

ORIGINAL

IN THE SUPREME COURT OF OHIO

ORIGINAL ACTION FOR A WRIT OF QUO WARRANTO

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

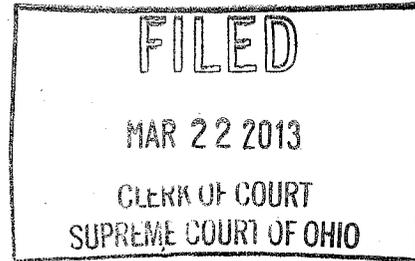
Relators,

v.

CHARLES BROWN

Respondent.

CASE NO: 2013-0280



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RELATORS' MEMORANDUM IN RESPONSE TO  
MOTION FOR JUDGMENT ON THE PLEADINGS

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NOW COME Relators Paul Calvaruso, Elizabeth A. Daugherty, Michael G. Prebonick, Martha L. Sullivan, Sylvia D. Trundle, and Daniel D. Zampelli, by and through counsel, and in opposition to Respondent<sup>1</sup> Charles Brown's Motion for Judgment on the Pleadings. Relators have properly alleged the elements necessary for a Quo Warranto claim. Relators have made a good faith claim that they are entitled to serve as Acting Police Chief and Deputy Police Chief of the City of Akron ("City") and properly seek to oust Mr. Brown from his position as Acting Chief and *de facto* Deputy Chief. Further, Relators have paid security for costs pursuant to requirements of the Ohio Revised Code and Supreme Court Rules of Practice.

## I. STANDARD OF REVIEW

Supreme Court Rule of Practice 12.04(B) permits the Respondent to file a Motion for Judgment on the Pleadings in a Quo Warranto proceeding. However, the requirements for a motion for judgment on the pleadings "set a high bar for the moving party to prevail." *Kincaid v. Erie Ins. Co.*, 128 Ohio St. 3d 322, 327-328, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 25. This Court recently described the standard for a motion for judgment on the pleadings as follows:

dismissal is appropriate only when 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."

*Id.* (citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996)). In order to be entitled to judgment on the pleadings the movant must be entitled to judgment as a matter of law and no material issues of fact may exist. *Id.*; *Pontious*, 75 Ohio St.3d at 570.

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<sup>1</sup> Respondents do not oppose the City of Akron's Motion to Intervene. See *State ex rel. Johnson v. Richardson*, 131 Ohio St.3d 120, 2012-Ohio-57, 961 N.E.2d 187, ¶ 7-8 (explaining in a Quo Warranto claim that a village has an interest in a case involving a village's charter and holding Civil Rule 24 is liberally construed in favor of intervention).

Mr. Brown is plainly *not* entitled to a judgment on the pleadings. Mr. Brown admits there are several material facts in dispute between the parties. Mr. Brown claims “regardless of the truth of the factual allegations made by Relators” Relators failed to state a claim on which relief can be granted. However, as shown herein Relators have clearly asserted a claim on which relief can be granted.

## **II. RELATORS HAVE STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Mr. Brown illegally holds the office of Acting Chief and illegally serves as *de facto* Deputy Chief in contravention of the City of Akron’s Charter and Municipal Ordinances. An unclassified civil servant cannot—even temporarily—serve within the chain of command of the City’s Division of Police. Mr. Brown must be ousted from the office of Acting Chief and Deputy Chief. Relators are lawfully qualified to hold the positions of Acting Chief and execute the duties of Deputy Chief. Indeed, Relators have held the position of Acting Chief and have fulfilled the duties of the Deputy Chief. Relators are entitled to serve as Acting Chief and Deputy Chief.

The Respondent’s Motion for Judgment on the Pleadings does not address whether an unclassified civil servant can serve in the command structure of the City’s Division of Police. Instead, Respondent inaccurately asserts 1) Relators failed to give security for costs; 2) Mr. Brown is not Acting Chief or *de facto* Deputy Chief; and, 3) Relators did not claim they are entitled to be Acting Chief or Deputy Chief. Each issue is addressed herein.

### **A. RELATORS GAVE SECURITY FOR COSTS**

The Revised Code allows individuals claiming title to a public office to file an Original Action for a Writ of Quo Warranto Claim “upon giving security for costs.” R.C. 2733.06.

