

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. TIMOTHY)
A. SWANSON, et al.,)
)
Relators,)
)
vs.)
)
STARK COUNTY DEMOCRATIC)
CENTRAL COMMITTEE, et al.,)
)
Respondents.)

CASE NO. 2013-1822

*ORIGINAL ACTION IN
MANDAMUS*

MOTION TO EXPEDITE WRIT OF MANDAMUS

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RECEIVED
DEC 09 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
DEC 09 2013
CLERK OF COURT
SUPREME COURT OF OHIO

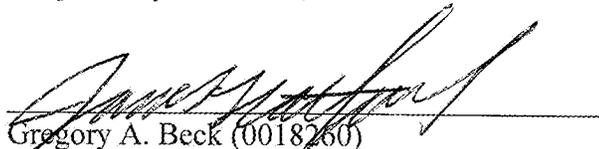
MOTION TO EXPEDITE WRIT OF MANDAMUS

Relators, Timothy A. Swanson and Lou Darrow, pursuant to S.Ct.Prac. R. 4.01(C), former XIV, Section 4(c), respectfully move this Court for an order expediting consideration of their petition for a Writ of Mandamus against the respondents in this case. Relators respectfully submit that the interests of justice warrant immediate consideration by this Court.

The respondents, Stark County Democratic Central Committee (“DCC”) and Chairman Randy Gonzalez, have scheduled a meeting of the DCC for December 11, 2013, in Canton, Ohio. The respondents are under the clear legal duty to complete an appointment to the vacancy in the Office of Stark County Sheriff at that time from the eligible candidates who qualified for such appointment prior to the applicable qualification date of February 6, 2013. Mandamus is the appropriate remedy to assure that this duty is carried out in an orderly and lawful manner.

Relators’ motion is supported by the complaint, memorandum and affidavits in support, and the accompanying memorandum, which are fully incorporated herein.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF MOTION TO EXPEDITE WRIT

I. INTRODUCTION.

Time is of the essence in connection with this mandamus action. As indicated above, a meeting of the respondent DCC is scheduled for December 11, 2013, and the respondents should be compelled to carry out at that meeting their duty to appoint a person to serve as Stark County Sheriff from the two eligible people qualified to fill the vacancy created on January 7, 2013.

This action follows on the heels of this Court's decision in *State ex rel. Swanson v. Maier*, ___ Ohio St. 3d ___, 2013-Ohio-4767, rendered November 6, 2013. Consistent with that decision, relator, Timothy A. Swanson, is serving the citizens of Stark County as Acting Sheriff until a "person qualified" is appointed by the respondent DCC in accordance with Ohio law.

This case turns on pivotal legal questions which have been clearly framed by the parties' respective filings. There are no factual issues to determine.

Relators maintain that the only vacancy which remains to be filled by appointment is that created when officer-elect, Michael A. McDonald, announced that he was unable to assume office in January of 2013. The vacancy occurred January 7, 2013 and the applicable qualification date for appointment to that vacancy was February 6, 2013. "Here, McDonald indicated before the beginning of his term that he was unable to assume office, so the vacancy occurred on January 7, the first day of McDonald's term. And 30 days after that date is the 'qualification date' February 6, 2013." *Swanson v. Maier*, at ¶28.

Importantly, it is undisputed in this case that two individuals, relator Lou Darrow and Larry Dordea, qualified for the appointment to the McDonald vacancy, and they did so prior to the February 6, 2013 qualification date.

In stark contrast, the respondents' position in this case can be drawn from the brief they filed on December 2, 2013. Therein, the respondents claim that there was a "vacancy caused by the removal of Maier" which resulted from the judicial ouster of Maier by this Court. (Respondents' Brief, p. 12). Based upon that faulty premise, the respondents then further contend that this "new vacancy" allowed for an "updated 30 day qualification date" extending from the Court's decision in *Maier*. (Respondents' Brief, p. 12). Operating under these positions, the respondents are not confining the December 11, 2013 meeting to their duty to appoint from the qualified candidates who satisfied the applicable qualification date of February 6, 2013 for the McDonald vacancy but, instead, are going to allow consideration of applications meeting the "updated" qualification date they have fashioned, for what the respondents evidently deem as the "Maier vacancy."

Because the only vacancy which remains to be filled by appointment under R.C. 305.02(B), for the term of officer-elect McDonald, is the McDonald vacancy, the Court should expedite consideration of this case and grant the mandamus relief requested by the relators. Such expedited consideration is warranted to avoid further protracted litigation and uncertainty over who is lawfully qualified to serve as the next Stark County Sheriff, to take office for the McDonald term. This case is of substantial public importance and immediacy.

