

ORIGINAL

IN THE SUPREME COURT OF OHIO

The State, ex rel. Dick Flanagan	*	Original Action in Quo Warranto
	*	
Relator,	*	Case No. 13-0239
	*	
v.	*	
	*	
David M. Lucas	*	
	*	
Respondent.	*	
	*	

**REPLY BRIEF IN SUPPORT OF RELATOR'S CLAIM
FOR A WRIT OF QUO WARRANTO**

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REPLY ARGUMENT

I. THE PEACE OFFICER APPOINTMENTS RELIED UPON BY THE RESPONDENT DO NOT QUALIFY AS “FULL-TIME” EMPLOYMENT AS A PEACE OFFICER.

As anticipated in the Relator’s Merit Brief, the Respondent contends that he qualifies for the office of Belmont County Sheriff, for purposes of R.C. 311.01(B)(8)(a), based upon one appointment as a special deputy. The subject appointment identified by Respondent as the one which he relies upon is his appointment as Special Deputy with Belmont County Sheriff’s Office. Despite Respondent’s wishful thinking, R.C. 311.01(B)(8)(a) is not satisfied by merely possessing an appointment as a peace officer. To the contrary, the statute requires employment as a full-time peace officer within the four-year period prior to the qualification date; the candidate or applicant must have “been employed...as a full-time peace officer as defined in Section 109.71 of the Revised Code performing duties related to the enforcement of statutes, ordinances or codes.” Respondent has not provided this Honorable Court with any evidence of enforcement of statutes, ordinances or codes as Respondent did not perform any.

In his brief, the Respondent does not contest the facts relating to his “full-time” employment during the time period relevant for consideration under R.C. 311.01(B)(8)(a) as he was retired from full-time police work and lounging in Florida at his now disclosed residence. From October 31, 2007 to January 6, 2013, Respondent served as an officer of Pyrotechnics by Presutti, Inc. The only evidence from Respondent in his record of full-time employment since Respondent’s retirement on October 31, 2007 was his full-time employment with Pyrotechnics by Presutti, Inc. (Relator’s Exhibit 3 in Relator’s Evidence Volume).

Respondent does not establish through his brief that his position with Pyrotechnics by Presutti, Inc. and as special deputy (although unpaid) qualify as “peace officer” positions

pursuant to R.C. 109.71. Thus, during the relevant time period of inquiry, the Respondent's employment in these positions was not employment as a full-time peace officer. Consequently the Respondent attempts to bootstrap his ancillary work as a range officer with the Belmont County Sheriff's Office into "full-time" employment. Respondent relies upon his alleged eight-hour days for a few days service with the Belmont County Sheriff's Office as satisfactory "full-time" employment as a peace officer for purposes of the Revised Code. Both propositions offered by the Respondent should be rejected by this Honorable Court.

The law regarding determination of "full-time" employment, developed in this context of R.C. 311.01 is set forth fully within Relator's Merit Brief. Respondent does not offer any different legal principals, as volunteer work as a range officer is exactly that, volunteer work.

II. THE POSITIONS OF OFFICER OF PYROTECHNICS BY PRESUTTI, INC. AND RANGE OFFICER DOES NOT QUALIFY AS FULL-TIME "PEACE OFFICER" POSITIONS AS ANY SUPERVISORY EXPERIENCE IN THOSE CAPACITIES ARE IRRELEVANT FOR PURPOSES OF R.C. 311.01(B)(9)(A) AS NEITHER POSITION WAS AT CORPORAL OR ABOVE.

The court conducts a plain reading of the language of the statute to determine the intent. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.

Respondent confines his argument for compliance with R.C. 311.01(B)(9)(A) to his alleged "supervisory experience" (although denied by Relator) to positions as a range officer. What the Respondent fails to address, however, is that the supervision of peace officers must be at rank of corporal or above in said alleged position as a supervisory range officer.

R.C. 311.01 expressly prohibits the appointment of a candidate to the office of sheriff who does not meet the specific statutory requirements. R.C. 311.01 sets forth specific qualifications and requirements for county sheriff, and Section 311.01(B) specifically provides

that *no person is eligible to be a candidate* for sheriff unless the requirements of 311.01(B) are met:

(B) Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements...

Pursuant to R.C. 311.01(H)(1), the "qualification date" for the Office of Belmont County Sheriff was December 7, 2011. (Complaint, ¶____ and Answer, ¶_____).

