

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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

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RESPONSE IN OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION.

The Relators, Timothy A. Swanson (“Swanson”) and Lou Darrow (“Darrow”), filed their complaint seeking a writ of mandamus in this case on November 18, 2013. The Relators simultaneously filed affidavits in support and a Memorandum in Support of Writ. S.Ct. Prac.R. 12.02(B)(1). The questions before the Court are clearly delineated, and Relators have stated a viable claim in mandamus.

At issue is the lawful exercise of statutory appointment authority for the purpose of filling a vacancy in the office of Stark County Sheriff. This case was filed shortly after this Court rendered its decision on November 6, 2013, in *State ex rel. Swanson v. Maier*, ___ Ohio St. 3d ___, 2013-Ohio-4767. The Relators filed their complaint as soon as it became apparent, in the wake of the judicial ouster of George T. Maier (“Maier”) in *Swanson v. Maier*, that the Respondents, Stark County Democratic Central Committee (“DCC”) and its Chairman Randy Gonzalez, intended to treat this Court’s opinion as having created a “new vacancy” in the office at issue, for which Maier could seek reappointment.

George T. Maier has, in fact, been reappointed by the Respondent DCC as Stark County Sheriff. The DCC held a meeting on December 11, 2013, at which time a vote proceeded, with Maier and Darrow (among two others) being deemed “qualified” for the appointment. Maier received 101 votes, Darrow received 65 votes, and the others received no votes. According to the DCC’s appointment certification, Maier has been appointed to fill the “vacancy” in the office of sheriff that “has occurred on November 6, 2013 due to the removal of George Maier” from that office. The Respondents have elected to ignore the actual vacancy in the office which resulted from

Sheriff-elect, Michael A. McDonald's announcement that he could not assume office for personal health reasons. As alleged in the complaint, and addressed more-fully herein below, it remains the Relators' position that the Respondents are under the clear legal duty to fill the McDonald vacancy from the two applicants for that vacancy who satisfied all legal qualifications before the applicable "qualification date." The reappointment of Maier by the DCC demonstrates a gross departure from the Respondents' legal duties and, frankly, flies in the face of this Court's decision in *Swanson v. Maier*.

The complaint sets forth clearly and succinctly the factual predicate for the claim that the Respondents have the clear legal duty to exercise statutory appointment authority, triggered by the McDonald vacancy, in compliance with a fixed qualification date of February 6, 2013 for that vacancy. In turn, the Relators [Swanson in his capacity as Acting Sheriff appointed by the Stark County Commissioners under R.C. 305.02(F) and Darrow as one of the applicants for the McDonald vacancy who met all legal qualifications for the Office of Sheriff prior to February 6, 2013] have the clear legal right to require the Respondents to exercise their appointment authority in a lawful manner. Accordingly, a claim in mandamus has been stated, and the motion to dismiss should be overruled.

II. THE ALLEGATIONS OF THE COMPLAINT ARE TAKEN AS TRUE FOR PURPOSES OF THE MOTION TO DISMISS.

The Respondents' motion is filed under Ohio R. Civ. P. 12(B)(6). The parties recognize that, pursuant to S.Ct. Prac.R. 12.01(A)(2)(b) [former 10.2], in an original action, the "Ohio Rules of Civil Procedure shall supplement these rules [the Rules of Practice of the Supreme Court of Ohio] unless clearly inapplicable." Consequently, the "factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded

all reasonable inferences possibly derived therefrom.” Volbers-Klarich v. Middletown Mgmt., Inc., 125 Ohio St. 3d 494, 2010-Ohio-2057, ¶12 (Citations omitted). *See also*, City of Cincinnati v. Beretta USA, 95 Ohio St. 3d 416, 2002-Ohio-2480, ¶5. “[A]s long as there is a set of facts, consistent with the plaintiff’s complaint, which would allow the plaintiff to recover, the court may not grant a defendant’s motion to dismiss.” Id. For a motion to dismiss, under Civ. R. 12(B)(6), to be granted it “must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief.” Id. The Respondents have acknowledged this heightened standard in their motion. (Motion, p. 6).

