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I. INTRODUCTION

Respondent Brown's and Intervenor City of Akron's (collectively, hereinafter "Respondents") Brief is a misguided effort to persuade this Honorable Court that the Intervenor City can illegally circumvent its municipal charter, establish a shadow chain of command within the City's Division of Police and allow an unclassified civilian to serve as Acting Police Chief and perform the duties of a Deputy Police Chief. Respondent Brown must be ousted from the offices of Acting Police Chief and *de facto* Deputy Police Chief.

In defense of its position, Respondents make three claims: 1) the office of Acting Police Chief is not a public office; 2) Respondent Brown does not act as a Deputy Chief; and, 3) Relators'¹ have not claimed that they are entitled to hold the offices of Acting Chief or Deputy Chief. Respondents fail to dispute the Relators' evidence, present a revisionist version of the facts and rely on antiquated and misleading jurisprudence in defense of their position. The flaws in Respondents legal arguments are addressed after a brief review of Respondents' counterstatement of facts.

II. RESTATEMENT OF THE FACTS

Respondents readily admit that Respondent Brown served as Acting Police Chief from February 11, 2013 until February 15, 2013. Further, because Respondents have no evidence or authority to the contrary, Respondents fail to challenge the evidence showing Respondent Brown acts as a Deputy Chief. Respondents claim they "dispute[]" Relators' facts and falsely suggest

¹ Relators Paul Calvaruso, Elizabeth A. Daugherty, Michael G. Prebonick, Martha L. Sullivan, Sylvia D. Trundle and Daniel D. Zampelli (collectively "Relators") filed the instant original action for writ of quo warranto pursuant to Ohio Constitution Article IV, Section 2(B)(1)(a) and R.C. Chapter 2733. Respondents suggest that the instant matter is actually a challenge to Respondent Brown's job duties brought on behalf of the Fraternal Order of Police, Lodge No. 7 ("Union" or "FOP"). (R/I, p.1-2). While Relators are members the FOP, the FOP is not a party to the instant matter.

that the Relators' facts are "irrelevant topics totally unrelated to the issues presented." (I/R, p.4).² Respondents' bald assertion cannot be accepted. As presented in the Relators' Brief, collectively the evidence overwhelmingly illustrates that Respondent Brown is assigned and performs the duties of a Deputy Chief. (Rel., p.32-42). Respondents only suggest Relators' facts are "irrelevant." Respondents cannot dispute Relators' evidence and instead hope this Court will simply ignore the mountain of evidence that shows Respondent Brown clearly acts with the authority of a Deputy Chief within the chain of command.

Respondents inaccurately allege that the similarities between the Deputy Chief job description, (Jt. Ex. D), and Mr. Brown's position, (Jt. Ex. E), are superficial. (R/I, p.8). Even a cursory comparison of the two documents shows that Respondent Brown is assigned the duties of a Deputy Chief in his role as Assistant Chief. (*compare* Jt. Ex. D with Jt. Ex. E: *see also* Rel., p.32-42). Specifically, Respondents claim that the evidence reflects that Respondent Brown is not a supervisor in the chain of command and that he does not plan and direct the activities of one or more subdivisions of the Division of Police. (R/I, p.8). As stated, the undisputed evidence overwhelmingly illustrates that Respondent Brown is assigned and performs the duties of a Deputy Chief. (Rel., p.32-42). Respondent Brown assists with management objectives and implementation of law enforcement trends and innovations. (Jt. Ex. D). Respondent Brown oversees and supervises the Division of Police hiring process. (Zampelli Aff. ¶24-25; Brown Aff. ¶6). Respondent Brown monitors the day-to-day activities of the Division of Police and directs various activities within the Uniform subdivision. (Rel., p.36-37). Respondent Brown