Correspondingly, the Rules of Practice “require a deposit in the amount of one hundred dollars as security for costs,” which “shall be paid before the case is filed.” S.Ct.Prac.R. 3.05. Relators paid security for costs upon filing the instant claim. (Ex. J).<sup>2</sup> Further, it is likely that Relators’ claim would have been rejected by the Clerk’s office in the event it was filed without security for costs. *See id.* Indeed, it would be difficult to affirmatively show payment of security for costs. To do so, Relators would be required to file a Quo Warranto complaint and immediately file an amended complaint evidencing payment of security for costs. This would be a clear waste of time and resources.

Citing one case from Ohio’s Second District Court of Appeals dating from 1930, Mr. Brown claims that a relator “*must show affirmatively* that security for costs, as required by statute, has been given” and that “relators simply ignore this requirement.” (Brown MJP, p. 6-7 (citing *State ex rel. Gusman v. Emely*, 8 Ohio Law Abs. 602 (2nd Dist. 1930))). This antiquated appellate case interpreting Ohio’s General Code—the predecessor to the Revised Code—is not binding on this Court and cannot be used as a basis for granting Mr. Brown’s motion. Further, Relators paid security for costs. This Court cannot sustain Mr. Brown’s Motion.

**B. RESPONDENT BROWN IS A FULL-TIME POLICE OFFICER SERVING AS *DE FACTO* DEPUTY CHIEF AND ACTING CHIEF.**

Mr. Brown’s Answer confirms that Mr. Brown serves as a full-time police officer. Mr. Brown admits that he continues to be a member of the Ohio Police and Fire Pension Fund (“OP&F”). (Brown Answer, ¶ 18). The Revised Code describes a member of OP&F as

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<sup>2</sup> Exhibit J is attached. Citations to Affidavits and Exhibits A through I reference attachments to Relators’ Complaint.

(a) Any person who receives an original appointment as a full-time regular police officer in a police department . . . .<sup>3</sup>

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(c) Any person who commences employment on or after September 16, 1998, as a full-time police officer with a police department in a position in which the person is required to satisfactorily complete a peace officer training course in compliance with section 109.77 of the Revised Code.

R.C. 742.01 (A) (2). As such, Mr. Brown is a “full-time police officer.”

The City’s Charter provides that the police force “consists of a Chief of Police and such officers and employees as may be provided for by the Council.” Alternatively, the Mayor—when authorized by City Council—may “appoint substitute or special patrolmen who shall not be considered in any sense to be regular member of the Police Division and who need not be in the classified service.” (Ex. A, p.2). Therefore, pursuant to charter, Mr. Brown must either 1) serve as a full-time police officer in a position established in City Ordinance 409-2012 (Police Chief, Police Deputy Chief, Police Captain, Police Lieutenant, Police Sergeant, Police Officer), (Ex. B); or, 2) serve as a full-time police officer who is not “considered in any sense” to be a member of the Police Division. If Mr. Brown is not “in any sense” a member of the Police Division Mr. Brown cannot be assigned to serve as Acting Chief, serve within the rank structure, give orders to members of the Police Division or perform the duties of the Deputy Chief. However, Mr. Brown’s assignment as Acting Chief and assigned job duties confirm Mr. Brown

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<sup>3</sup> Deleted portions of R.C. 742.01(A)(2) include references to several statutes irrelevant to the instant matter: R.C. 124.411 (allowing municipalities to appoint police officers older than thirty-five (35) years of age in the event territory is annexed into a municipal corporation); R.C. 742.511 (discussing transfer of police officers of a newly incorporated municipality taking place prior to 1983); R.C. 742.513 (discussing procedures for a township which assumes municipal status); R.C. 742.15 (discussing the appointment of a village marshal); and, R.C. 742.16 (discussing the appointment of a village deputy marshal).

serves (illegally) in a public office as a member of the command structure in the Police Division. As such, the issue is not whether Mr. Brown is a police officer, but which rank he holds.