In light of this standard, the analysis of the Relators’ complaint must begin with acceptance of the following facts as true:

- On January 7, 2013, a vacancy was created for the office for Sheriff of Stark County, Ohio based upon the announcement by the sheriff-elect, Michael McDonald (“McDonald”), of a terminal illness. (Complaint, ¶3).
- The issues surrounding this matter and the qualifications for applicants were fully discussed and determined in this Court’s recent decision in *State ex rel. Swanson v. Maier*, 2013-0274 (*Slip op.*, 2013-Ohio-4767). (Complaint, ¶4).
- Upon the ouster of George Maier from the office of Stark County Sheriff, relator, Timothy A. Swanson, was reinstated as acting sheriff, based upon his appointment from the Stark County Commissioners to serve in that capacity. (Complaint, ¶6).
- This Court’s decision in *Swanson v. Maier* did not create a new vacancy in the office of Stark County Sheriff. To the contrary, the vacancy that remains to be filled by lawful appointment is that based upon the McDonald notice that Sheriff-elect McDonald was not physically able to assume office. (Complaint, ¶9).
- The Relator, Timothy A. Swanson, lawful acting Sheriff of Stark County, asserts that the unlawful usurpation of power and control by George Maier and his removal by judgment of this Court, does not

create a new vacancy; instead, as this Court noted in ¶28 of its opinion in *Swanson v. Maier*, the application date (“qualification date”) based upon the only vacancy in issue was fixed by law for February 6, 2013. (Complaint, ¶10).

- As a result of this Court’s decision, and the operation of law, the only applications that the respondents, Stark County Democratic Central Committee and its Chairman, may consider for Sheriff are those applicants who were lawfully qualified as of February 6, 2013, namely relator, Lou Darrow, and Larry Dordea. (Complaint, ¶11).
- At the time of the original and only vacancy to the Stark County Sheriff’s Office in early January, 2013, only three applicants timely applied for the position, namely George Maier, Larry Dordea, and Lou Darrow. (Complaint, ¶12).
- Unless this Court directs the respondents, Stark County Democratic Central Committee and its Chairman, to consider only applicants for the vacancy and persons qualified for the vacancy prior to the applicable qualification date, the Relators will be harmed and damaged. The respondents have no authority to deviate from applicable Ohio law, including the law of the case fixed by this Court’s judgment in *Swanson v. Maier*. (Complaint, ¶26).
- If the Stark County Democratic Central Committee is permitted to review and accept applications from individuals other than those who had applied in January, 2013, (and prior to the qualification date) those applications would be received and reviewed well after the close of the qualification date, which was established by this Court as February 6, 2013; as a result, any such applicant considered and who may be eventually appointed, whose application was not processed before February 6, 2013, by law is unqualified. (Complaint, ¶27).

Assuming such facts, as alleged in the complaint, as true, the appointment authority of the DCC must be exercised only within express legal parameters. It is inescapable that “[N]o 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 . . .**” R.C. 311.01(B). (Emphasis added). A timely application (prior to the applicable qualification date) is itself a specific requirement of R.C. 311.01(B). Only persons who met all legal qualifications, including the

applicable qualification date of February 6, 2013, can be considered for appointment to the McDonald vacancy, and continued existence of the McDonald vacancy cannot simply be ignored.

III. THE POSITION ASSUMED BY THE RESPONDENTS – WHICH IGNORES THE EXISTENCE OF THE McDONALD VACANCY – IS AN APPROACH WHICH THIS COURT HAS REJECTED.