² Citations reference Evidence and Pleadings filed with this Court as follows: Joint Exhibits are cited as "Jt. Ex. ___"; Joint Facts are cited as "Jt. F. ___"; Relators' Exhibits are cited as "Ex. ___"; Affidavits are cited as "Last Name Aff. ¶ ___"; Relators' Brief is cited as "Rel., p. ___"; Respondents Brief is Cited "I/R, p. ___." Note that "Ex. O-2" and "I/R Brown Ex. 2" are available in the Joint Motion for Leave to Clarify the Record, as granted by this Court on July 15, 2013.

signs documents under the title “Subdivision Commander” and “Chief.” (Ex. T; Ex. M-1; Ex. R). Police Chief James Nice has revoked supervisory authority from police captains refusing to recognize Respondent Brown’s appointment within the chain of command. (Ex. Q). Further, although Respondent Brown no longer serves within the chain of command he continues to hold authority over his former inferior officers. (Rel., p.36; Ex. Y). The evidence showing Respondent Brown acts as a Deputy Chief is not “superficial,” it is overwhelming.

Respondents’ arguments that Respondent Brown does not act as a Deputy Chief are disingenuous. For example, Respondents dispute that no rule “requires” Captains or Deputy Chiefs to serve on the Firearms Review Board. (I/R, p.9). However, the Police Division Rules and Regulations state that the Firearms Review Board shall consist of three (3) subdivision commanders or their designated replacements. (Jt. Ex. C, p.14). The Rules and Regulations further define a subdivision commander as a “deputy chief, or his / her designated replacement, assigned by the Chief of police to command a subdivision.” (Jt. Ex. C, p.7). Therefore, pursuant to the Rules and Regulations, if Respondent Brown serves on the Firearms Review Board (which he does) he must either serve as a Deputy Chief or be assigned the duties of a Deputy Chief.

Further, Respondents claim that the S-List shows that Respondent Brown was never assigned to serve as Deputy Chief. Respondents claim that even the January 17, 2013 S-List “accurately listed the number of Deputy Chiefs within the Division as ‘0.’” (I/R, p.7). However a comparison of the January 17 and January 22 S-Lists is revealing. The January 17, 2013 S-List shows that Respondent Brown was designated “S-2,” the second-highest rank, immediately behind the Chief and ahead of all Captains; only three (3) Deputy Chief positions are vacant; and, the “GRAND TOTAL” number of Supervisors is listed at 87. (Jt. Ex. F). The January 22 S-List shows four (4) vacant Deputy Chief positions—Respondent Brown’s name is removed;

lists the number of authorized and filled supervisory positions; and, lists the “GRAND TOTAL” number of supervisors as 86. (Jt. Ex. H). The only name removed from the January 17 S-List is Respondent Brown’s name. Following Respondent Brown’s removal, the revised S-List shows one additional vacant Deputy Chief position and one fewer supervisor (a decrease from 87 to 86). Clearly, the City intended that Mr. Brown serve in the capacity of a Deputy Chief with supervisory authority over members of the Division of Police. Respondent Brown’s name was only removed from the S-List after Susannah Muskovitz sent correspondence to the City concerning Respondent Brown’s employment. (Jt. Ex. G).

Respondents also make the illusory claim that Respondent Brown performs no duty “exclusively performed by a Deputy Chief.” (I/R, p.9). Respondents neglect to mention that—prior to Respondent Brown’s illegal service—and throughout Chief Nice’s tenure, the City has not had a single employee formally serve as Deputy Chief. (*See, e.g.,* Daugherty Aff. ¶7). Instead, all of the City’s Police Captains—including the Relators—have performed the duties of the Deputy Chief. For example, Captain Zampelli serves as the acting Services Subdivision Commander and has served in that capacity since March 3, 2009, (Zampelli Aff. ¶ 21); Captain Daugherty has served as the acting Commander of the Investigative Subdivision. (Ex. Z, p.13). Indeed, Respondent Brown does not perform any duties which—immediately prior to his appointment—were “exclusively” performed by a Deputy Chief. In fact, no Deputy Chief has been in place to exclusively perform the duties of a Deputy Chief.

