

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-1277

STATE OF OHIO, EX REL.,
FRANK MORRIS, et al.,

Relators,

ANSWER OF RESPONDENT, STARK
COUNTY BOARD OF ELECTIONS

-vs-

STARK COUNTY BOARD OF
ELECTIONS, et al.,

Respondents.

Now comes Respondent, Stark County Board of Elections (hereinafter “Board”), by and through its counsel pursuant to S. Ct. Prac. R. 12.08, and answers Relators’ Complaint for a Writ of Prohibition as follows:

1. Respondent Board neither admits nor denies the allegations in Paragraphs 1 through 137 of Relators’ Complaint. Respondent Board submits that it is a nominal, albeit necessary, party to the instant litigation.
2. Respondent Board admits that its actions with respect to the matter are reflected in 1) Exhibit B attached to the Complaint, which is a copy of the transcript of the Protest hearing regarding Mr. Bernabei’s candidacy as an independent for the office of mayor of Canton, Ohio, which resulted in a tie vote, and 2) in the filing with Respondent Secretary of State the attached position statements (Exhibits “A” and “B”).
3. Respondent Board avers that R.C. 3501.11(X) which provides that in all cases involving a tie vote of a board of elections, the matter shall be submitted to the secretary of state “who shall summarily decide the question, and the decision of the

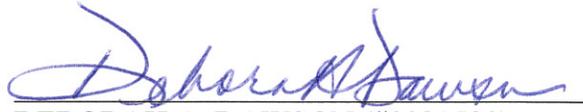
secretary of state shall be final”, necessarily means Respondent Secretary of State Husted is the real party in interest.

4. Since Respondent Board cast two votes in favor and two votes against the challenge to Mr. Bernabei’s candidacy, the Board has not taken and will not take a substantive position in this litigation.

WHEREFORE, having fully Answered, Respondent Stark County Board of Elections hereby respectfully submits and informs this Court that while it will not actively participate in this litigation, it will comply in full with any judgment rendered by this Court.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing Answer of Respondent, Stark County Board of Elections, has been sent electronically this 10th day of August, 2015 to the following:

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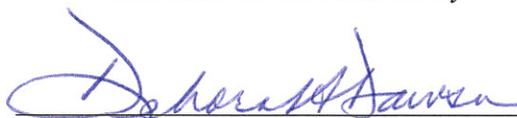
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**STARK COUNTY BOARD OF ELECTIONS
TIE VOTE**

**IN RE: Protest Against the Nominating Petitions and Candidacy of
Thomas M. Bernabei as an Independent Candidate for the
Office of Mayor of the City of Canton, Ohio**

**POSITION STATEMENT OF STARK COUNTY BOARD MEMBERS
SAMUEL J. FERRUCCIO, JR. AND WILLIAM V. SHERER, II**

Introduction

The current sitting Democratic Stark County Commissioner, Thomas M. Bernabei, filed a nominating petition and statement of candidacy on May 4, 2015 in an effort to be placed on the November ballot as an independent candidate for the office of Mayor of Canton, Ohio.

On May 29, 2015 a protest was filed against Bernabei's nominating petition and candidacy in accordance with R.C. §§ 3513.262 and 3501.39(A).¹ The protest challenged Bernabei's ability to run as an independent candidate on the following grounds:

- (1) Bernabei was not actually unaffiliated or disaffiliated from the Democratic Party when he signed and/or submitted his independent candidate nominating petition, and Bernabei's claim of unaffiliation from the Democratic Party was not made in good faith as required by R.C. §§ 3501.01(I) and 3513.257 and Ohio Sec. State Adv. Op. No. 2007-05, and
- (2) Bernabei's "voting residence" stated in his independent candidate nominating petition was not his actual permanent residence when he signed and/or submitted his petition, and he was therefore not "a qualified elector" at that address nor "an elector qualified to vote for the office" he seeks as required by R.C. § 3513.261.

In accordance with R.C. §§ 3513.262 and 3501.39(A), the Board promptly scheduled a protest hearing for July 6, 2015. Notice was sent to all parties involved. It

¹ The protest was filed on behalf of Majority Leader Frank Morris, Canton City Council, Ward 9, Assistant Majority Leader Chris Smith, Canton City Council, Ward 4, Thomas E. West, Canton City Council, Ward 2, Kevin Fisher, Canton City Council, Ward 5, David R. Dougherty, Canton City Council, Ward 6, John Mariol II, Canton City Council, Ward 7, Edmond J. Mack, Canton City Council, Ward 8, the Ohio Democratic Party, and the Stark County Democratic Party. The Stark County Democratic Party withdrew as a formal party to the protest on July 2, 2015.

was reported to the Board at its meeting on June 17, 2015 that Bernabei's petition satisfied the applicable signature requirements. However, the Board deferred any action on Bernabei's petition until resolution of the issues raised by the protest.

The hearing on the protest occurred on July 6, 2015. Prior to the hearing, all parties were given an opportunity to request and secure the issuance of subpoenas to compel the attendance of witnesses. During the hearing, all parties were represented by counsel, and were given an opportunity to make opening statements, call witnesses for direct examination and cross-examination, make objections, introduce exhibits and make closing arguments.

This position statement is submitted by Board Members Samuel J. Ferruccio, Jr. and William V. Sherer, II, who voted to uphold the protest. These votes were based upon the undisputed evidence presented at the hearing, which confirmed that Bernabei failed to actually disaffiliate with the Democratic Party in good faith, and failed to establish a permanent voting residence in Canton prior to signing and submitting his nominating petition.

Therefore, Board Members Ferruccio and Sherer urge Secretary of State Husted to break the tie vote in favor of upholding the protest and refusing the certification of Thomas M. Bernabei as an independent candidate for the office of Mayor of Canton, Ohio.

THE MOTION

I move to uphold the protest and not certify the nominating petitions and candidacy of Thomas M. Bernabei as Mayor for the City Canton.

The above Motion was made at the end of the protest hearing held on July 6, 2015 by Member William V. Sherer, II and seconded by the Chairman, Samuel J. Ferruccio, Jr.

Members Samuel J. Ferruccio, Jr. and William V. Sherer, II voted to uphold the protest and disqualify Thomas M. Bernabei's name from being placed on the ballot as an independent candidate for the office of Mayor of Canton, Ohio.

Members Frank C. Braden and William S. Cline voted to deny the protest and allow Thomas M. Bernabei's name to be placed on the ballot.

A roll call vote was taken and the results are as follows:

Roll Call Vote:

Chairman Ferruccio	Yes
Member Braden	No
Member Cline	No
Member Sherer	Yes

Second Roll Call Vote:

Chairman Ferruccio	Yes
Member Braden	No
Member Cline	No
Member Sherer	Yes

A tie vote was declared.