Respondent avers Relators have not shown that Mr. Brown *actually holds* a public office. (Brown MJP, p.11-12 (citing *City of Parma v. City of Cleveland*, 9 Ohio St.3d 109, 112, 459 N.E.2d 528 (1984); *State ex rel. Mikus v. Chapla*, 1 Ohio St.2d 174, 174-175, 205 N.E. 2d 663 (1965); *Klick v. Snavelly*, 119 Ohio St. 308, 309, 164 N.E. 233 (1928))). However, the case law cited by the Respondent is easily distinguishable from this matter. In *Parma* this Court held that the claim “cannot be characterized as one which seeks to oust a specific individual from office” because appointment to the office at issue “had been effectively enjoined before any vacancy occurred.” *Parma*, 9 Ohio St.3d at 112. In *Klick* this Court dismissed a Quo Warranto claim because the Relators had already secured a judgment in a mandamus claim preventing the respondent from taking office. In *Chapla*, this Court held a Quo Warranto claim was moot because the respondent’s term as a public officer had expired and he had not been reappointed. In the instant matter, no party has filed a mandamus claim or a claim for injunctive relief. As such *Parma* and *Klick* are inapplicable. Further, unlike the respondent in *Chapla*, Relator claims the City may assign Mr. Brown to serve as Acting Chief at any time. (Brown Answer, ¶ 56). Mr. Brown should be ousted from the offices of Acting Chief and *de facto* Deputy Chief.

Indeed, the pleadings—particularly when construed in a light most favorable to the Relators—clearly show that Mr. Brown serves as Acting Chief and *de facto* Deputy Chief.

### ***1) Acting Chief***

Respondent admits that Mr. Brown served as Acting Chief of Police from Monday February 11, 2013 through Friday February 15, 2013. (Brown Answer, ¶ 27). Nonetheless,

Respondent claims he cannot be ousted from the position of Acting Chief because he does not currently hold the position of Acting Chief. (Brown MJP, p.14). Respondent implies that Mr. Brown's assignment to Acting Chief for "a week or so at a time" is short enough that the position is not a public office. (Brown MJP, p.14-15). However, this Court has plainly held "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). The City's Rules and Regulations state "all of the authority, responsibilities and duties of the position rest with the acting member." (Ex. C, p.2). Regardless of whether an individual serves as Acting Chief or Chief, the position remains a public office. It is illogical to insist that an office is no longer public because it is only vacant for a short period of time. Mr. Brown clearly held the public office of Acting Chief from February 11 to February 15, 2013.

This Court would effectively protect the City's decision to appoint an unclassified civilian to serve as Acting Chief if it rules in favor of Respondent Brown. *See State ex rel. Ziegler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405. In *Zumbar*, the respondent alleged a Quo Warranto claim was moot because the respondent was no longer serving in the contested office. In fact, several successors had already been appointed to and removed from the office. *Id.* at ¶ 13. However, this Court held, "the fact that there have been three successors since [the relator] does not bar his quo warranto claim. If this were true, an appointing authority could insulate its improper removal of a public officer by appointing multiple persons to the office in quick succession," thereby sanctioning "an unreasonable result." *Id.* at ¶ 13. The same legal principal applies to the instant action: this Court would sanction the temporary appointment of an unclassified civil servant to the office of Acting Chief if the Respondent's Motion for Judgment on the Pleadings is sustained.

## 2) *De facto Deputy Chief*

A *de facto* officer is “defined as one who, although not an officer in point of law, has the reputation of being the officer he assumes to be and is accepted as such by those who deal with him.” *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 708, 76 N.E.2d 886 (1947); *see State ex rel. Huron Cty. Prosecutor v. Westerhold*, 72 Ohio St.3d 392, 396, 650 N.E.2d 463 (1995). As noted by the Respondent, a *de facto* officer holds an office “irrespective of any question of appointment or election” if an officer has acted “under such circumstances” to “invoke his action in the supposition that he is in truth the officer he assumes to be.” (Brown MJP, p.13). Although the City has not made a formal appointment, the City has charged Mr. Brown with the duties of the Deputy Police Chief. As such, it appears Mr. Brown “invokes action” as the *de facto* Deputy Chief “irrespective of any question of appointment or election.”

The City’s “Summary of Job Duties” for the Assistant Chief of Police<sup>4</sup> reflects the responsibilities the City has charged Mr. Brown with executing. These responsibilities clearly indicate that Mr. Brown is *de facto* Deputy Chief. Mr. Brown is incorrect in his claim that a “cursory examination” of the Deputy Chief Job Description and the Assistant Police Chief “Summary of Job Duties” shows that Deputy Chief and Assistant Police Chief are not similar positions. (Brown MJP, fn.4). To the contrary, the following chart compares direct quotes from the Assistant Police Chief Summary of Job Duties and the Deputy Chief Job Description. The positions are strikingly similar:

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<sup>4</sup> Proposed Intervenor City claims that the Assistant Chief of Police “Summary of Job Duties” was prepared for OP&F. (City Answer, ¶ 20). The City, however, denies that Exhibit E is a “job description.” (City Answer, ¶ 20-21). It is, at a minimum, odd that the City now attempts to distance itself from the Summary of Job duties after preparing this document for a public entity—OP&F.