Respondents frequently claim that the Mayor has authority to hire assistants to the Mayor. Respondents further claim an assistant may be assigned any duties, without limit. However, the Mayor’s authority over the Police Division is restricted by Charter Section 68 which states the police force shall consists of a “Chief of Police and such officers and employees

as may be provided for by the Council” and grants the Mayor the right “to appoint substitute or special patrolmen who shall not be considered in any sense regular members of the Police Division and who need not be in the classified service.” (Jt. Ex. A, p.24). Section 68 therefore requires individuals who are considered regular members of the Police Division to be authorized by council. Ordinance 409-2012 does not authorize Respondent Brown to serve as a regular member of the Police Division, (Jt. Ex. B), therefore he cannot “be considered in any sense” to be a regular member of the police department. Further, pursuant to Charter Section 105, the Mayor is restricted from unilaterally assigning unclassified civilians the duties of classified civil servants. (I/R, p.24).

Oddly, Respondents appear to dispute the validity of the Rules and Regulations of the Akron Division of Police stating that the Rules and Regulations somehow conflict with the Mayor’s authority as proscribed by the City Charter. Respondents claim Relators’ reliance on the Rules and Regulations “cloud[s] the issues” and “deflect[s] away” from the Mayor’s authority to appoint unclassified assistants. (I/R, p.6). However, the Rules and Regulations were established by the Mayor and are subject to the Mayor’s modification. (Jt. Ex. A, p.24; *See* Jt. Ex. C). The Rules and Regulations do not cast a shadow on the City Charter: they are established pursuant to Charter and set forth the policies and procedures of the Division of Police. (Jt. Ex. A, p.24).

Finally, Respondents admit in their brief and in evidence that Respondent Brown does not actually serve the City of Akron as an assistant to the Mayor. Respondent Brown admits he is the “Assistant Chief of Police.” (Brown Aff. ¶2). Chief Nice explains that he refers to Respondent Brown “as Assistant Chief” and Chief Nice gives Respondent Brown his work assignments. (Nice Aff. ¶2-3). Chief Nice’s executive secretary has explained in

correspondence addressed to the entire Division of Police that Respondent Brown's "formal title is Assistant Chief of Police." (Ex. N-1). Respondents provide no evidence that Respondent Brown assists the Mayor.

III. LAW AND ARGUMENT

Proposition of Law #1: Relators have made a good faith claim of entitlement to serve in the public office of Acting Police Chief and Deputy Police 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.*

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). This Court has long-held that a Relator need only establish his claim to a public office on "good faith and reasonable grounds." *State ex rel. Delph v. Barr*, 44 Ohio St.3d 77, 80, 541 N.E.2d 59 (1989); *State ex rel. Hanley v. Roberts*, 17 Ohio St.3d 1, 6, 476 N.E.2d 1019, 1023 (1985); *State ex rel. Ethell v. Hendricks*, 165 Ohio St. 217, 135 N.E.2d 362, paragraph three of the syllabus (1956).

Relators have adequately alleged they are entitled to serve as Acting Chief and *de facto* Deputy Chief because they have performed the duties of Deputy Chief and have served as Acting Chief. First, there is no dispute that Relators have served as Acting Chief prior to Respondent Brown's appointment. Further, Relators have performed the duties of a Deputy Chief for several

years. For example, Captain Zampelli and Captain Daugherty both serve as subdivision commanders—jobs reserved for Deputy Chiefs. (Jt. Ex. C, p.7). In that capacity they clearly perform the duties of a Deputy Chief. Further, Respondent Brown has usurped authority typically designated to a Deputy Chief / subdivision commander. Prior to Respondent Brown's appointment Captain Zampelli supervised the Division of Police's hiring process in his role as the acting Services Subdivision Commander. In Spring of 2013, at the early stage of a hiring process, Captain Zampelli became aware that Respondent Brown was also overseeing the hiring process, including background investigations. In early April, 2013, during the course of a meeting with several of his fellow Captains and Chief Nice, Captain Zampelli asked Chief Nice who (Captain Zampelli or Respondent Brown) was responsible for overseeing the ongoing hiring process—including background investigations. Chief Nice responded that Respondent Brown was responsible for handling background investigations and that Captain Zampelli should report to Respondent Brown. (Zampelli Aff. ¶ 25). Indeed, both Respondent Brown and Chief Nice admit that Respondent Brown manages the Division of Police's hiring process. (Brown Aff. ¶ 6; Nice Aff. ¶ 5). Respondent Brown has taken over duties traditionally assigned to subdivision commanders (captains in the absence of deputy chiefs).