**SUMMARY OF THE LAW AND FACTS AS
PRESENTED ON JULY 6, 2015**

It is the position of Board Members Samuel J. Ferruccio, Jr. and William V. Sherer, II, based upon the testimony and evidence provided during the protest hearing, that Bernabei failed to satisfy both the "independent candidate" requirements of R.C. §§ 3501.01(l) and 3513.257 and the "voting residency" requirements of R.C. § 3513.261.

As explained in detail below, Bernabei **failed to actually disaffiliate with the Democratic Party** prior to signing and submitting his independent nominating petitions for Canton Mayor. This is confirmed most clearly by Bernabei's current and ongoing service as a Democratic-elected County Commissioner. (Tr., pp. 38-39; Prts.' Exhs. 16, 110). It is also confirmed by his ongoing membership in Democratic clubs and active campaigning on behalf of Democratic candidates. (Tr., pp. 46-58, 112-21, Prts.' Exhs. 52, 90, 92, 93, 103, 112, 113). Bernabei's recent and consistent Democratic voting history, contributions, ballot appearances, and years of service as a Democratic elected official further supports this conclusion. (Tr., pp. 62-63, 76-77, Prts.' Exhs. 22, 118, 119, 122).

While Bernabei presented evidence that his desire to run for Mayor of Canton was motivated by his belief that he could provide valuable service to the city, legal precedent instructs that "good intentions" are not the same as "good faith" for purposes of Ohio's independent disaffiliation requirement. Indeed, the evidence confirmed that Bernabei did not begin to take any actions to disaffiliate with the Democratic Party **until seven days before filing his independent nominating petitions.** (Tr., p. 234), Prts.' Exh. 112). He was not motivated by any disagreement or ideological split with the Democratic Party when he did this. (Tr., p. 84). Rather, he simply wanted to run for Mayor as an

independent as a result of his own dissatisfaction with the Democratic candidates that were already in the race. (Tr., p. Tr. 229-233). Bernabei even stated during his testimony, **"I wish I would had run in the Democratic primary."** (Tr., p. 296).

On June 26, 2012, Secretary of State Husted sustained a protest that prevented Mr. Greg Jolivette from appearing as an independent candidate for State Representative for the 51st House District. *In re Greg Jolivette*, Ohio Sec. of State Letter (June 26, 2012), *aff'd*, *Jolivette v. Husted*, 886 F. Supp. 2d 820 (S.D. Ohio 2012), 694 F.3d 760 (6th Cir. 2012). This decision was based upon less evidence than what was presented at the hearing on this protest confirming Bernabei's party affiliation. It is the position of the undersigned Members Ferruccio and Sherer that this precedent is directly on point and should be followed.

Even if Bernabei did satisfy the independent candidate disaffiliation requirements, the unrefuted evidence adduced at the hearing still confirmed that Bernabei's candidacy is nevertheless fatally flawed. This is due to Bernabei's failure to establish a **permanent voting residence** in the City of Canton prior to signing and filing his nominating petition.

In fact, when Bernabei signed his petition, he had failed to establish any habitation at the address in his nominating petition whatsoever. (Tr., p. 256-58).

- A. When Bernabei did begin to establish habitation at this address, he still intended it to be temporary residence only. (Tr., pp. 20-21, Prts.' Exh.49, pp. 3-4). This was corroborated by, among other undisputed facts, that since 2004:
 - i. Bernabei owned another home in an adjacent municipality (Tr., p. 237),
 - ii. Bernabei had never slept at the address stated in his nominating petition prior to his signing the nominating petition (Tr., p. 259),
 - iii. The house stated in his nominating petition was vacant and listed for sale by a friend (Tr., p. 97)
 - iv. He only moved a very small amount of his belongings into the temporary address (Tr., p. 96),
 - v. His wife did not join him at the temporary residence, but stayed at the marital home Bernabei owned in the adjacent municipality and had lived there for several years (Tr., pp. 263, 292), and
 - vi. Bernabei only slept at the address stated in his nominating petition for four nights, whereupon he moved to another Canton address located in different ward (Tr., pp. 259-60, 292).

Indeed, Bernabei further admitted that the reason why he secured this temporary residence was solely to enable him to establish a residence in Canton to enable him to run for Mayor. (Tr., pp. 237-239, 243).

When Bernabei signed his nominating petition, he was required to disclose his "voting residence," and to affirm that he is "a qualified elector" at that address and "an elector qualified to vote for the office" of Canton Mayor. R.C. § 3513.261. A valid "voting residence" requires "fixed habitation, and "your voting residence is the location that you consider to be a **permanent, not a temporary, residence.**"² Confirmed by Bernabei's own testimony, he failed to establish valid, permanent voting residence in the City of Canton prior to signing and filing his nominating petition as required by Ohio law. Based upon the precedent of the Ohio Supreme Court, the undersigned respectfully submit this is an additional reason to break the tie-vote in favor of Bernabei's disqualification.

Therefore, for these reasons described in more detail below, Board Members Ferruccio and Sherer urge this Honorable Secretary of State to break the tie vote in favor of upholding the protest and refusing the certification of Thomas M. Bernabei as an independent candidate for the office of Mayor of Canton, Ohio.

**BERNABEI FAILED TO SATISFY THE INDEPENDENT CANDIDATE
REQUIREMENTS OF R.C. §§ 3501.01(I) AND 3513.257**

I. Bernabei Was and Is Objectively Affiliated with the Democratic Party.

The record evidence presented at the hearing proved, by clear and convincing evidence, that Bernabei was objectively affiliated, or failed to objectively disaffiliate, with the Democratic Party at the time he submitted his independent nominating petitions on May 4, 2015.

A. Bernabei Knew he had to Completely Disaffiliate.

Established by the above legal authority, Bernabei knew he was required to objectively and completely disaffiliate if he desired to run as an independent candidate for Mayor of Canton. Bernabei testified:

- Q. You've recognized and understood in terms of your efforts that you have to establish complete disaffiliation with your Democratic Party before you begin the process of filing; correct?

² Ohio Secretary of State, Voter Registration and Information Update Form, SEC4010 (Rev. 6/14), <http://www.sos.state.oh.us/sos/upload/elections/forms/4010.pdf> (Prts.' Exh. 8). See also, Ohio Secretary of State, Guide to Voting in Ohio, SOS 0513 (02/2015) ("your residence is a location you consider your permanent dwelling.") (Prts.' Exh. 120).

A. Yes.

* * *

Q. If you are establishing complete disaffiliation before you file, you cannot continue to be affiliated up to, through, and including the election; correct?

A. Yes.

(Tr. p. 44, 46).

B. Bernabei's Post-Petition Affiliation is Confirmed by his Current Position as a Democratic-Elected County Commissioner.

Bernabei's affiliation with the Democratic Party is objectively and conclusively established by his current, sitting status as the elected-Democrat Stark County Commissioner, which he has been since his election in November of 2010. (Tr. 220). When Bernabei circulated his Declaration of Candidacy to run for election to this position in 2010, and again when he ran for re-election in 2012, Bernabei affirmed as follows:

"I further declare that, if elected to this office [County Commissioner], I will qualify therefor, and I will support and abide by the principals enunciated by the DEMOCRATIC Party."