The facts essential to the determination of this case are manifestly clear and cannot be ignored by the Respondents. As set forth more-fully in the Complaint and Memorandum in Support of Writ, there remains a vacancy in the Office of Stark County Sheriff. That vacancy was created on January 7, 2013, when the Sheriff-elect, Michael A. McDonald, gave notice that he was unable to assume office for personal health reasons. The term of office which remains to be filled is that of Sheriff-elect McDonald. Since the vacancy at issue in the case occurred on January 7, 2013, the qualification date was February 6, 2013. “Here, McDonald indicated before the beginning of his term that he was unable to assume the 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. For purposes of filling the McDonald vacancy, the “qualification date” fixed by law was and remains February 6, 2013.

Seemingly without regard to these facts, the Respondents ignored the McDonald vacancy in preference to what they deem the “new vacancy” created by this Court’s judicial ouster of Maier. According to the Respondents, there was a “vacancy caused by the removal of Maier,” and reportedly this “new vacancy” allowed for an “updated 30 day qualification date” extending from the Court’s decision in *Maier*. (Respondents’ Response to Motion for Ancillary Relief, p. 12). This approach, of course, further ignores that, in *Swanson v. Maier*, this Court not only ousted Maier but, further, reinstated Swanson to his appointment as acting sheriff. *Swanson v. Maier*, at ¶40. Incident

to Swanson's reinstatement, the only vacancy remaining within the jurisdiction of the DCC to fill by appointment was the McDonald vacancy.¹

In *State ex rel. Deiter v. McGuire*, 119 Ohio St. 3d 384, 2008-Ohio-4536, the Court addressed a challenge to the procedures used in the appointment of a municipal police chief, by way of appeal in a combined quo warranto and mandamus action. The relator sought a writ of quo warranto to oust a police chief and a writ of mandamus to compel a competitive promotional examination for appointment to a vacancy. The action was filed in the Seneca County Court of Appeals, and that court had dismissed. The Supreme Court reversed and remanded.

In *Deiter*, the City of Fostoria terminated its police chief in 2004 and, at that time, conducted a promotional examination. Two individuals participated in the exam, and the person who passed the exam then declined appointment. *Id.*, ¶2. The civil service commission thereafter suspended the competitive examination rules and, in February of 2006 appointed John McGuire as the chief. *Id.*, ¶4. The action, which reached the Supreme Court on appeal, was filed in 2007 by Deiter and others, seeking the ouster of McGuire, and mandamus relief. The appellate court dismissed, in part, based upon the adoption of the Fostoria Charter in November of 2005. The Charter had superseded the competitive examination procedures otherwise provided for in R.C. 124.44. *Id.*, ¶17.

First, the Court concluded that the court of appeals had erred in dismissing the quo warranto claim. Other remedies "would not have resulted in McGuire's ouster" and, thus, did not preclude quo warranto relief. *Id.*, ¶20. The Court then addressed dismissal of the mandamus claim. The court of appeals held, in part, that "because of the adoption of the Fostoria Charter, any vacancy in the police chief position caused by the ouster or retirement of McGuire would be governed by the

¹ Presumably, if this Court intended to create a new vacancy, the order ousting Maier would have also ordered the county commissioners to appoint a new acting sheriff to fill the new vacancy.

applicable charter provision, which does not require a competitive promotional examination” *Id.*, ¶26. The charter, however, had not become effective until November of 2006, and it could not be applied retroactively to the vacancy that was at issue in the case; namely, the vacancy originally created in 2004. *Id.* Consequently, the Court concluded: “The charter provisions did not apply retroactively to **a vacancy that should have been filled in accordance with the law in effect** before the charter became effective.” *Id.* (Emphasis added).

In other words, the vacancy that remained to be filled in *Deiter*, by competitive exam, was that which dated back to the 2004 termination of the police chief. The 2004 vacancy was the vacancy that should have been filled in accordance with examination procedures and not through the suspension of those rules and direct appointment of McGuire. The fact that McGuire had been appointed and was subject to removal through quo warranto did not empower the city to skip over the 2004 vacancy and assume the position that a new vacancy, upon ouster of McGuire, would avoid appointment through a competitive exam, under the later-adopted charter. Accordingly, the Court held that dismissal of the mandamus claim was error, since the relators in *Deiter* had stated a claim for compelling the respondents to proceed with an appointment to the 2004 vacancy through the process of competitive examination.