Relators' quo warranto claim was brought in good faith and on reasonable grounds. Further, justice requires this Court determine whether Respondent Brown may lawfully serve as Acting Chief and if the City can continue to operate a shadow chain of command within the Division of Police by assigning Respondent Brown the duties and responsibilities of a Deputy Chief. If Relators' claim is denied on standing grounds it does not appear that any individual party has standing to challenge Respondent Brown's illegal service as Acting Police Chief or Deputy Police Chief. Indeed, Relator Captains are best suited to bring the instant matter because

they are privy to the internal systems and procedures of the Akron Division of Police; they are familiar with the duties and responsibilities of the members of the Akron Division of Police; and, they have the strongest claim to serve—and have served as and performed the duties of Acting Chief and *de facto* Deputy Chief.

Respondents attempt to mislead this Court with citations to *State ex rel. Cain v. Kay* and *State ex rel. Annabel v. Stokes*. In *Cain*, this Court discussed whether an individual could bring a quo warranto claim to determine who properly holds the office of chairman of the state political party. *State ex rel. Cain v. Kay*, 38 Ohio St.2d 15, 16, 309 N.E.2d 860 (1974). This Court explained that the state political party had no “official powers that are part of the sovereign functions of the state” and held that “courts should defer to the appropriate political party . . . for resolution of internal disputes.” *Id.* at 18-19. The facts of the instant matter clearly distinguish *Cain*: the police power of the Akron Division of Police is a sovereign function of the state; no internal political process exists to resolve the instant dispute. *Stokes* is further afield. In *Stokes* citizens filed a quo warranto claim attempting to oust United States Congressional Representative Louis Stokes from office based on the claim that his congressional district should be declared “unconstitutionally created” and is therefore not a valid Congressional District. *State ex rel. Annabel v. Stokes*, 24 Ohio St.2d 32, 32, 262 N.E.2d 863 (1970). However, in *Stokes*, Relators failed to make a good faith claim that they were entitled to serve in the Congressional office; the claim was summarily dismissed. *Id.*

Respondents make precisely the same claims in their Brief which were presented and rejected in their Motion for Judgment on the Pleadings. *State ex rel. Calvaruso v. Brown*, 135 Ohio St.3d 1457, 2013-Ohio-2285, 988 N.E.2d 577. Further, Respondents suggest that there is a distinction between a claim to an office and entitlement to an office. (l/R, p.13). However,

Relators have shown that in the absence of Deputy Chiefs they assume the roles and responsibilities of Deputy Chief. As such, Respondent Brown not only acts as a Deputy Chief, but has also usurped the authority of the Relator Captains—who are lawfully serving within the chain of command—by taking over roles and responsibilities that the Captains have performed in the absence of Deputy Chiefs: serving on the Firearms Review Board; overseeing hiring within the Division of Police; and, among others, approving overtime, travel and other requests within the chain of command.

Relators have made a good faith claim of entitlement to serve in the public office of Acting Chief and Deputy Chief. Indeed, Relators have served as Acting Chief and have performed the duties of the Deputy Chiefs.

Proposition of Law #2: Respondent Brown, an unclassified civilian appointed as an assistant to the Mayor of the City of Akron, unlawfully held and exercised the office of Acting Deputy Police Chief and must be ousted from the office of Acting Deputy Chief.