A review of Protestor's Exhibit 16, reveals that Mr. Bernabei stated, under penalty of election falsification, that he was a "member of the Democratic Party for the **full term** [of County Commissioner] **commencing 01/02/2013.**" His current **four year term expires December 31, 2016.**

Mr. Bernabei obviously can always change his mind to associate with whatever party or group he chooses, but as a **Candidate** he cannot have it both ways. The candidate argues he can do what he wants but the distinction is that as a **Candidate** you must comply with our statutory framework, directives from the Ohio Secretary of State and established case law. The Candidate is not doing that in this case.

Bernabei agreed that this statement of party affiliation is important, and something he would expect voters to rely upon:

Q. So it should be taken seriously when you state to the public and to the Board of Elections "I will support and abide by the principles enunciated by the Democratic Party" as you so stated on November 22nd, 2011, for the 2012 general election; correct?

A. Yes.

Q. Okay. When a candidate like you makes a statement on a serious document to the public, you would expect that this statement, this promise is something that you wanted the voters to believe and rely on; correct?

A. Yes.

(Tr. p. 37).

Q. You signed a statement that said you would be true to the principles of the Democratic Party. When you signed those statements, when you signed those pledges, in your heart did you intend to honor them?

A. Yes.

(Tr., p. 275).

Q. Is there an expiration date on that promise?

A. No.

(Tr., p. 280).

Q. You do expect to be bound by people being able to rely upon "you will say what you do and do what you say"; correct?

A. That is an important thing.

(Tr. 299-300).

When Bernabei signed his independent nominating petitions on May 3, 2015, and continuing through today, Bernabei still holds the office of County Commissioner as an elected Democrat:

Q. So this election in 2012 where you ran as a Democrat, and you represented you would support and abide by the principles of the Democratic Party, you currently are still a sitting Stark County Commissioner; correct?

A. Yes.

(Tr., p. 39).

Through the protest hearing, the official records of the Stark County Board of Elections Records list Bernabei as a Democratic office holder. (Tr. p. 86, Prts.' Exh. 110).³ Bernabei never requested that these records be altered or adjusted as a result of any disaffiliation with the Democratic Party. (Tr., p. 86).

Bernabei is not only affiliated as a matter of fact with Democratic Party through his service as an elected-Democrat Commissioner, as explained above, but he is also affiliated as a matter of law. This is because if Bernabei were to resign from his position of Commissioner (which is his intention if elected Mayor (Prts.' Exh. 50, p. 13)), "the county central committee of the political party with which the last occupant of the office *was affiliated* shall" select Bernabei's successor. R.C. § 305.02(B).⁴ To determine the political party with which Bernabei "was affiliated" in this context, the "voting record for the two years preceding" is determinative. *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 585-86, 651 N.E.2d 995 (1995). Bernabei has only voted as a Democrat within this time-period. (Tr. 77, Prts.' Exh. 22). The Stark County Democratic Central Committee would therefore appoint Bernabei's successor. As a result, Bernabei is "affiliated" with the Democratic Party by operation of law through his continued service as a Democrat County Commissioner.

Bernabei agreed that, if he wanted to completely disaffiliate with the Democratic Party, he could have resigned as Commissioner:

Q. Your counsel asked the rhetorical question of what more you could have done to disaffiliate yourself. You ran twice and won with the support of the Democratic Party, suggesting and promising that if elected you would support and abide by the principles of the Democratic Party. One of the things you could have done to clarify and make clear your disaffiliation, you could have resigned this position; correct? You could have done that?

A. Yes.

(Tr., p. 39. See also, Tr., p. 63).

In *Jolivette*, both this Honorable Secretary and the affirming opinions cited the recent affirmation to "support and abide by the principles enunciated by" a political party as grounds to require the disqualification of an independent candidate, even though the affirmation was withdrawn prior to the candidate filing his independent nominating petitions. 886 F. Supp. 2d at 831; 694 F.3d at 768. **In this case, the affirmation was not withdrawn.** Rather, Bernabei continues to hold elected office based upon his Democratic-affirmation through the filing of his independent nominating petition, further

³ See also, Stark County Board of Elections, *Elected Officials List for 2015*, <http://www.starkcountyohio.gov/board-of-elections/documents/right-panel-documents2/eol13.xls>

⁴ The procedure to replace an "independent" Commissioner is only followed if that Commissioner "was elected as an independent candidate," in which case, "the prosecuting attorney and the remaining commissioners" select Bernabei's successor. R.C. § 305.02(C). As Bernabei was "elected" as a Democrat, the procedure for replacing an "independent" Commissioner does not apply.

admitting that he could have resigned from this position to make his disaffiliation from the Democratic Party clear. Under the unique facts of this case, Bernabei's continued service as a Democrat-elected Commissioner establish that he is not objectively "disaffiliated," requiring his disqualification as an independent candidate.

C. Bernabei's Post-Petition Affiliation is Confirmed by his Campaigning for Democratic Candidates.

On February 5, 2015, Bernabei agreed to serve as the Campaign Treasurer for Kristen Donahue Guardado, a Democratic Candidate for the Canton Municipal Court. (Tr. p. 46-57, Prts.' Exhs. 21, 116). Guardado's effort to secure the Democratic nomination for election to this position was subject to a primary election on May 5, 2015 against another Democratic candidate. (Tr., p. 209). Bernabei offered his public endorsement in support of Guardado's efforts to secure the Democratic nomination. (Prts.' Exhs. 92). As a result, Bernabei's name appeared on Guardado's campaign materials, as both Guardado's treasurer and by his public endorsement, through the date Bernabei filed his independent nomination petitions on May 4, 2015. (Tr., pp. 54, 58).

By way of example, once piece of campaign literature published in connection with Guardado's Democratic primary campaign has been included as Exhibit 92 which showed an endorsement by Stark County Commissioner Bernabei.

Bernabei's name also appeared on Guardado's yard signs that were publicly displayed in support of her candidacy in the Democratic primary. (Tr., pp. 49-50, Prts.' Exh.92). These signs continued to be displayed after the date Bernabei filed his independent nominating petitions on May 4, 2015 and through the primary election on May 5, 2015. Bernabei testified:

Q. [Y]our name continued to be on campaign signs through the day of the election; correct? You would not disagree with that?

A. No. I agree with that.

(Tr., p. 58).

Bernabei recorded a radio commercial on behalf of Guardado's primary campaign on April 29, 2015 – five days before Bernabei filed his independent nominating petitions. (Tr. 106-07, Prts.' Exh. 103). This radio ad stated:

MR. BERNABEI: This is Stark County Commissioner Tom Bernabei. In my former job as Canton Law Director, 19 years ago I hired Kristen Donohue Guardado as a young lawyer. Today, she is an experienced prosecutor and an active community leader in Canton and Stark County.