The Relators’ claim in mandamus has the same logical foundation as the claim in *Deiter*. The vacancy that remains to be filled is that created by Sheriff-elect McDonald’s inability to assume office – the January 7, 2013 McDonald vacancy. The fact that Maier was previously appointed to the office, and was actually removed through quo warranto, does not empower the appointing authority to skip or gloss over the McDonald vacancy. Just as the ouster of McGuire would not create a new vacancy to be filled by new rules, the ouster of Maier does not create a new vacancy

to be filled by any person claiming to possess credentials or qualifications arising before a new or “updated” qualification date. In *Deiter*, following the ouster of McGuire, the city was called upon to appoint someone to fill the 2004 vacancy to which McGuire had been appointed without following lawful procedure. Following the ouster of Maier, the DCC was called upon to appoint someone to fill the January 7, 2013 vacancy to which Maier had been appointed but for which he was not legally qualified.

No “new” rules, time deadlines or other criteria or credentials can be utilized by the Respondents in the process of exercising appointment authority to fill the McDonald vacancy. Relators maintain that the jurisdiction and authority of the Respondents is confined to consideration for the appointment to that vacancy from those eligible and legally-qualified candidates who timely submitted and processed their applications for that vacancy prior to the “applicable qualification date” of February 6, 2013. See, *State ex rel. Swanson v. Maier*, ¶28. See also, R.C. 311.01(B)(6), (7), and (H)(1).²

IV. THERE IS A SINGLE VACANCY AT ISSUE IN THIS CASE, AND THAT VACANCY DICTATES THE “QUALIFICATION DATE” OF FEBRUARY 6, 2013.

There is but one vacancy in the Office of Stark County Sheriff to fill at this time; namely, the vacancy created January 7, 2013. The “reappointment” of Maier by the DCC does not alter this fact. The “applicable qualification date” fixed by law for the vacancy was February 6, 2013. *Swanson v. Maier*, ¶28. It is not disputed that two individuals timely completed applications and complied with all aspects of the qualifications set forth in R.C. 311.01 prior to the applicable qualification date.

² As addressed more-fully in the Memorandum in Support of Writ, the “qualification date” also fixes the date by which one must apply for a vacancy, complete fingerprinting, and allow for review by the Administrative Judge and submission or referral to the county central committee.

Given the record, and this Court's ruling in *Maier*, the Respondents have a clear legal duty to consider only the applications for appointment that were in compliance with R.C. 311.01 and were timely submitted prior to the applicable qualification date. Timely submission is itself a qualification which one must satisfy under R.C. 311.01 for prospective appointment. See, R.C. 311.01(B)(6), (7). These matters are more-fully addressed in the Relators' Memorandum in Support of the Writ.

The absence of a "new vacancy" is perhaps best drawn from R.C. 305.02(F) itself and the facts of this case. It is undisputed that, following the McDonald vacancy, Relator Swanson was appointed by the Stark County Commissioners to serve as acting Sheriff. See, *Swanson v. Maier*, at ¶7. Upon such appointment, "Swanson took the oath and was bonded as acting sheriff." *Id.* Relator Swanson was appointed under the authority of R.C. 305.02(F):

The board of county commissioners may appoint a person to hold any of the offices named in division (A) of this section as an acting officer and to perform the duties thereof between the occurrence of the vacancy and the time when the officer appointed by the central committee qualifies and takes the office.

(Emphasis added). Again, as part of the prior *quo warranto* action, this Court not only ousted Maier but also reinstated Swanson as acting Sheriff. *Id.*, ¶40. R.C. 305.02(F) contemplates the acting officer's appointment for "the vacancy" -- a single, identifiable vacancy.

