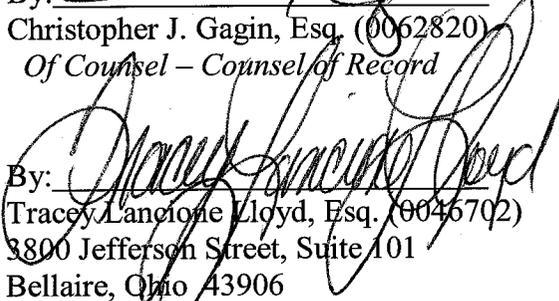


Pursuant to S.Ct.Prac.R. 12.04(B)(2) and (B)(3), as well as Civ.R. 12(F), Respondent, David M. Lucas, by and through counsel, now moves this Honorable Court for an Order striking Exhibits 2 and 3, as well as all references to same, within Relator's Response to Respondent's Motion for Judgment on the Pleadings. The grounds for this motion are set forth more fully in the memorandum in support, which is attached hereto and incorporated as if fully re-written herein.

Respectfully submitted,

LANCIONE, LLOYD & HOFFMAN
LAW OFFICE CO., L.P.A.

By: 
Christopher J. Gagin, Esq. (0062820)
Of Counsel – Counsel of Record

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Trial Counsel for Respondent

MEMORANDUM IN SUPPORT

I. CASE HISTORY:

Relator filed this original action in quo warranto on February 8, 2013. Respondent was served via certified mail on February 14, 2013. On February 26, 2013, Respondent filed his answer concurrently with a motion for judgment on the pleadings pursuant to S.Ct.Prac.R. 12.04(B)(1) and Civ.R. 12(C). Thereafter, on March 8, 2013, Relator filed his Response to Respondent's Motion for Judgment on the Pleadings, which included Exhibit 2 (Relator's 2nd Affidavit) and Exhibit 3 (Respondent's Candidate Qualification Documents) as attachments.

Because Relator is not permitted to submit any additional evidentiary materials in response to Respondent's motion for judgment on the pleadings, Respondent now moves this Honorable Court for an order striking Exhibits 2 and 3, as well as all references to them, pursuant to S.Ct.Prac.R. 12.04(B)(2) and (B)(3), as well as Civ.R. 12(F).

II. STANDARD OF REVIEW:

In response to an original action, S.Ct.Prac.R. 12.04(B)(1)-(4) establishes a very specific procedure to test the complaint's sufficiency. S.Ct.Prac.R. 12.04(B)(1)-(4) state as follows:

(B) Responses

- (1) The respondent may file a motion for judgment on the pleadings at the same time an answer is filed. The relator may not file a motion for judgment on the pleadings or a response to an answer.
- (2) The relator may file a memorandum in response to a motion to dismiss or a memorandum in response to a motion for judgment on the pleadings within ten days of the filing of the motion.
- (3) Neither party may file a motion for summary judgment.
- (4) The Clerk of the Supreme Court shall refuse to file a response that is untimely or prohibited by this rule.

Because Relator has included evidentiary material not permitted under S.Ct.Prac.R. 12.04(B)(2) and (3), Respondent now moves this Court pursuant to Civ.R. 12(F). In pertinent part, Civ.R.12(F) states:

(F) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him ..., the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

III. ARGUMENT:

A. *S.Ct.Prac.R. 12.04(B)(2) and (3) do not permit Relator to present additional evidence:*

S.Ct.Prac.R. 12.04(B)(2) and (3), as well as Civ.R. 12(C), clearly do not permit Relator to present any additional evidence to the Court via his memorandum in response. As set forth above, S.Ct.Prac.R. 12.04(B)(2) only permits a “memorandum” in response to Respondent’s motion for judgment on the pleadings. Moreover, S.Ct.Prac.R. 12.04(B)(3) makes clear that neither party may move for summary judgment, which would otherwise allow either party to present evidence and/or affidavits properly permitted under Civ.R. 56(C) and/or (E). Indeed, the fact that the Court expressly prohibited parties from moving for summary judgment is an expression that the Court has strictly restricted the parties’ ability to present evidence at this very early stage.