Kristen Donohue Guardado is running for Canton Municipal Court Judge. She has deservedly earned the endorsements of the Repository and Canton Police Patrolmen's Association.

Please join me in voting for Kristen Donohue Guardado for Judge.

Paid for by the Kristen Donohue Guardado for Judge Committee.

(Tr., p. 51, Prts.' Exh. 52 [emphasis added]).

Bernabei helped edit this ad prior to its recording and airing. (Tr., pp. 272-73). His request for voters to "join him" in voting for Guardado in the Democratic primary implied that he too was a Democrat that would be voting in this primary, and Bernabei agreed:

Q. The next-to-the-last sentence where you say "Please join me in voting for Kristen Donohue Guardado for judge," this was a primary, a Democratic primary election that Kristen Donohue Guardado was running in; correct?

A. Yes.

Q. To vote for her in that primary election, you had to be a Democrat; correct?

A. Yes. Or registered as one.

(Tr., pp. 51-52).

Bernabei confirmed, and the evidence established, that this radio ad began publicly airing on April 30, 2015, and continued through and after the date that Bernabei filed his independent nominating petitions, until May 5, 2015:

Q. You will note that your radio ads asking voters to join you in voting for Kristen Guardado, the Democratic candidate, they ran Monday, the 4th, Tuesday, the 5th; correct?

A. Yes.

(Tr. p. 54. See also, Tr., pp. 107-08, 272, Prts.' Exh. 93).

Finally, Bernabei made no effort to terminate any of his active involvement and public support of Guardado's Democratic primary campaign prior to filing his independent nominating petitions:

Q. [You] made no effort to communicate to Kristen Guardado to stop the radio ads, to take down signs, to correct the representation that you

were supporting her in her Democratic campaign? You made no effort to do that?

A. Of course not.

(Tr. p. 57).

Bernabei's involvement in this Democratic primary campaign establishes that he was not objectively "disaffiliated" with the Democratic Party at the time he submitted his independent nominating petitions on May 4, 2015, and further supports his disqualification as an independent candidate.

D. Bernabei's Post-Petition Affiliation is Confirmed by his Membership in Democratic Clubs.

Through and after the filing of Bernabei independent petitions on May 4, 2015, Bernabei remained a member of two local Democratic Clubs. These clubs are the Alliance Area Democratic Club and the Jefferson-Jackson Democratic Club.

Steven Okey, President of the Alliance Area Democratic Club testified:

Q. Can you describe the Alliance Democratic Club briefly?

A. Sure. The Alliance Area Democratic Club is an independent organization of Democrats serving the people in and around Alliance and actually open to membership to any member of the Democratic Party in Stark County.

Q. Is Tom Bernabei a member?

A. Yes, sir,

Q. And does he pay dues? I mean how does one become a member?

A. He pays dues. You sign up on a sheet which Mr. Bernabei did in February of this year. And you're a member.

(Tr., pp. 112-113. See also, Prts.' Exhs. 112, 113).

David Kirven, President of the Jefferson-Jackson Democratic Club testified:

Q. Can you briefly tell us what the Jefferson-Jackson Democratic Club is?

A. It's much like the Alliance Club, a democratic club. We just – it's a club made up of just local resident Democrats that are Democrats. We bring in public officials and folks that talk about issues in regards to democratic issues we have.

Q. Is Tom Bernabei a member?

A. Yes.

Q. Do you recall when he renewed his membership?

A. Just the same as everybody else. We send them out January. They come in January, February.

(Tr., pp. 119-20. See also, Prts.' Exh. 90).

Bernabei did not resign from either Democratic club prior to filing his independent nominating petitions on May 4, 2015, and remained a member of both through the date of the protest hearing. With respect to the Alliance Area Democratic Club:

Q. And did Mr. Bernabei ever resign from the club?

A. To our knowledge, no.

Q. You never got a resignation letter?

A. No, sir, we never did.

(Tr., p. 113). The Jefferson-Jackson Democratic Club:

Q. Mr. Kirven, did you ever receive a letter from Mr. Bernabei resigning his membership of the Jefferson-Jackson Club?

A. I did not.

Q. Okay. Are you aware if anybody ever received a letter resigning his membership of the Jefferson-Jackson Club?

A. Not to my knowledge.

(Tr., pp. 120-21).

Bernabei testified that, on April 30, 2015, he prepared letters resigning from both of these clubs. One was addressed to Mr. Kirven, the other Ms. Gwendolyn Dunagan, the Treasurer of the Alliance Area Democratic Club. (Resp. Exh. B). That day, April 30, he provided the original copies of these letters to Jeannette Mullane, Deputy Director of

the Stark County Board of Elections, and asked that she deliver the letters to Phil Giavasis, the Chairman of the Stark County Democratic Party. (Tr., pp. 70, 245-49). However, Bernabei testified that he provided these letters to Mr. Giavasis on a **"conditional basis,"** and that his resignations from these Clubs would only be effective if Bernabei made the final decision to run for Mayor of Canton. (Tr., pp. 245-254). This final decision was ultimately made by Mr. Bernabei on May 2, 2015, and the decision was communicated the following day – which was the day before he filed his independent nominating petitions. (Tr., pp. 233, 255, 305).

However, Bernabei never actually mailed or otherwise delivered his **"conditional"** letters of resignation to the actual Democratic clubs from which he intended to resign. (Tr., pp. 66-67). Similarly, the Presidents of the clubs confirmed that Mr. Giavasis did not communicate Bernabei's resignation, conditional or otherwise. (Tr., pp. 115, 121). Mr. Bernabei testified:

Q. You know Mr. David Kirven; don't you?

A. I do.

Q. So I presume then that you made arrangements and handed that letter to Mr. Kirven?

A. I did not.

Q. You did not. I presume that because of the seriousness of establishing clarity in your disaffiliation you made sure that you personally put that letter in the mail to send it to him; correct?

A. I did not.

* * *

Q. And the same with regard to the Democratic club in Alliance? What's the name of that?

A. Correct.

Q. Okay. You –

A. I did not mail that to them.

Q. Okay. And you did not hand it to any of the officers of that Democratic club?

A. I did not.

(Tr., pp. 66-67).

While Mr. Bernabei testified that he believed he submitted his conditional resignations from these clubs to the “appropriate persons” (Tr., pp. 65-67), no evidence was produced at the hearing to establish this fact. Neither Mr. Giavasis nor Ms. Mullane testified that they were the “appropriate persons.” Nor is such evidence provided by the Constitution and Bylaws of the Stark County Democratic Party. (Prts.’ Exh. 107). Rather, the evidence confirmed that, if Mr. Bernabei desired to resign from these clubs, he was required to communicate this resignation directly to the clubs themselves. Mr. Okey, the President of the Alliance Area Democratic Club testified that, “if he didn’t want to be a member, he can send us a letter.” (Tr., p. 118).