Swanson's appointment under R.C. 305.02(F) extends from "between the occurrence of the vacancy" and the time when a qualified, eligible officer is appointed by the DCC. In other words, the Swanson appointment operates along the continuum from the occurrence of "the vacancy," meaning the McDonald vacancy which occurred January 7, 2013, and the time a qualified officer is appointed by the DCC. Swanson's actual service as acting sheriff was interrupted by Maier's usurpation of the office. However, Swanson's lawful appointment as acting sheriff was never interrupted. That is why this Court reinstated Swanson based upon his original appointment by the

County Commissioners upon the occurrence of the McDonald vacancy.

If, as the Respondents contend, the judicial ouster of Maier somehow created a “new vacancy,” then the County Commissioners would have been called upon again to make an interim or acting appointment under R.C. 305.02(F). Of course, the Commissioners were not required to do so precisely because there had not been the occurrence of any new vacancy. Swanson was reinstated consistent with his appointment by the Commissioners, and he duly assumed service as acting Sheriff. Swanson’s entitlement to the appointment as acting Sheriff has already been judicially established in *Maier* and is not subject to collateral attack. Swanson’s lawful appointment as acting Sheriff will continue from the occurrence of the vacancy until the appointment of a qualified candidate to the McDonald vacancy. Importantly, 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). In other words, the person who is ultimately 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 that term.

The Respondents criticize the Relators’ case as resting upon a “sentence and a half found at ¶ 28 of this Court’s decision in *State ex rel. Swanson v. Maier*,” (Motion, p. 7). Yet, the Respondents entire position rests upon one portion of a sentence drawn from ¶ 40 of the Court’s decision in *Swanson v. Maier*. The Court reinstated Swanson and recognized that he would served as acting Sheriff “until the DCC, pursuant to R.C. 305.02(B), appoints a person qualified under R.C. 311.01 to assume the office of Stark County sheriff.” *Swanson v. Maier*, ¶40. Respondents suggest this portion of the Court’s decision created a new period of appointment (an altogether “new

vacancy” and “updated” qualification date). It does not. A “person qualified under R.C. 311.01 to assume the office of Stark County sheriff” must, among other qualification, satisfy the qualifications date of February 6, 2013, for appointment to the McDonald vacancy and term. This Court did not expressly or by implication tell the DCC to use some new “updated” qualification date to proceed under R.C. 305.02(B).

There is no logic to the Respondents’ position. In their motion, the Respondents suggest 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 certainly understand that February 6, 2013, served as the qualification date for the quo warranto action in *Swanson I.*” (Motion, p. 7). However, the Respondents then contend that such qualification date was somehow rendered meaningless for purposes of the DCC’s exercise of its statutory appointment authority, post *Swanson v. Maier*. February 6, 2013 is the applicable qualification date for appointment to the only applicable vacancy – the vacancy created by McDonald’s inability to assume office.

Remarkably, the Respondents once again ignore the specific “exception” language of R.C. 305.02(B) in an effort to convince the Court that the judicial ouster of Maier created a “new vacancy.” 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.’” (Motion, p. 7; *See also*, Respondents’ Response 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. Only the exception clause of R.C. 305.02(B) remains applicable post *Swanson v. Maier*.

The only way for the DCC to appoint a qualified person, “pursuant to R.C. 305.02(B),” is for the DCC to follow the exception. Because officer-elect McDonald was unable to take office, 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 that term. In this case, the only applicable qualification date is February 6, 2013.

Equally important is R.C. 305.02(C), which 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.

If one accepts the Respondents’ argument, that “[a]fter 45 days, the DCC’s legal authority lapses and it has no power to appoint,” then the Respondents must recognize relator Darrow, who was the qualified applicant who received the most votes at the February 5 meeting, as the appointee to the McDonald vacancy. (Motion, p. 8). That is the result dictated by the code as opposed to recognition of some fictitious new vacancy and new qualification date. The term of officer-elect McDonald is to be filled by appointment, and that vacancy relates back to January 7, 2013. The corresponding qualification date necessarily relates back to February 6, 2013 for the only appointment available.