R.C. 311.01(B)(9)(a) must, of course, be applied in this case as written as the language is clear. This subsection is clear – it is only satisfied by way of two years of supervisory experience “as a peace officer.” To qualify, the candidate or applicant must have “at least two years of supervisory experience as a peace officer at the rank of corporal or above...” Respondent does not satisfy this requirement. This Honorable Court recognized this element of the Revised Code in the case of *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 2000-Ohio-294:

Under the language used in the pertinent portion of R.C. 311.01(B)(9)(a), in order to be eligible to be a candidate for sheriff, the person must, within the five-year period, have two years of supervisory experience **and that supervisory experience must have been earned when the person served as a peace officer** at the rank of corporal or above. (Emphasis added).

Id., p. 184. The code “expressly requires that the supervisory experience be ‘as a peace officer at the rank of corporate or above.’” *Id.*, pp. 185-186. The Respondent’s argument fails for these reasons.

III. THE AFFIRMATIVE DEFENSES ASSERTED BY THE RESPONDENT ARE WITHOUT MERIT AND THEY CANNOT OPERATE TO CURE THE RESPONDENT’S LACK OF QUALIFICATIONS UNDER R.C. 311.01.

The “entitlement to office” issues were previously addressed by the Relator, in the briefing of Respondent’s Motion for Judgment on the Pleadings and Relator’s Merit Brief. In any event, the Respondent has raised the issue once again and argues over the issue of standing.

Standing, generally, is satisfied when one has a “stake in the outcome” of litigation. E.g., *State ex rel. E. Cleveland Fire Fighters v. Jenkins*, 96 Ohio St.3d 68, 70, 2002-Ohio-3527; *Cleveland v. Shaker Heights* (1987), 30 Ohio St.3d 49, 51. Respondent’s name should have never been on the ballot as Respondent does not meet the mandatory qualifications of R.C. 311.01 et al and his election is null and void. Relator being the only qualified candidate on the ballot to the office of Belmont County Sheriff establishes Relator’s stake in the outcome of this quo warranto action which establishes standing clearly.

In a quo warranto action, the relator “need not establish his right to title to the public office beyond all doubt, but rather need only establish his claim ‘in good faith and upon reasonable grounds.’” *State ex rel. Powers v. Curtis*, 2003-Ohio-6104, ¶10; *State ex rel. Delph v. Barr* (1989), 44 Ohio St.3d 77, 80 (citations omitted). Accord, *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d 1, 6. In this case, the Relator has set forth through the evidence his claim to the Office of Belmont County Sheriff “in good faith and upon reasonable grounds.”

The unlawful acts of the Belmont County Board of Elections in placing Respondent on ballot do not cure Respondent’s lack of qualifications to be on the ballot let alone serve as sheriff. R.C. 311.01 et al. are mandatory qualifications which this Honorable Court cannot rewrite.

Regardless, as this Honorable Court is well-aware, even if this Honorable Court is not satisfied that the Relator remains entitled to the office that does not somehow act as an affirmative defense entitling the Respondent to the office. This Honorable Court has recognized on numerous occasions that “[i]f a relator in a quo warranto proceeding fails to establish entitlement to the office, judgment may still be rendered on the issue of whether respondent lawfully holds the disputed office.” *State ex rel. Deiter v. McQuire*, 119 Ohio St.3d 384, 2008-

Ohio-4536, ¶22; *State ex rel. Newell v. Jackson*, 118 Ohio St.3d 138, 2008-Ohio-1965, ¶8; *State ex rel. Myers v. Brown*, 87 Ohio St.3d 545, 547, 2000-Ohio-478; *State ex rel. Varnau v. Wenminger*, 131 Ohio St.3d 169, 2012-Ohio-224, ¶12. Accord, *State ex rel. Powers v. Curtis*, supra at ¶11. Thus regardless of Respondent’s contention that the Relator is not entitled to the office of sheriff, such does not operate as an affirmative defense. “If [Flanagan] established that [Lucas] is unlawfully holding the office of [sheriff], [] he would be entitled to the writ to oust him.” *State ex rel. Newell v. Jackson*, supra at ¶8.

This rule is premised upon R.C. 2733.08. R.C. 27733.08 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.

All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise.

The Court in *State ex rel. Deiter v. McQuire*, supra, further observed:

[I]t is apparent that Section 2733.08 recognizes that a relator’s proof may fail in regard to one element and yet succeed with respect to the other, and provides that in such instance the court, as representative of the state, shall step in and render whatever decision is required by justice.

Id., 2008-Ohio-4536, ¶22. Therefore, Respondent’s stated defense as to standing is without merit.

This Honorable Court is urged to consider that not proceeding with the ouster of the Respondent on the merits of this case will result in violation of R.C. 311.01(B). R.C. 311.01(B) has an “unequivocal and definite meaning” and the requirements for election or appointment as a County Sheriff are just that, requirements. See, *Wellington v. Mahoning County Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, ¶48. It shall be remembered that any predicament that the

Belmont County Board of Elections and the Ohio Secretary of State has placed itself in by allowing Respondent's name to appear on the ballot and hold the Office of Belmont County Sheriff who does not possess the necessary legal qualifications is a predicament of its own creation. The Ohio Secretary of State will have to deal with any consequences produced by the outcome of this case relative to the Belmont County Board of Elections not performing its statutory obligation as more fully described in previous pleadings. (See Relator's Response to Judgment on the Pleadings and Relator's Merit Brief.)

