16); and there is no allegation that the Chief’s duties have been temporarily assigned for more than a week or so at a time (*Id.* at ¶¶ 17, 27).

IV. CONCLUSION

For all of the above reasons, Brown is entitled to judgment on the pleadings.

Respectfully submitted,



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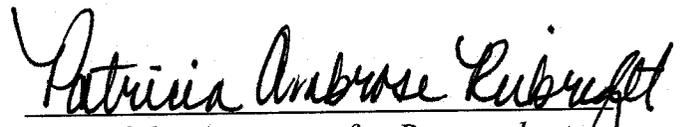
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A copy of the foregoing was served on March 11, 2013 pursuant to Civ.R.

5(B)(2)(c) by mailing it by United States mail to:

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