There is nothing which needs to be reconciled, and no time period needs to be extended. The Respondents can comply with the directive in *Swanson v. Maier*, and simultaneously fulfill the legal duties imposed under R.C. 305.02 and 311.01, by simply completing the appointment process which was begun at the time of the February 5, 2013 meeting of the DCC. Respondents have admitted that two qualified applicants were considered at the time of the February 5, 2013 meeting, namely, Darrow and Dordea. The Respondents’ legal duty is to appoint from the qualified applicants to assume the term of sheriff-elect McDonald – to take such office at the beginning of that term.

Relator Darrow, who satisfied all legal requirements by the qualification date, has a clear legal right to see that the Respondents carry out their appointment authority in compliance with Ohio law.

V. MANDAMUS IS THE PROPER REMEDY TO COMPEL THE RESPONDENTS TO COMPLETE THE EXERCISE OF APPOINTMENT AUTHORITY WHICH THEY PREVIOUSLY BEGAN.

As addressed in Relators' Memorandum, the DCC already held a timely meeting under R.C. 305.02(C), on February 5, 2013. At that time, two applicants, Relator Lou Darrow and another, Larry Dordea, were deemed qualified by the DCC for the appointment. (Relators' Memorandum in Support of Writ, Exhibit C, ¶¶8, 10). For purposes of the record, these facts are alleged in the Complaint and fully admitted by the Respondent, Randy Gonzalez, in his prior affidavit submitted in the *Maier* case. (See, Memorandum in Support, Exhibit C, ¶8). This is further demonstrated by the minutes of the DCC's prior meeting held on February 5, 2013. (See, Memorandum in Support, Exhibit C, attachment 2).

Relators have sufficiently alleged a basis for relief granting a writ of mandamus directing the DCC and its Chairman to appoint from the eligible applicants who satisfied the qualification date, both in terms of having completed and submitted applications prior to the qualification date and having substantively met all other requirements of R.C. 311.01 before the qualification date. Because the Respondents are legally obligated to appoint from the two eligible applicants, mandamus is the appropriate remedy.

A writ of mandamus is defined as "a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01; *State ex rel. Sprague v. Wellington*, 2012-Ohio-1698, ¶2 (7th Dist.). Here, the DCC, and its Chairman, are

specially enjoined with the duty to proceed with the appointment to fill the vacancy in the office of Stark County Sheriff, in accordance with R.C. 305.02. The DCC has already held a meeting for such purpose, and that meeting was held within 45 days of the date of the vacancy. Importantly, only two eligible applicants satisfied the qualification requirements of R.C. 311.01(B)(6), and (7) at that time, and “prior to the qualification date,” and met the balance of the legal requirements. Consequently, the DCC is legally obligated to consider only the applications of Relator Darrow and Dordea in order to complete the lawful appointment to the vacancy of Stark County Sheriff. The “qualification date” is long passed, and no new or additional applications can be considered beyond that date. Moreover, no one with new or recent credentials (created after the qualification date) is eligible for the McDonald vacancy and term.

To be entitled to a writ of mandamus, a relator must show: (1) that there is a clear legal right to the requested relief; (2) that the respondent is under a clear legal duty to perform the act sought; and (3) that relator has no plain and adequate remedy at law. *State ex rel. Fain v. Summit Cty. Adult Probation Dept.* (1995), 71 Ohio St.3d 658, citing *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589. In this case, the Respondent DCC has a clear legal duty, fixed by law, to comply fully with R.C. 305.02 and 311.01 in filling the vacancy of Stark County Sheriff. The DCC has already held a meeting for the purpose of appointment, and only Darrow and Dordea were the applicants eligible for appointment with timely submissions prior to the qualification date. The DCC is under a clear legal duty to appoint from those two eligible applicants.