Finally, the action of the Belmont County Board of Elections is not entitled to any form of deference in this action, as Respondent suggests pursuant to R.C. Chapter 3513, and as demonstrated by *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, supra, cited by the Respondent, as the County Board of Elections employ a quasi-judicial process in determining whether a candidate for sheriff meets the qualifications set forth in R.C. 311.01(B). However, in this case, no hearing or investigation was ever held as the Belmont County Board of Elections ignored the unequivocal lack of qualifications of Respondent. The Honorable Court has, on multiple occasions, allowed a writ in contravention of a County Board of Elections determination of eligibility under R.C. 311.01(B). See, e.g., *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 150 (2008). The Board of Elections abused its discretion and clearly disregarded the requirement and directions of the legislature when it comes to insuring only qualified candidates appear on the ballot.

IV. RESPONDENT WAS NEVER QUALIFIED TO BE A CANDIDATE FOR THE OFFICE OF SHERIFF PURSUANT TO R.C. 311.01(B) AND THEREFORE, THE ONLY QUALIFIED CANDIDATE ON THE NOVEMBER 6, 2012 BALLOT WAS RELATOR FLANAGAN.

This Honorable Court has previously found that R.C. 311.01(B) limits both the right to be a candidate for sheriff and the right to hold the office. *State ex rel. Altieri v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 164, 165, 602 N.F. 2d 613 (1992).

The statute is clear and each and every argument advanced by Respondent further establishes he did not perform full-time police work (enforcement of statutes, ordinances or codes) as either a uniformed officer or as a supervisor at the rank of corporal or above. Quite simply, Respondent is his worst enemy as Respondent knows clearly what is and is not full-time police work. Nevertheless, Respondent misrepresented his stature to the voters of Belmont County through billboards and the communications in his unlawful quest to become Sheriff of Belmont County. Respondent could have remained in full-time police work through the Belmont County Sheriff's Office or otherwise but he elected to retire and donate his energies to private employment with Pyrotechnics by Presutti, Inc. Respondent's alleged performance as a range officer a few days during a period of over 1,520 days as constituting full-time police work is an affront to this Honorable Court and the citizens of Belmont County. It shall be noted that not one single individual corroborated Respondent's assertions that he performed eight hour work days as a range officer and that lack of corroboration is telling in and of itself as evidently others do not want to assist Respondent in his unlawful quest to remain sheriff.

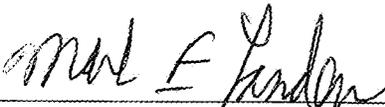
Respondent's desperate attempt to plead liberal construction of a well defined statute that serves as a condition precedent to having one's name lawfully as a candidate is amazing at best. A cursory review of record shows Respondent was not eligible to be a candidate. Retirement as a Major from the Belmont County Sheriff's Office means just that, a retirement with no status of major thereafter. Respondent puts forward no evidence that he ever served at the rank of corporal or above at any time subsequent to his October 31, 2007 retirement. (See Exhibit3,

Relator's Evidence Volume). Respondent's citation to the *Haff v. Pask* case does not assist Respondent in his continued response to mislead the voters of Belmont County. The mandatory qualifications of R.C. 311.01 et al. were not in existence at the time of the decision in *Haff v. Pask* and are therefore said case is not relevant to the present proceedings before this Honorable Court. The legislature in Ohio evidently decided to set forth clear criteria as to who could be a candidate on a ballot and who could serve as Sheriff in Ohio pursuant to R.C. 311.01 et al. Quite simply, Respondent clearly does not meet the requirements as spelled out in R.C. 311.01(B)(8) and (B)(9) by any stretch of imagination let alone fact.

CONCLUSION

WHEREFORE, this Honorable Court should sustain its previous grant of quo warranto to Relator and remove Respondent from Sheriff of Belmont County and issue an Order declaring Relator the only duly qualified candidate appearing on the ballot on November 6, 2012 and as the Sheriff of Belmont County.

Respectfully submitted,

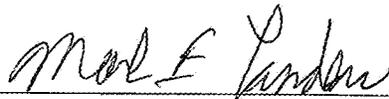
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CERTIFICATE OF SERVICE

Service of the foregoing Merit Brief was had upon counsel for the Respondent by mailing a true and correct copy thereof by U. S. mail, postage prepaid, this 19 day of August, 2013, to:

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