<b>Assistant Police Chief “Summary of Job Duties” (Ex. E)</b>	<b>Corresponding Language in Deputy Chief Job Description (Ex. D)</b>
Representing the Police Chief, Mayor and City of Akron at various public and private meetings and events.	Represent the Police Chief at various public and private functions.
Assisting the Police Chief in the supervision and direction of all Police Department functions.	Assists the Police Chief in all aspects of management of the Police Division.
Monitoring the daily operations of the Police Department.	Plans and directs all activities of one or more subdivisions of the Akron Police Division.
Developing, recommending and / or instituting policies with the Chief of Police to maintain or improve the Department’s effectiveness, efficiency and customer service.	Assists in the creation, implementation and revision of departmental goals, objectives and policies. Acquires knowledge of current trends and innovations in law enforcement and recommends implementation for the efficient and effective delivery of public service and management objectives.
Reviewing and providing guidance on administrative investigations and personnel issues.	
Analyzing data and information to evaluate departmental activities to determine effective allocation of resources.	Participates in the development and administration of the division budget and forecasting necessary to staff and equip the Police Division.
Communicating with the media, public and employees.	Engages in public speaking.  Acts as a liaison with other law enforcement and judicial agencies, government officials, community groups and general public.
Taking police action, if necessary.	Responds to incidents and emergencies as needed.
Performing related duties as required by the Chief of Police and Safety Director.	Performs leadership and other managerial duties in direct assistance to the Police Chief and Mayor.  Perform related work as required.
Serving as Acting Chief. (Ex. B).	Serves as Acting Police Chief as assigned.

Even this  *cursory* comparison indicates that the Assistant Police Chief serves as the  *de facto* Deputy Chief.

Mr. Brown falsely asserts a person must “claim title” to a particular office in order to become the  *de facto* holder of a different office. Mr. Brown’s own citations do not support this claim. Mr. Brown claims an individual “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 assumed to be and is dealt with as such.” (Brown MJP, p.13 (citing  *State ex rel. Witten*, 148 Ohio St. 702;  *State ex rel. Huron Cty. Prosecutor*, 72 Ohio St.3d 392)). In this instance, the City—via Police Chief Nice’s order temporarily assigning Mr. Brown to serve as Acting Chief, (Ex. B), and the “Summary of Job Duties” for Assistant Chief of Police, (Ex. E)—has assigned Mr. Brown the duties of a Deputy Chief. Regardless of whether Mr. Brown “claims” title to the office of Deputy Chief, Mr. Brown is  *actually serving* as Deputy Chief. As such Mr. Brown illegally holds title to the Deputy Chief position. Respondent’s Motion must be denied.

**C. RELATORS MADE A GOOD FAITH CLAIM OF ENTITLEMENT TO THE PUBLIC OFFICE OF ACTING CHIEF AND  *DE FACTO* DEPUTY CHIEF.**

The Revised Code states

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.*”

*See, e.g., State ex rel. Deiter v. McGuire*, 119 Ohio St.3d 384, 2008-Ohio-4536, 894 N.E.2d 680,

¶ 22 (emphasis original) (citing R.C. 2733.08). In order to be completely successful in a Quo

Warranto claim “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. A relator need not prove his own title beyond all doubt, but his claim must be established on good faith and reasonable grounds. *State ex rel. Delph v. Barr*, 44 Ohio St. 3d 77, 80, 541 N.E.2d 59, 62 (1989). Relators’ pleadings make a good faith and reasonable claim to entitlement to office.

A good faith claim may be established even when a relator is not entitled to serve in a public office. For example, in *Newell*, the relator was not entitled to the office of Fire chief because she “did not pass the promotional examination.” *Newell* ¶ 6. Nonetheless, the relator’s failure to establish her entitlement “did not preclude a writ of quo warranto.” *Id.* ¶ 8. Likewise, in *Delph*, this Court ousted a police chief from office even though none of the relators were entitled to serve as police chief. *Delph*, 44 Ohio St.3d at 81.