VI. THE RESPONDENTS HAVE NO AUTHORITY TO CREATE A NEW OR “UPDATED” QUALIFICATION DATE.

Realizing that the judicial ouster of Maier rendered Maier incapable of satisfying the applicable qualification date of February 6, 2013, Respondents have fashioned a new, or as they call

it, an “updated 30 day qualification date” extending to thirty days after the Court’s November 6, 2013 decision in *Maier*. On this premise, the Respondents allowed for the submission of new applications seeking appointment as Stark County Sheriff and allowed submission of “new” credentials or qualifications for the appointment. The Respondents had absolutely no authority to depart from the qualification date established by R.C. 311.01 for the McDonald vacancy and had no authority to ignore this Court’s recognition of that qualification date.

There is no process in the statutes permitting the DCC to “re-open” the qualification date, merely because it previously appointed an unqualified applicant who was subject to judicial ouster. As alleged in the complaint, Relator Darrow complied with all requirements, substantively and procedurally, and the process he legally commenced prior to the qualification date of February 6, 2013 must be recognized and accorded legitimate status.

The process set forth in R.C. 305.02 for completing an appointment to a vacant county office must, necessarily, be triggered by a vacancy. The Office of Stark County Sheriff became vacant when McDonald could not assume the office. The McDonald term is that which must be filled by a legally-qualified appointee.

George T. Maier did not have any term in office as Stark County Sheriff. To the contrary, he was judicially ousted, and that ouster is treated as though his appointment to the position had never occurred. Inasmuch as Maier served no term in office, and his appointment was never legitimate, his ouster did not create any new vacancy.

Again, “[t]he exception [in 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 Atty. Gen. No. 63, *6 (Emphasis added). There is no process to appoint someone to the alleged

“Maier vacancy,” since Maier was not an officer elect who died, resigned or was unable to take office. Maier had no lawful term in office, and his judicial ouster did not create a vacancy. The Respondents are attempting to fashion, and have this Court endorse, rules for an appointment authority which simply do not exist under R.C. 305.02. That attempt should be flatly rejected.

VII. RELATORS DO NOT SEEK INJUNCTIVE RELIEF.

The primary argument advanced in the Respondents’ motion to dismiss is directed to jurisdiction. The Relators, however, seek a writ of mandamus compelling the Respondents to carry out their clear legal duty to exercise statutory appointment authority under the record of this case.

The Respondents do not contest, and cannot dispute, that this Court has original jurisdiction in mandamus. Ohio Constitution, Article IV, Section 2. *See also*, R.C. 2731.02. Instead, the Respondents suggest that the Relators action is “injunctive in nature.” (Motion, p. 2). The Complaint does not seek injunctive relief, and that is precisely why the Relators previously requested ancillary injunctive relief, requesting to maintain the status quo during the pendency of this case, through the filing of a separate motion. The separate motion was filed on November 22, 2013, and the subject matter of that motion was the announced December 11, 2013 meeting scheduled by the Respondent DCC. The Court overruled the motion for ancillary injunctive relief on December 10, 2013, and no other form of injunctive relief is implicated in this case. As indicated above, the DCC proceeded with its meeting, without regard to the pendency of this case, and the reappointment of Maier to the public office from which he had been ousted just weeks before resulted.

Through their Complaint, the Relators have demanded an order which compels action; namely, which directs the Respondents to complete the appointment process which they began in February of 2013, for the McDonald vacancy, in a lawful manner which recognizes that vacancy and

respects the applicable qualification date. Remarkably, the Respondents even acknowledge that the “complaint is couched in terms of compelling acts.” (Motion, p. 4). That observation is correct – 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. (Complaint, p. 6). No form of injunction 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. A declaratory judgment in some form would, likewise, fail to provide Relators with the relief that has been requested. *Id.* Consequently, and “notwithstanding respondents’ claim to the contrary, relators’ mandamus claim is not an ill-disguised claim of declaratory judgment and prohibitory injunction, and neither a declaratory judgment nor a prohibitory injunction would constitute an adequate remedy in the ordinary course of law.” *Id.* “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.