As a result, Bernabei acknowledged that his failure to deliver his conditional resignations to these Democratic clubs was an “omission” on his part. (Tr., pp. 72, 296). While Bernabei left for vacation in Florida the day he drafted his conditional letters of resignation on April 30, 2015, not returning until May 3, 2015 (Tr., pp. 242, 255-56), Bernabei acknowledged that his Florida vacation did not prevent Bernabei from avoiding this omission:

Q. If you wanted to ensure that delivery was made, you could have flipped them in the mailbox at the airport?

A. Yes.

Q. You could have done that but you choose not to?

A. ...It was not an issue of choice. It was an issue of omission.

Q. An issue of omission?

A. Omission on my part to fail to mail them. Yes, I wish I had mailed them obviously. I wish I had run in the Democratic primary. We wouldn’t be here today. Neither of those things happened. I omitted to mail them. I did not intentionally choose not to mail them.

(Tr., p. 296).

While Bernabei’s “omissions” in failing to disaffiliate with the Alliance Area Democratic Club and the Jefferson-Jackson Democratic Club were perhaps inadvertent, the Sixth Circuit made clear in *Morrison v. Colley* that this does not matter. 467 F.3d 503 (6th Cir. 2006). Indeed, applying *Morrison*, the Sixth Circuit rejected this exact type of “accidental oversight” defense when it affirmed this Honorable Secretary’s decision in *Jolivette*. 694 F.3d at 768.

Bernabei’s failure to properly terminate his membership in the Alliance Area Democratic Club and the Jefferson-Jackson Democratic Club by the time he submitted

his independent nominating petitions on May 4, 2015 establishes that he was not objectively “disaffiliated” with the Democratic Party, further supporting his disqualification as an independent candidate.

E. Bernabei’s Post-Petition Affiliation is Confirmed by Public Displays of Continued Affiliation with the Democratic Party.

Through and after the filing of Bernabei independent petitions on May 4, 2015, Bernabei’s name and image continued to be publicly displayed in a manner conveying affiliation with the Democratic Party. More specifically:

- Bernabei continued to be listed as a Democratic elected official and leader on the Stark County Democratic Party’s website. (Prts.’ Exh. 98).
- Bernabei’s photograph continued to be displayed on the walls of the Stark County Democratic Headquarters as a Democratic elected official. (Prts.’ Exh 94).
- Bernabei continued to be listed as Democrat Kristen Donohue Guardado’s Campaign Treasurer on Guardado’s campaign website. (Prts.’ Exh. 95).
- Bernabei continued to be listed as Democrat Chryssa Hartnett’s Campaign Treasurer on Hartnett’s campaign website. (Prts.’ Exh. 96).
- Bernabei continued to be listed as Democrat Frank Forchione’s Campaign Chairman on Forchione’s campaign website. (Prts.’ Exh. 97).

Bernabei never requested that these public displays of Democratic affiliation be removed prior to filing his independent nominating petitions on May 4, 2015. (Tr., pp. 59-60). Nor did Bernabei ask that his name or image be removed after the filing of the protest. (Tr., pp. 59-60).

In *Jolivette*, the Sixth Circuit held that public displays of a claimed independent candidate’s political affiliation is evidence that will support the candidate’s disqualification due to the candidate’s failure to “completely undo [their] affiliation with [their political party] in advance of filing their petition to run as an independent.” 694 F.3d at 768. Such is the case here.

F. The Evidence Demonstrating Bernabei’s Pre-Petition Affiliation with the Democratic Party Further Supports Bernabei’s Disqualification.

Both the Advisory and subsequent case law confirm that evidence of pre-petition affiliation is relevant to the determination of whether an independent candidate is

"affiliated" with a political party. *Jolivette*, 694 F.3d at 768; *State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St. 3d 222, 2013-Ohio-4616, 998 N.E.2d 1093. ¶¶ 25-27. In addition to the post-petition evidence described above, the following pre-petition evidence was presented at the protest hearing:

- Bernabei's served 17 years in office as an elected Democrat, which continues to the present. (Tr. 62-63, Prts.' Exh. 119). Bernabei appeared on the ballot as a Democratic candidate 14 times, most recently in May of 2014. (Id.). Bernabei was employed by other elected-Democrats for 12 years, most recently in 2008. (Id.). This evidence is reflected in Exhibit 119 (See also Tr., pgs. 62-63).

It was established that, since 1998, Bernabei donated \$30,203.22 to Democratic candidates and organizations. (Tr., p. 76. See also, Prts.' Exhs. 26-42, 87-88, 90-91).

However, since 2014, Bernabei's Democratic political contributions were established as noted in Exhibit 118.

It is noteworthy that the evidence reflected Bernabei's \$500 donation to the Stark County Democratic Party on April 22, 2015 was as a "Bar Sponsor" in connection with a Party fundraiser held on April 30, 2015 – **four days** before Bernabei submitted his independent nominating petitions. (Tr., p. 83, Prts.' Exh. 91). Bernabei's \$200 donation to Jefferson-Jackson Democratic Club was in sponsorship of a fundraiser for the Club on April 24, 2015 – **eleven days before Bernabei submitted his independent petitions**. (Tr., pp. 119-20, Prts.' Exh. 90).

The evidence confirmed that Bernabei's own campaign Designation of Treasurer on file with the Stark County Board of Elections designated Bernabei as a Democrat. (Tr., p. 80, Prts.' Exh. 18). Bernabei did not change this designation to "independent" until May 4, 2015, which is the same day submitted his independent nominating petitions. (Tr., p. 80, Prts.' Exh. 46).

The evidence showed that Bernabei was the Campaign Treasurer for Democrat candidates Joseph Martuccio, Chryssa Hartnett, and Kristen Donahue Guardado until he resigned on May 4, 2015, the day submitted his independent nominating petitions. (Tr., p. 80, Prts.' Exhs. 19, 20, 21, 45). Bernabei testified that he did not inform Guardado that he was resigning as her Treasurer, or that he was otherwise attempting to disaffiliate with the Democratic Party, until after Bernabei filed his independent petitions. (Tr., p. 292).

It was established that Bernabei was elected to the Stark County Democratic Central Committee in May of 2014. (Tr. 39-42; Prts.' Exh. 48). Bernabei submitted his "**conditional**" resignation from the Central Committee to Party Chairman Giavasis on April 30, 2015, which was only effective if Bernabei made the final decision to run for Canton Mayor as an independent candidate. (Tr., pp. 245-254, Resp. Exh. D). Bernabei made the final decision May 2, 2015, and his resignation from the Central Committee was

filed with the Board of Elections on May 4, 2015, subsequent to the filing of his independent petitions. (Tr., p. 233, Prts.' Exh. 1, Resp. Exh. D).