Respondents do not—and cannot—dispute that Respondent Brown served as Acting Police Chief from February 11, 2013 until February 15, 2013. (Jt. F. 14; Jt. Ex. I). Respondents do not claim that Respondent Brown’s service as Acting Chief was legal. Instead Respondents inaccurately allege the office of Acting Chief is not a public office and aver that Respondent Brown cannot be ousted from an office he no longer holds.

The office of Acting Chief is a public office. This Court has consistently explained “to constitute a public office, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law.” *State ex rel. Landis v. Bd. of*

Comms. of Butler Cty., 95 Ohio St. 157, , 159-160, 115 N.E. 919 (1917) (citing *State ex rel. Atty. Gen. v. Jennings*, 57 Ohio St. 415, 419, 49 N.E. 404 (1898)). More recently one appellate court has stated, to “constitute a ‘public office,’ a position must have been endowed with a part of the sovereignty of the state and certain independent public duties by law.” *State ex rel. Scioto Cty. Prosecutor v. Murphy*, 4th Dist. Scioto No. 02CA2831, 2003-Ohio-4550, ¶21 (citing *State ex rel. Atty. Gen. v. Jennings*, 57 Ohio St. 415, 419, 49 N.E. 404 (1898)). Respondents inaccurately claim that the criteria for determining whether a position is a “public office” are merely limited to “durability of tenure, oath, bond, emoluments,” the exercise of independent functions and the duties imposed. (I/R p.15 (acknowledging *State ex rel. Landis v. Bd. of Comms. of Butler Cty.*, 95 Ohio St. 157, 115 N.E. 919 (1917))).

A police chief holds a public office. *State ex rel. Delph v. Barr*, 44 Ohio St.3d 77, 79, 541 N.E.2d 59 (1989); see *State ex rel. Brenders v. Hall*, 71 Ohio St.3d 632, 646 N.E.2d 822 (1995) (holding all police officers hold public office). Pursuant to the City Charter, in this case, the Police Chief has jurisdiction and control over all patrolmen and employees within the Division of Police. (Jt. Ex. A, p.24). The Rules and Regulations clearly state the Acting Chief is “vested with the authority and responsibility” of the Chief. (Jt. Ex. C, p.20). While serving as Acting Chief, Respondent Brown exercises his authority issuing a “Chief’s Directive.” (Ex. M-1). There can be no doubt that Acting Chief is a public office endowed with the execution of the Division of Police.

Respondents claim that the brevity of Respondent Brown’s tenure as Acting Chief shows that the office of Acting Chief is not a public office. (I/R, p.15). Respondents claim that a ten-day appointment to serve as Acting Chief is not an appointment to a public office. Respondents’ argument also suggests that a six-month appointment to serve as Acting Chief is not an

appointment to a public office. Respondents propose a slippery slope. The duration of an assignment to the public office of Acting Chief is irrelevant. An Acting Chief's exercise of sovereign police power confirms that an Acting Chief serves in a public office.

Finally, Respondents claim that Respondent Brown can no longer be ousted from office because he does not currently serve as Acting Chief. However, if this Court does not rule on this issue, the City will be free to illegally appoint Respondent Brown as Acting Chief at any time. This action cannot be permitted. Respondents claim that someone must "actually hold[] office." Respondents rely on *City of Parma* wherein this Court held ouster would not lie where the appointment of an individual to a public office had previously been enjoined. *City of Parma v. City of Cleveland*, 9 Ohio St.3d 109, 112, 459 N.E.2d 528 (1984). In accord with *City of Parma*, Relators could not bring the instant action—with respect to Acting Chief—if Respondent Brown did not take office as Acting Chief. Of course, in this matter Respondent Brown did serve as Acting Chief. Therefore, Respondents' reliance on this Court's holding in *City of Parma* is unfounded.

Recently, in *Zeigler*, this Court disapproved of an appointing authority's attempt to insulate "its improper removal of a public officer by appointing multiple persons to the office in quick succession." *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶13. The same logic applies in this matter. Respondents claim that Respondent Brown's short tenure as Acting Chief insulates him from a quo warranto claim. If this Court determines that Respondent Brown may serve as Acting Chief—because Respondent Brown's service is limited to a narrow timeframe—this Court will sanction the illegal assignment of an unclassified civilian to the office of Acting Chief. Pursuant to *Zeigler*, this Court cannot stand by and allow Respondent Brown to serve as Acting Chief.