Relators have claimed that they are entitled to serve as Acting Police Chief. The City has regularly assigned Relator 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). Mr. Brown even admits Police Chief James Nice has appointed a Police Captain as Acting Chief during Chief Nice’s absence. (Brown Answer ¶ 17). Relators state they may lawfully be assigned to serve as Acting Police Chief because they are members of the classified civil service. (*See* Aff. Calvaruso, ¶ 12; Aff. Daugherty, ¶ 12; Aff. Prebonick, ¶ 12; Aff. Sullivan, ¶ 12; Aff. Trundle, ¶ 12; Aff. Zampelli, ¶ 12). Further, Relators—unlike Mr. Brown—are employees of the Division of Police and may lawfully serve as Acting Police Chief. (Ex. A, p.2; Ex. B, p. 28-29).

Likewise, relators have claimed that they are entitled to serve and perform the duties of Deputy Police Chief. As classified civil servants Relators may lawfully be assigned to fulfill the duties of Deputy Chief. (*See* Aff. Calvaruso, ¶ 12; Aff. Daugherty, ¶ 12; Aff. Prebonick, ¶ 12; Aff. Sullivan, ¶ 12; Aff. Trundle, ¶ 12; Aff. Zampelli, ¶ 12). Only classified civil servants may fill the position of Deputy Chief pursuant to City Ordinance No. 409-2012. (Ex. B, p. 28-29). But for Mr. Brown's *de facto* service as Deputy Chief, Relators—as the highest ranking members of the Division of Police below the rank of Chief—assume the responsibilities of the vacant Deputy Chief positions. Respondents are entitled to continue fulfilling said responsibilities until a Deputy Chief is properly appointed pursuant to civil service rules and regulations.

Further, justice requires this Court oust Mr. Brown from the positions of Acting Chief and *de facto* Deputy Chief. This Court has long held that Quo Warranto is the exclusive method for “testing the question of title to office.” *State ex rel. Maxwell v. Schneider*, 103 Ohio St. 492, 496-497 (134 N.E. 443 (1921)); *State ex rel. Battin v. Bush*, 40 Ohio St.3d 236, 238-239, 533 N.E.2d 301 (1988); *State ex rel. Deiter v. Mcguire*, 119 Ohio St.3d 384, 2008-Ohio-4536, 894 N.E.2d 680, 684, ¶ 20. Although Mr. Brown admits he is not part of the classified service of the City of Akron, Mr. Brown denies that he is not part of the rank structure of the Akron Police Department, (Brown Answer, ¶ 32, 36); denies that he cannot serve as Acting Chief of the Akron Police Department, (Brown Answer, ¶ 37); and, denies that he cannot serve as or fulfill the duties of the Police Deputy Chief of the Akron Police Department. (Brown Answer, ¶ 38). The City seeks to evade its own civil service rules and regulations. Because Quo Warranto is Relator's exclusive remedy to test Mr. Brown's claim to public office, in the interest of justice, Mr. Brown's Motion for Judgment on the Pleadings cannot be sustained.

As the highest ranking officers in the Division of Police below the rank of Chief, the Relator Captains have made a good faith claim to their entitlement to the office of Acting Police Chief and to execute the duties of Police Deputy Chief.

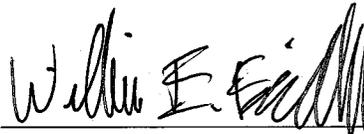
### III. CONCLUSION

This Court should not grant Respondent's Motion for Judgment on the Pleadings. Relators have properly pled the elements necessary for a Quo Warranto claim. Respondent Brown is not entitled to hold the office of Acting Chief or *de facto* Deputy Chief. Relators have made a good faith claim that they are entitled to serve as Acting Chief and *de facto* Deputy Chief. When Relators' claims are viewed in the most favorable light, it is clear that Respondent's Motion is groundless.

This Court must deny Respondent's Motion for Judgment on the Pleadings.

Respectfully submitted,

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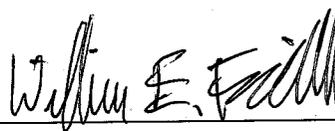
*Attorneys for Relators*

**CERTIFICATION OF SERVICE**

I hereby certify that pursuant to Civil Rule 5 a copy of the foregoing MEMORANDUM IN RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS was served via regular U.S. Mail this 21<sup>ST</sup> day of March, 2013, upon the following:

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The Supreme Court of Ohio  
Office of the Clerk

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EXHIBIT

J