As briefed in the Memorandum in Support, 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 similarly 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. *Id.*, ¶19. This is a mandamus action properly within the Court’s original jurisdiction, and the Respondents’ desperate attempt to recast the claims should be rejected.

VIII. THE APPOINTMENT STATUTE ITSELF PROVIDES NO ALTERNATIVE REMEDY – PRECISELY BECAUSE THE RESPONDENTS HAVE IGNORED THE McDONALD VACANCY, IGNORED THE EXCEPTION LANGUAGE OF R.C. 305.02(B), AND IGNORED THE APPLICABLE QUALIFICATION DATE.

R.C. 305.02(B) is not somehow self executing so as to provide an alternative remedy at law. It is the enforcement of Respondents’ legal obligations under the exception language of R.C. 305.02(B) which is part of the relief in mandamus sought by the Relators. Respondents have ignored the exception (which is the only basis for the DCC appointment authority relative in *Swanson v. Maier* and thus to this case as well) and have even glossed over same in the briefing before this Court. The “exception” clause of R.C. 305.02(B) only authorizes the DCC to exercise appointment authority for the McDonald vacancy under the facts of this case as set forth in the Complaint.

The McDonald vacancy must be filled. The exception uses the word “shall:” “**an appointment to take such office at the beginning of the term shall be made** by the central

committee . . .” Given this directive, mandatory language, the DCC has no authority to ignore the McDonald vacancy, create a new “updated” qualification date and proceed with any appointment to the Office of Stark County Sheriff premised upon the alleged “Maier vacancy.”

IX. CONCLUSION.

The Respondent DCC has admitted, through its counsel, that the Maier appointment was a nullity. (Memorandum in Support of Writ, DCC Letter, Exhibit D). The Respondents concede: “It is well settled law that whether an official is elected by the public or appointed by some other authority, where said official is later found to be disqualified to hold the office by Statute, the original appointment or election is a nullity, which means the appointment is treated as though it never happened.” *Id.*, *Citing, State ex rel. Vian v. Bryan*, 30 Ohio Law Bs. 61 (Ohio Ct. App. 1938). The Maier appointment was a nullity, and Maier’s removal – coupled with the reinstatement of Swanson – did not create a new vacancy. The Respondents are under a clear legal duty to fill a lawful appointment for the McDonald vacancy, completing the process that was begun in February of 2013.

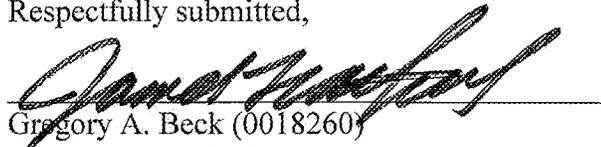
Recognition of the single vacancy at issue, the McDonald vacancy, and preservation of the applicable qualification date of February 6, 2013 for that vacancy, provide the only mechanism for protecting the appointment process from manipulation. This Court should reject any approach under which an unqualified 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, as demonstrated by this case.

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.

There are significant issues to be determined by this Court in this *mandamus* action. Moreover, the reappointment of Maier as Stark County Sheriff, in contravention of the applicable appointment authority under R.C. 305.02(B), does not end the controversy. If anything, the positions asserted and measures undertaken by the Respondents reenforce the urgent need for mandamus relief.

WHEREFORE, Relators, Timothy A. Swanson and Lou Darrow, respectfully request that the Respondents’ motion to dismiss be overruled. Further, Relators respectfully requests that a schedule be fixed for the prompt completion of discovery, presentation of evidence and submission of briefs.

Respectfully submitted,



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PROOF OF SERVICE

Copies of the foregoing response in opposition to motion to dismiss were served by regular U.S. mail and e-mail transmittal this 19th day of December, 2013, to:

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