Respondent Brown must be ousted from the office of Acting Chief.

Proposition of Law #3: Respondent Brown, an unclassified civilian appointed as an assistant to the Mayor of the City of Akron, unlawfully serves the City of Akron within the Chain of Command of the Akron Division of Police as a *de facto* Deputy Chief. Respondent Brown must be ousted from the office of *de facto* Deputy Chief.

Intervenor City unlawfully assigned Respondent Brown the duties of a Deputy Chief³ under the fictitious title “Assistant Chief of Police.” Respondent Brown is an unclassified civilian and is therefore ineligible to hold the office of Deputy Chief. Indeed, Respondents do not dispute that Respondent Brown cannot legally hold the office of Deputy Chief. Instead Respondents dispute that Respondent Brown acts as a Deputy Chief. Regardless of Respondents’ semantic arguments the record clearly reflects that Respondent Brown serves the City as a Deputy Chief. Rather than dispute the Relators’ evidence showing that Respondent Brown serves as a Deputy Chief, Respondents hide behind semantics, antiquated case law interpreting the phrase *de facto* as well as specious arguments misinterpreting this Court’s precedent and misstating the City’s Charter authority.

A. The Charter Prohibits Respondent Brown’s Assignment as Deputy Chief

This Court has previously reprimanded the City of Akron for circumventing its municipal charter and Civil Service Commission. *See Local 330, Akron Firefighters Assn., AFL-CIO v. Romanoski*, 68 Ohio St.3d 596, 629 N.E.2d 1044 (1994). In the instant matter, the Intervenor

³ Respondents do not dispute that the office of Deputy Chief is a public office. Indeed, the office of Deputy Chief / *de facto* Deputy Chief is a public office. *State ex rel. Brenders v. Hall*, 71 Ohio St.3d 632, 646 N.E.2d 822 (1995) (“A police officer of a municipal corporation is a public officer and occupies a public office.”).

City again attempts to circumvent its municipal charter and Civil Service Rules. Rather than properly appoint a Deputy Chief through the Civil Service Commission, the City has illegally hired Respondent Brown to act as a Deputy Chief, thereby creating a shadow chain of command within the Division of Police. In *Romanoski*, this Court evaluated whether the City of Akron's Charter gives the City the authority to assign various employees to classified positions without the approval of the Civil Service Commission. The City's fire chief made promotional assignments without the approval of the City's Civil Service Commission. This Court held that the City's analysis misconstrued its municipal charter and circumvented the purpose and rules of the Civil Service Commission. *Id.* at 601-602. Today, the City's actions are more egregious than in *Romanoski*. The City has assigned the duties and responsibilities of the Deputy Chief to Respondent Brown under the fictitious title "Assistant Chief"; the City has shifted responsibilities of acting subdivision commanders to Respondent Brown. *Romanoski* is not simply a generic proposition of law—it is directly on point both as a matter of fact and a matter of law. The City has again attempted to circumvent the Civil Service Commission by appointing an unclassified civilian to serve as assistant to the Mayor, with all the duties and responsibilities of a Deputy Chief.

Respondents repeatedly claim that the City Charter places no restrictions on the duties assigned to the various "assistants to the Mayor" appointed under Charter section 105(1)(g). (*See, e.g., I/R, p.24*). Charter Provision 68 states in pertinent part:

The police force shall consist of a Chief of Police and such officers and employees as may be provided for by the Council. . . . The Mayor shall have the right, whenever authorized by Council, to appoint substitute or special patrolmen who *shall not be considered to be in any sense regular members of the Police Division* and who need not be in the classified service.