The evidence also reflected that, on February 5, 2015, Bernabei was a guest speaker at the meeting of the Alliance Area Democratic Club. (Tr., p. 78, Prts.' Exh. 82). On November 18, 2014, Bernabei was a guest speaker at a meeting of the Western Stark County Democratic Club. (Tr., 83, Prts.' Exh. 81). On July 17, 2013, Bernabei was a co-host to Chairman Chris Redfern at a reception to benefit the Ohio Democratic Party. (Prts.' Exh. 79).

The evidence showed that, in 1989, Bernabei successfully sought appointment by the Stark County Democratic Party Central Committee to the position of Canton Law Director. (Prts.' Exh. 62, 63). Upon Bernabei's retirement from this position in 2000, he successfully lobbied the Stark County Democratic Party Central Committee to appoint Democrat Joseph Martuccio as Bernabei's successor. (Tr., 75, Prts.' Exh. 64).

With respect to Bernabei's voting history, the evidence demonstrated a consistent voter in Democratic primaries as noted in Exhibit 22. (Tr. 77, Prts." Exh.22).

During his testimony, Bernabei acknowledged that, until he began his efforts to run as an independent candidate for Canton Mayor in late-April 2015, Bernabei has consistently considered himself a Democrat, a self-identification that dates back to the late '60s. (Tr., p. 219). The evidence further confirmed that, in March of 2014, Bernabei was quoted in the media as stating, "Yes, I am a dyed-in-the-wool Democrat who serves with two Republicans." (Tr., p. 58, Prts.' Exhs. 80, 84). Bernabei testified:

- Q. Okay. And two lines – three lines farther down, once again the general understanding that you had described yourself as a dyed-in-the-wool Democrat. This is now reported by a second newspaper or media outlet. Those are your words? That's how you described yourself; correct?
- A. I acknowledge that. Yes.

The decision in *Boyle*, and the *obiter dicta* affirming opinion of the Summit County Court of Common Pleas, cited this exact type of pre-petition evidence to disqualify an independent candidate, even without post-petition evidence. 2007 WL 4462641. The undersigned respectfully submit that the hearing in this case revealed far more pre-petition evidence than was presented in *Boyle*. It also presented significant post-petition evidence objectively demonstrating a failure to disaffiliate, which was entirely absent in *Boyle*. This distinguishes this matter from the decisions that will undoubtedly be relied upon by our Board Member counterparts. None of these decisions presented any post-

petition evidence, and the pre-petition evidence that did exist was far weaker than the undisputed evidence presented at the hearing here.⁵

At the hearing in this matter, Bernabei did present evidence to show that, in the days leading up to the filing of his independent nominating petitions, he did take some actions to try to disaffiliate with the Democratic Party. However, as recognized in both the Advisory and *Jolivette*, taking *some* action in an effort to disaffiliate with a political party is insufficient if that conduct does not establish a complete and actual disaffiliation. 886 F. Supp. 2d at 830. In other words, the candidate must “completely undo” their affiliation with their political party “in advance of filing [their] petition to run as an independent.” 694 F.3d at 768. Even Bernabei himself agreed that he was required to “establish complete disaffiliation with your Democratic Party before you begin the process of filing.” (Tr. p. 44, 46).

As was the case in *Jolivette*, the post-petition evidence confirms that Bernabei failed to completely and objectively disaffiliate prior to filing his independent petition. Like *Jolivette*, the voluminous pre-petition evidence supports this conclusion.

II. Bernabei Failed to Disaffiliate with the Democratic Party in Good Faith.

Assuming Bernabei did completely disaffiliate with the Democratic Party prior to filing his independent nominating petitions on May 4, 2015, the record evidence presented at the hearing nevertheless proved, by clear and convincing evidence, this disaffiliation did not occur in good faith.

Bernabei did not testify that his motivation for disaffiliating with the Democratic Party was due to any disagreement with the Democratic Party. Nor did Bernabei testify that his disaffiliation was due to any change in ideology. Instead, Bernabei has consistently described his relationship with the Democratic Party in positive terms. During the hearing, Bernabei described his connection with the Democratic Party as “heartfelt,” and acknowledged “the party that had treated me well.” (Tr. pp. 221, 225). In an interview two days after filling his independent petitions Bernabei explained:

MR. BERNABEI: But ya know, again, ya know, no I, I am not leaving the Democratic Party, ah, ya know, on, on bad terms in any way, shape or form. *Ya know, nothing occurred.* And if you read the cases by the way, most of the, most of these cases are about candidates who left their party because they were spurned in some way, shape or form, or, or ya know, there’s, there’s a whole line of cases like that and so forth. But no, I truly appreciate the relationship that I had with the Democratic Party.

⁵ See, *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 137 Ohio St. 3d 62, 2013-Ohio-4490, 997 N.E.2d 524; *State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St. 3d 222, 2013-Ohio-4616, 223, 998 N.E.2d 1093; *State ex rel. Livingston v. Miami Cty. Bd. of Elections*, 196 Ohio App. 3d 263, 963 N.E.2d 187, 2011-Ohio-6126.

(Prts.' Exh. 49 [emphasis added]).

Instead, Bernabei testified that his motivation for disaffiliating from the Democratic Party was for one reason – he wanted access to the ballot as candidate for Mayor, and the only way to the ballot at the time he made this decision to run for Mayor was via the independent route:

Q. So when did it occur to you at last that you were going to really do this? When did you firmly in your min[d] decide to disaffiliate from the party and seek the mayoral?

A. I ultimately firmly made the decision in, when I was in his Clearwater Beach on probably Saturday, **May 2nd, 2015**.

(Tr., p. 233).

Bernabei described the reason why he wanted to run for Mayor at length. Bernabei consistently expressed that this reason was he became “disillusioned” and “underwhelmed” and with the Democratic candidates who were running against each for Mayor in the Democratic primary at the time, namely, Mayor William J. Healy, II and Auditor Kim Perez. (Tr. p. 229. See also, Tr. pp. 205-06). Because there was no Republican candidate that was running for Mayor, the officeholder would be decided in the Democratic primary between Healy and Perez absent an independent candidate entering the race. (Prts.' Exh. 131).

Bernabei testified that his dissatisfaction with the Democratic mayoral candidates was “galvanized” after listening to a debate between the two candidates on April 22, 2015, and after reading an editorial in the local newspaper on April 26, 2015. (Tr. 229-230. See also, Tr., pp. 205-06; Prts.' Exhs. 130, 131). This caused Bernabei to draw the conclusion that he would do a better job as Mayor than the two Democratic candidates that were running. Bernabei explained:

I think that, probably by way of my elected office that I had hold, that I have done many things. I think that other things I have done I've done well. But I believe that I could do more and that I owe the community more.

And it was a combination or convergence of that state of mind with the, again, the debate and the editorial that led me to seriously undertake this decision and to ultimately make it.

(Tr., p. 232).