II. MANDAMUS IS IN ORDER TO COMPEL RESPONDENTS TO APPOINT A PERSON QUALIFIED UNDER R.C. 311.01 IN ALL RESPECTS.

It is fundamental that, a person qualified under R.C. 311.01 to assume the office of Stark County Sheriff must, among his qualifications, satisfy the applicable qualification date of February 6, 2013. Any person seeking appointment to the McDonald vacancy and term based upon experience, credentials or qualifications after the qualification date of February 6, 2013, cannot demonstrate compliance with R.C. 311.01. Relator Darrow, and Larry Dordea as well, both

submitted timely applications for the McDonald vacancy, those applications were complete, reviewed and forwarded to the DCC before the applicable qualification date, and the DCC voted at the February 5, 2013 meeting that both applicants met the qualifications of R.C. 311.01. These facts are undisputed. (See, Memorandum in Support or Writ, Exhibit C, Gonzalez Affidavit, ¶8; and attached Meeting Minutes). The respondents have a duty to complete the appointment process begun at their meeting of February 5, 2013, by making an appointment from these two qualified candidates.

The relief sought in this case is an order *compelling* the respondents to carry out the legal duties imposed upon them to complete the statutory appointment process they previously began. (Complaint, p. 6). No other form of claim would “provide relators with the relief they request; an order to *compel* the [respondent] to comply with its duties under [the] R.C. . . .” See, *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St. 3d 315, 2010-Ohio-1845, ¶28. “In order for an alternative remedy to constitute an adequate remedy at law, it must be complete, beneficial, and speedy.” *State ex rel. Crabtree v. Franklin Cty. Bd. of Health* (1997), 77 Ohio St. 3d 247, 249-250. See also, *State ex rel. Gilmour Realty v. City of Mayfield Heights*, 119 Ohio St. 3d 11, 2008-Ohio-3181, ¶14. Here, there is no other alternative remedy for the relators which would afford complete, beneficial and speedy relief—compelling the respondents to satisfy the legal duties already imposed upon them as a function of law. See also, *State ex rel. Ohio Gen Assembly v. Brunner*, 114 Ohio St. 3d 386, 392, 2007-Ohio-3780, ¶25; *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 327, 2009-Ohio-4900, ¶16.

There is no legal authority for the proposition advanced by respondents that a “new vacancy” in the office at issue was “created” by this Court’s judicial ouster of George T. Maier. The respondents have a clear legal duty to carry out the operative statutory appointment authority in strict

compliance with Ohio law, and mandamus is the proper remedy to compel the respondents accordingly. It is only the McDonald vacancy and term that remain to be filled by appointment.

As addressed in the memorandum in support of the writ, in *State ex rel. Union Cty. Veterans Serv. Comm. v. Parrott*, 108 Ohio St. 3d 302, 2006-Ohio-92, this Court addressed a suit seeking a writ of mandamus to compel the proper use of statutory appointment authority. *Id.*, ¶1. *Parrott* involved a vacancy on a county veterans service commission. *Id.*, ¶5. The Court granted the writ, finding that the respondent judge was under the statutory duty, a “manifest legal duty,” to complete a requested appointment. *Id.*, ¶17. The duty at issue, respecting a public appointment, was created by statute. Here, the respondents are equally under a manifest legal duty to fill the vacancy in the Office of Stark County Sheriff, existing by reason of the officer-elect’s inability to assume office, through appointment of a qualified candidate, in conformity with Ohio law. R.C. 305.02 and 311.01 confer corresponding legal rights upon the relators to see that the lawful appointment is accomplished, and no adequate alternative remedy exists in the ordinary course of the law to compel the respondents’ action. A Writ of Mandamus should issue. *Id.*, ¶19.

The qualification date was and remains February 6, 2013. It is undisputed that the respondent DCC already held a meeting “for the purpose of making an appointment” on February 5, 2013, at which time relator Lou Darrow and Dordea were deemed qualified for the appointment. These facts alone impose the legal duty upon the respondents to complete the appointment process.¹

¹ It is apparent that respondents DCC and Gonzalez hope to reinstate Maier into the Office of Sheriff. The only way to accomplish this maneuver is to “re-open” the appointment process based on an alleged new “vacancy” created by the ouster of Maier. This also presupposes that Maier qualified for the position, which relators assert is still in dispute.

III. THE “APPLICABLE QUALIFICATION DATE” FOR THE McDONALD VACANCY MUST BE RECOGNIZED AND RESPECTED.

The respondents have asserted the position that the February 6, 2013 qualification date was somehow relevant only for the purpose of deciding the *Swanson v. Maier* quo warranto action. “The respondents most certainly understand that February 6, 2013, served as the qualification date for the quo warranto action in *Swanson I.*” (Respondents’ Brief, p. 8). Yet, the respondents contend that such qualification date is now meaningless for purposes of the DCC’s exercise of its statutory appointment authority.