Instead, the Court limited the parties to the procedure appropriate under a Civ.R. 12(C) motion. As Respondent set forth in his motion, Civ.R. 12(C) governs a motion for judgment on the pleadings. In its entirety, Civ.R. 12(C) states, “After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” In *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 664 N.E.2d 931 (1996), this Honorable Court provided the appropriate standard of review for a Civ.R. 12(C) motion.

[T]he standards for Civ.R. 12(B)(6) and (C) motions are similar, (Footnote omitted.) but **Civ.R. 12(C) motions are specifically for resolving questions of law**, *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166, 63 O.O.2d 262, 264, 297 N.E.2d 113, 117. **Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint**, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. (Citation omitted.) Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. (Citation omitted.) *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d at 569-570, 664 N.E.2d at 936. (Emphasis added).

However, Civ.R. 12(C) permits the Court to consider the complaint and answer, while a Civ.R. 12(B)(6) motion must be judged on the face of the complaint alone. *Id.* at 569.

Thus, the mandates of S.Ct. Prac.R. 12.04(B)(2) and Civ.R. 12(C) are consistent with one another: The Court may only consider the complaint, including its exhibits; the answer, including its exhibits (if any); Respondent's motion for judgment on the pleadings and Relator's memorandum in reply. There is no opportunity for Relator to supplement the evidentiary record with additional documents and/or affidavits beyond those attached to the original complaint.

The Court will note that Respondent did not attach any exhibits or evidentiary material to its motion for judgment on the pleadings. Any evidentiary materials Respondent references in his motion were properly attached to his answer, not his motion.

Conversely, Relator seeks to present defenses to the arguments Respondent sets forth in his motion and answer. By way of example, the Court's attention is directed to paragraph 5 of Exhibit 2. There, Relator avers: "5. I am not a classified employee nor is

my salary paid through federal dollars. The Hatch Act and R.C. 124.57 have been complied with in all relevant areas.” Notably, because Relator’s potential violation of the Hatch Act and/or R.C. §124.57 involve questions of fact, as well as law, Respondent did not assert such a violation within his motion for judgment on the pleadings. However, Respondent alleged such a violation in his answer, as his seventh affirmative defense. Thus, not only is Exhibit 2 (and 3) not permitted under this Honorable Court’s Rules of Practice, they also present content which goes well beyond the arguments Respondent has advanced via his motion for judgment on the pleadings – including matters which are more purely questions of fact, and therefore, premature at this stage in the proceeding.

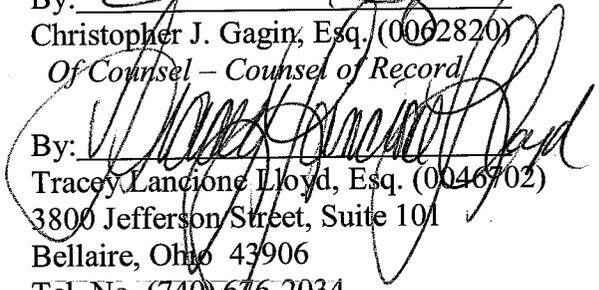
IV. CONCLUSION:

Because the evidentiary materials attached to Relator’s response are improper, Respondent respectfully requests this Honorable Court strike Exhibit 2 and 3, as well as any reference to them, within Relator’s response to Respondent’s motion for judgment on the pleadings.

Respectfully submitted,

LANCIONE, LLOYD & HOFFMAN
LAW OFFICE CO., L.P.A.

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Christopher J. Gagin, Esq. (0062820)
Of Counsel – Counsel of Record

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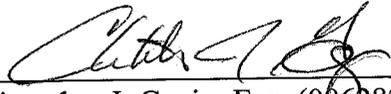
Trial Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Respondent's Answer was served via electronic mail upon Relator's Counsel of Record, Mark E. Landers, Esq., at *mark.landlers.esq.@gmail.com*, pursuant to S.Ct.Prac.R. 3.11(B), on this 11th day of March, 2013.

Respectfully submitted,

LANCIONE, LLOYD & HOFFMAN
LAW OFFICE CO. L.P.A.

By: 
Christopher J. Gagin, Esq. (0062820)
Of Counsel – Counsel of Record