However, because Bernabei arrived at his decision to run for Mayor well after the February 4, 2015 primary filing deadline, the only way Bernabei could run for Mayor was as an independent:

Q. So this is not something you were doing because you missed the deadline for the primary filing?

A. That is correct.

Q. Something you're doing because you came to the decision **afterward** that somebody ought to run as an independent?

A. That is correct.

(Tr, pp. 298-99 [emphasis added]).

It is the position of the undersigned, Board Members Ferruccio and Sherer, that this is not good faith. As both opinions affirming this Secretary's decision in *Jolivette* recognized, "good faith" is lacking when a candidate disaffiliated from a party solely because the candidate "wanted access to the ballot" as an independent candidate. 886 F. Supp. 2d at 832-33; 694 F.3d at 768-69. It is true that a candidate's claim of disaffiliation is not automatically "in bad faith" simply because the candidate considered the strategic implications of the disaffiliation decision. *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 137 Ohio St. 3d 62, 2013-Ohio-4490, 997 N.E.2d 524, ¶ 27. However, without more supporting the claim of disaffiliation, such as an expression of "a change in ideology or policy to explain [the] disaffiliation," good faith cannot be based upon a desire to access the ballot via the independent route alone. *Jolivette*, 886 F. Supp. 2d at 832-33; 694 F.3d at 768-69. In other words, merely having "good intentions" in seeking to run for office is not the same as disaffiliating from a political party "in good faith."

If the aim of Ohio's disaffiliation requirement is "maintaining the integrity of various routes to the ballot [and] preventing candidacies that are prompted by short-range political goals, ... [t]his type of political maneuvering must not be condoned, lest the integrity of the political process will suffer." *Jolivette*, 886 F. Supp. 2d at 828, 834. To hold otherwise would essentially render the "good faith" requirement of the Advisory meaningless. If a member of a political party could establish their "good faith" political disaffiliation merely by expressing their sincere desire to appear on the ballot as an independent, it would automatically be established in every case.

The evidence at the hearing overwhelmingly confirmed that, if Bernabei desired to run for Mayor of Canton, he should have run in the Democratic primary. Bernabei himself acknowledged this, and even testified: "I wish I had run in the Democratic primary." (Tr., p. 296). The reasons that Bernabei offered for failing to do so were far from compelling so as to overcome Bernabei's own acknowledgment.

During an interview prior to the hearing, Bernabei explained:

REPORTER: Why didn't you run in the primary?

TOM BERNABEI: I didn't run in the primary because I hadn't contemplated running for the office of mayor in the primary at that time. That was back in November or December of last year. And we were very busy in the commissioner's office. .. ummm, you know..., [I] allow[ed] the process in the primaries to take its place. I was hopeful, of course, that there would be a Republican candidate as well as a Democratic candidate to challenge the various offices. And it turned out the way it turned out."

(Tr., p. 88). Bernabei gave a similar explanation during the hearing:

Q. Why didn't you run in the primary?

A. That's a great question. Why didn't Bernabei run in the primary?

Q. Yes, sir.

A. You know, again hindsight says that Bernabei probably should have chosen to run in the primary.

The answer is that during the primary season I was not focused on the issue of the mayoral race in the City of Canton. My focus at that time was with regard to county government which was always my primary function or focus, whatever office may be involved.

It was a determination. At the time prior to filing, I did not know who may or who may not file. I did not know that a Republican was not going to file. Those all became issues later on.

(Tr., p. 228).

In *Jolivette*, a hindsight admission similar to Bernabei's to support the disqualification of a purported independent candidate was noted. ("Mr. Jolivette indicated that he wished he had brought his [republican candidate] petitions into the Board of Elections earlier so that the error would have been noted and he would have had additional time to circulate another petition.") Applying this precedent, Mr. Bernabei's admissions that, "I wish I had run in the Democratic primary," and that he "should have chosen to run in the primary" (Tr., pp. 228; 296) support disqualification more forcefully than it did in *Jolivette*.

Bernabei's stated justifications for not running in the primary, that he was "very busy" at the time and "not focused on the issue of the mayoral race," and that he instead "allow[ed] the process in the primaries to take its place," are certainly insufficient to overcome Bernabei's admissions that he should have, in fact, run in the primary. (Tr., pp. 88, 228). While Bernabei testified that he did not realize the full extent of his dissatisfaction with Healy and Perez until April 26, 2015, the evidence confirmed that neither of these candidates were strangers to Bernabei. Bernabei worked with both Healy

and Perez for a number of years, and he “knows them both well.” (Tr. 230-31. See also, Tr. pp. 189, 210). The evidence did not reveal that there was anything about the debate between Healy and Perez was “starting or surprising.” (Tr. p. 211).

Bernabei was consistent in his testimony that he did not decide to run for Canton Mayor until after his dissatisfaction was “galvanized” as a result of the candidate debate on April 22, 2015 and the editorial on April 26, 2015. (Tr. 229-230. See also, Tr., pp. 205-06; Prts.’ Exhs.130, 131). Bernabei also consistently admitted that his late efforts to disaffiliate from the Democratic Party were driven by – even “conditioned upon” – his final decision to run for Canton Mayor as an independent. (Tr., pp. 233, 245-254). However, Bernabei’s suggestion that he blamed the Democratic Party for “fail[ing] us in not providing the quality candidates” for Canton Mayor, thereby providing a “good faith” basis for his last minute efforts to try to disaffiliate with the Democratic Party, is directly contradicted by the record evidence. (Tr., p. 228). This is because, after the “galvanizing” events of April 22 and 26, 2015, it is undisputed that Bernabei continued to engage in conduct confirming his affiliation with the Democratic Party.

By way of example, the same day as the debate, on April 22, Bernabei donated \$500 to the Stark County Democratic Party as a sponsor of a Party fundraiser held on April 30. (Tr., p. 83, Prts.’ Exh. 91). Two days after the debate, on April 24, Bernabei donated \$200 to the Jefferson-Jackson Democratic Club as a sponsor for their fundraiser. (Tr., pp. 119-20, Prts.’ Exh. 90). And while the editorial was published on April 26, Bernabei recorded a radio commercial three days later on April 29 for Democratic Candidate Guardado. (Tr. 106-07, Prts.’ Exh. 103). This radio ad asked voters to “please join” Bernabei in voting for Democrat Guardado in the Democratic primary, and aired April 30 through May 5. (Tr., p. 51, 54, 107-08, 272, Prts.’ Exhs. 52, 93).

As recognized in *Jolivette*, a candidate’s claim of good faith is undermined when a candidate continues to affiliate with a political party *after* the event that allegedly triggers the candidates shift toward independence. 886 F. Supp. 2d at 831 (“Plaintiff did not withdraw his candidacy immediately after the party endorsement meeting, which, according to Plaintiff, was essentially the proverbial ‘straw that broke the camel’s back.’ Such an assertion would have weight if Plaintiff had disaffiliated immediately after the meeting. Instead, he continued to press his candidacy as a Republican.”) The exact type of inconsistency that undermined a claim of independence in *Jolivette* exists here.