The respondents’ contention hinges, in part, on ignoring the specific “exception” language of R.C. 305.02(B). For instance, respondents contend: “R.C. 305.02(B) states in pertinent part: ‘If a vacancy occurs from any cause in any of the offices named in division (A) of this section, * * * if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party with which such officer-elect was affiliated.’” (Respondents’ Brief, p. 8). This *edited* excerpt of the code *makes it appear* as though the first clause of R.C. 305.02(B), relating to a vacancy occurring “from any cause,” applies to the latter segment of the code. However, respondents conveniently deleted the word “except,” and R.C. 305.02(B) actually provides:

(B) If a vacancy occurs from any cause in any of the offices named in division (A) of this section, the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified, ***except that if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made*** by the central committee of the political party with which such officer-elect was affiliated.

(Emphasis added). Under the facts of this case, only the “exception” portion of R.C. 305.02(B) is applicable. Officer-elect McDonald was unable to take office, and the vacancy created thereby is to be filled by “an appointment to take such office at the beginning of the term.” Appointment under the “exception” clause of R.C. 305.02(B) “relates to the appointment of an individual to begin the term of an officer-elect who has died, has resigned, or is unable to take office.” *1984 Ohio Op. Atty. Gen. No. 63, *6* (Emphasis added). The person who is to be appointed by the DCC is appointed for *the term* of the officer-elect who could not assume office. That person must have been qualified by the close of the applicable qualification date for the appointment to that vacant term. In this case, the only applicable qualification date is February 6, 2013.

R.C. 305.02(C) only required that the respondent DCC “shall meet for the purpose of making an appointment under this section.” Respondents necessarily admit that they met, for purposes of making an appointment, within the 45-day window when the DCC met on February 5, 2013. R.C. 305.02(C) does not expressly require that the appointment from that meeting be made within 45 days. If that was contemplated by the General Assembly, presumably the code would have been drafted to read something to the effect of “the county central committee shall make any appointment no later than 45 days after the vacancy occurred.” Of course, since the statute does not state the latter requirement, no such limitation is to be read into the code. The DCC met on February 5, 2013, for the purpose of making an appointment. The proper remedy in this case is to compel the respondents to now complete the process of appointment from the qualified candidates considered at the February 5, 2013 meeting, who satisfied all legal requirements under R.C. 311.01 by the applicable qualification date.

IV. CONCLUSION.

Recognition of the single vacancy at issue, the McDonald vacancy, and preservation of the applicable qualification date of February 6, 2013 for that vacancy, provide the only mechanism for protecting the appointment process from manipulation. This Court should reject any approach under which an unqualified candidate for the office of sheriff can receive an appointment, *usurping the appointment opportunity of qualified applicants*, and then effectively create time to manufacture new credentials if ousted by a challenger. Such an approach to utilization of the statutes would lead to manipulation.²

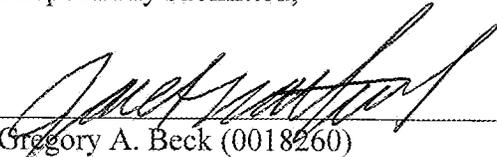
There was no “new vacancy” created by the judicial ouster of Maier. Maier was not legally qualified for the appointment, and he should never have even been in the office. Relator Swanson was entitled to the office, as Acting Sheriff, the entire time since his appointment in January of 2013 under R.C. 305.02(F). The “exception” clause of R.C. 305.02(B) makes its clear that there is but one vacancy to be filled in this instance, that of officer-elect McDonald, and the person lawfully appointed will assume the McDonald vacancy at the beginning of the term.

The respondent DCC is set to meet on December 11, 2013, and at that time will consider applicants for appointment to the McDonald vacancy who applied *after* this Court’s decision in *Swanson v. Maier* who possess credentials or qualifications created *after* this Court’s decision. This process should not be permitted, because it runs contrary to the Revised Code appointment procedures and utterly ignores the vacancy date of January 7, 2013 and applicable qualification date of February 6, 2013.

² Without question the respondents and Maier are attempting to manipulate the process. Maier and respondent Gonzalez have publically declared that the Maier ouster was based on a “technicality,” which has been allegedly (but not legally) rectified, allowing Maier to now re-apply as a candidate for appointment as sheriff.

WHEREFORE, the relators respectfully request that this Court expedite consideration of the complaint and the entry of judgment in this case and issue a Writ of Mandamus directing the respondents to consider only the eligible applications for appointment to the vacancy in the Office of Stark County Sheriff which were submitted for persons who qualified under R.C. 311.01 before the qualification date of February 6, 2013.

Respectfully submitted,



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PROOF OF SERVICE

5 Copies of the foregoing motion were served by regular U.S. mail and e-mail transmittal this day of December, 2013, to:

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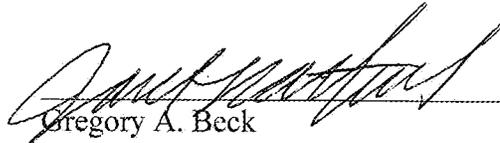
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