(Jt. Ex. A, p.24 (emphasis added)). Therefore, pursuant to the City Charter, Respondent Brown must either 1) serve as an officer in a position established in City Ordinance 409-2012⁴ (Police Chief, Police Deputy Chief, Police Captain, Police Lieutenant, Police Sergeant, Police Officer), (Jt. 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. Respondent Brown clearly serves the Division of Police with the authority and responsibility of a Deputy Chief. However, Respondents claim Respondent Brown was not appointed pursuant to City ordinance 409-2012 because Respondent Brown is not a classified employee. (I/R, p.6). Following the City’s argument, Respondent Brown cannot be considered in any sense to be a member of the Police Division. However, the facts overwhelming show that Respondent Brown illegally acts as a Deputy Chief. Thus, Respondent Brown cannot continue to act with the authority and responsibility of a Deputy Chief. Respondent Brown must be ousted from the office of *de facto* Deputy Chief.

B. Respondent Brown Assumed the Duties of Deputy Chief and is a de facto Deputy Chief

It is well settled that “quo warranto is the exclusive remedy by which one’s right to hold a public office may be litigated.” *State ex rel. Deiter v. McGuire*, 119 Ohio St.3d 384, 2008-Ohio-4536, at ¶ 20 (quoting *State ex rel. Battin v. Bush*, 40 Ohio St.3d 236, 238-239, 533 N.E.2d 391 (1988)). The City cites *State ex rel. Purola v. Cable* to suggest that a writ of quo warranto cannot be used to oust a *de facto* public officer. As Respondents point out, this Court has explained the *de facto* doctrine does “not protect or vindicate the acts or rights of the particular de facto office or the claims or rights of rival claimants to the particular office.” *State ex rel. Purola v. Cable*, 48 Ohio St.2d 239, 243-244, 358 N.E.2d 537 (1976). However Respondents’ citation is incomplete. This Court has consistently applied the *de facto* doctrine in quo warranto

⁴ City Ordinance 409-2012 was provided in response to Susannah Muskovitz’s request for “the hiring ordinance under which Mr. Brown was hired.” (Jt. Ex. G).

claims—including *State ex rel. Purola*—explaining “the only difference between an officer de facto and an officer de jure is that the former **may be ousted** in a direct proceeding against him.” *Id.* (emphasis added); *State ex rel. Huron Cty. Prosecutor v. Westerhold*, 72 Ohio St.3d 392, 396, 650 N.E.2d 463 (1995). Indeed, a *de facto* officer may only be removed through a valid quo warranto proceeding. *State ex rel. Huron Cty. Prosecutor*, 72 Ohio St.3d at 396.

Respondents attempt to distinguish the instant matter relying on citations to *State ex rel. Flask v. Collins* and *State ex rel. Coyne v. Todia*. (I/R, p.20-21). Neither case is applicable. *Coyne* involved a writ of prohibition concerning a dispute between municipal court judges and judges of a mayor’s court. Respondent municipal court judges argued that their counter-claims were actually an original action in writ of quo warranto. This Court granted the relator’s motion to dismiss respondents’ counter-claims. *State ex rel. Coyne v. Todia*, 45 Ohio St.3d 232, 238, 543 N.E.2d 1271 (1989). *Coyne* is simply inapplicable to this instant matter based on its procedural posture: no counter-claim has been asserted; no writ of prohibition has been requested.

Likewise, Respondents cite *Flask* to make the following allegation: “in a quo warranto action ‘the only thing that can be tried is the title to the office.’” (I/R, p.20 (citing *State ex rel. Flask v. Collins*, 148 Ohio St. 45, 49, 73 N.E.2d 195 (1947))). Respondents’ citation is misleading because it relies on statutory provisions which are no longer effective. The full quote reads, “the only thing that can be tried is the title of the office of the one bringing the action and the strength or weakness of the respondent is of no concern.” *Id.* at 49-50. In *Flask*, this Court interpreted Section 12307 of the Ohio General Code, a provision which was superseded in 1954 with the enactment of R.C. Chapter 2733. *Flask* is irrelevant because it no longer reflects the state of the law. This Court may issue a decision “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.*” *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).

A *de facto* officer “enters upon and performs the duties of [an] office with the acquiescence of the public authorities and the public and has the reputation of being the officer he assumes to be and is dealt with as such.” *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 76 N.E.2d 886, paragraph two of the syllabus (1947). The overwhelming evidence shows that Respondent Brown acts as a Deputy Chief and is *de facto* Deputy Chief. (Rel., p.32-42). Respondents defend Respondent Brown’s illegal assignment claiming that the title “assistant to the Mayor” is distinct from Deputy Chief and arguing that the Mayor has vast authority to assign assistants however he so chooses.

Respondent Brown acts as a Deputy Chief—not an assistant to the Mayor. Respondents hide behind the title assistant to the Mayor. However, neither Respondent Brown nor the Intervenor City state or claim that Respondent Brown actually assists the Mayor. Instead Respondents provide evidence that Respondent Brown is in fact the “Assistant Chief.” (Brown Aff. ¶2; Nice Aff. ¶2; Ex. N-1). Respondent Brown does not assist the Mayor—Respondent Brown’s appointment merely circumvents the City’s Charter and Civil Service appointment process. Rather than hold a civil service promotional examination and promote Deputy Chiefs, the Intervenor City has elected to establish a shadow chain of command wherein Respondent Brown has the authority of a Deputy Chief, but is not a classified civil servant. Respondent Brown illegally acts as Deputy Chief and must be ousted from the office of *de facto* Deputy Chief.

The Intervenor City dangerously asserts that the Mayor has “plenary” power to appoint assistants to the Mayor as he sees fit—without any restriction. The Intervenor City suggests that it has appointed assistants to the Mayor to supervise classified civilians acting within the chain of command, (I/R, p.6), and will not hesitate to do so in the future.⁵ The Mayor’s claimed plenary authority does not extend to the appointment of positions in the classified service—Charter Section 106 specifies rules for the appointment and promotion of classified civil servants. (Jt. Ex. A, p.40-41). As such, the Mayor cannot appoint an assistant or assign an unclassified civilian to serve as an Assistant Chief with the power and authority of a Deputy Chief. Respondent Brown’s service as Assistant Chief merely circumvents the City Charter and the Civil Service Commission. Respondent Brown must be ousted from the office of Deputy Chief.

IV. CONCLUSION

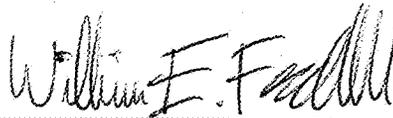
Respondent Brown unlawfully holds the position of Acting Police Chief, unlawfully serves as *de facto* Police Deputy Chief and unlawfully serves within the chain of command of the City of Akron’s Division of Police. Relators respectfully request that Respondent Brown be ousted from the public office of Acting Police Chief and be ousted from the public office of Police Deputy Chief. Relators further request that Respondent Charles Brown be ordered not to assume the duties of a sworn police officer in the chain of command. Correspondingly Relators request that Intervenor City of Akron be prohibited from assigning an unclassified civilian to perform duties within the chain of command of the Akron Division of Police. Further, Relators

⁵ In their Merits Brief Relators state the safety communications center “now falls into the chain of command.” (Rel., p.5). Citing this statement Respondents claim that Relators admit unclassified employees have supervised classified employees. (I/R, p.6). However, there is no evidence in the record which indicates when George Romanoski served as the civilian head of the safety communications center. Further no evidence indicates whether the safety communications center fell within the chain of command of the Division of Police during George Romanoski’s tenure.

have performed the duties of Deputy Chief and Acting Chief. As such, they believe they possess the necessary qualifications to serve and are entitled to serve as Acting Police Chief and Deputy Chief and respectfully request a declaration that they are entitled to be considered for the positions of Acting Police Chief and Deputy 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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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing RELATORS' REPLY BRIEF was served via email and regular U.S. Mail this 31st day of July, 2013, upon the following:

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