However, other conduct or circumstances may demonstrate that a candidate is not disaffiliated or that the disaffiliation was not made in good faith if the automatic disqualifiers are not present. In affirming *Jolivette*, the Southern District of Ohio recognized the logic of such a rule was that “a rational candidate attempting to disaffiliate from a party out of political convenience would not engage in such conduct, if the candidate understands that taking certain actions would necessarily preclude running as an independent.” 886 F. Supp. 2d at 831. Indeed, the evidence presented at the hearing in this case confirmed that Bernabei was aware of these automatic disqualifiers when he filed his independent nominating petitions. (Tr. 234-35, Prts.’ Exh. 49, pp. 8-10).

Ohio Sec. State Adv. Op. No. 2007-05 (the "Advisory") describes the type of evidence that may serve as an indication of party affiliation to support a protest against an independent candidate's candidacy. This evidence includes:

- Current holding of public office for which the office holder was nominated through a political party's primary election and elected on a partisan ticket.
- Information submitted on required election-related filings.
- Political advertisements.
- Participation as a political party officer or member.
- Past voting history. While voting history alone may be insufficient to disqualify an independent candidate, the Advisory states, "voting history, together with other facts tending to indicate party affiliation, may be sufficient grounds to disqualify an independent."

Other types of evidence, in addition to the above, to uphold a protest against an independent candidate's candidacy in the decisions of *Jolivette* and *In re Edna Boyle*, Ohio Sec. of State Letter (Oct. 5, 2007); *aff'd in dicta*, *State ex rel. Boyle v. Summit Cty. Bd. of Elections*, Ohio Ct. of Cm. Pleas, Summit Cty. Case No. 2007-10-7107, 2007 WL 4462641 (Oct. 17, 2007) include:

- Prior political contributions.
- Prior holding of office as for which the office holder was nominated through a political party's primary election and elected on a partisan ticket.
- Previously circulated declarations of candidacy.
- Prior political appointments.
- Information displayed on public websites.

The evidence listed above is relevant to both the actual disaffiliation and good faith inquiries. "The strength of the affiliation is necessarily pertinent when evaluating an asserted disaffiliation, as the candidate must demonstrate that the strings attaching him or her to the party are sufficiently severed, or at least that the candidate has engaged in decisive conduct demonstrating an intent to completely sever those strings, within a context not demonstrating a shift to independence as a means of political convenience or opportunism. *Jolivette*, 886 F. Supp. 2d at 829-30.

In this case, the undersigned determined Mr. Bernabei was more interested in being Mayor not an Independent Candidate.

**BERNABEI FAILED TO SATISFY THE RESIDENCY
REQUIREMENTS OF R.C. §§ 3513.261**

As required by R.C. § 3513.261, when Bernabei signed his independent nominating petitions for Canton Mayor on Sunday, May 3, 2015, Bernabei affirmed:

I, Thomas M. Bernabei, the undersigned, hereby declare under penalty of election falsification that my voting residence address is 2118 University Ave. N.W., Canton, Ohio, 44709; and I am a qualified elector.

* * *

I further declare that I am an elector qualified to vote for the office I seek.

(Prts.' Exh. 1).

This sworn statement effectively creates a residency requirement for persons desiring to run for municipal office, commencing on the date the candidate signs the nominating petition. *State ex rel. Markulin v. Ashtabula Cty. Bd. of Elections*, 65 Ohio St.3d 180, 184, 602 N.E.2d 626 (1992).

The evidence established that Bernabei recognized this residency requirement prior to signing his independent petitions on May 3, 2015:

But I myself, ya know, in order to comply with the residency requirements. Again, and the law says that to be mayor, and again to be law director, um ah, auditor or treasurer of a municipality you have to be an elector. That means that as of the date that you take office you have to be a resident, but in order also to circulate a petition to have those positions, you have to be an elector.

So before the filing of the petitions it was necessary that a, ya know, re-establish, or establish my residence in Stark County. In, in the City of Canton.

(Prts.' Exh. 49, p. 4).

The touchstone of the determination as to whether the residency requirement has been satisfied centers upon the address that the candidate lists as his or her "voting residence." As used in the above sworn statement, "voting residence" means that place of residence of an elector which shall determine the precinct in which the elector may vote." R.C. § 3501.01(P). A "qualified elector" means "a person having the qualifications

provided by law to be entitled to vote,” and that person may only vote in the precinct in which their “voting residence” is located. R.C. §§ 3501.01(N), (P), 3503.01(A).

The Ohio Supreme Court recognizes that the sworn statement above requires that the candidate’s “voting residence is in’ a specified precinct and that he is a qualified elector in such specified precinct; and that statement relates to the time the declaration of candidacy is signed and sworn to.” *State ex rel. Higgins v. Brown*, 170 Ohio St. 511, 166 N.E.2d 759 (1960), paragraph three of the syllabus.⁶

Similarly, “a qualified elector evidently is one who is qualified, at any designated time, to exercise the privilege of voting. He is qualified to vote then and there, not at some future time, or some other place.” *State ex rel. Barrett v. Leonard*, 6 Ohio Supp. 345, 1941 WL 3346 (Ohio Com. Pl., Hamilton Cty., Sept. 27, 1941).

If the statement of “voting residence” in a nominating petition is inaccurate, the nominating petition must be rejected. R.C. §§ 3513.262 and 3501.39(A). Similarly, persons who were not legitimate residents in their stated location and precinct “were improperly registered in the first place” and “were therefore ineligible to vote” at that illegitimate residence; consequently, they were not “qualified electors.”⁷ Therefore, if an address listed in the nominating petition is not the valid “voting residence” of that candidate at the time the candidate signed the petition, it necessarily follows that the candidate was not a “a qualified elector” at that address nor “an elector qualified to vote for the office [the person] seek[s],” similarly requiring the rejection of the nominating petition.⁸

Ohio Election law “does not contemplate multiple residences for election purposes.” *State ex rel. MacPherson v. Trumbull Cty. Bd. of Elections*, 11th Dist. No. 2011-T-0028, 2011-Ohio-1296, ¶ 28. Therefore, determination of a person’s “voting residence” requires application of the following the following pertinent rules, which are set forth in R.C. § 3503.02:

All registrars and precinct election officials, in determining the residence of a person offering to register or vote, shall be governed by the following rules:

(A) That place shall be considered the residence of a person in which the person’s habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.

* * *

⁶See also, *State ex rel. Stine v. Brown Cty. Bd. of Elections*, 101 Ohio St. 3d 252, 2004-Ohio-771, 804 N.E.2d 415, ¶ 13; *Markulin*, 65 Ohio St.3d at 184.

⁷*In re Paul S. Finnegan and Victoria J. Finnegan*, Ohio Sec. of State Letter (July 26, 2002). See also, *Bell v. Marinko*, 235 F. Supp. 2d 772 (N.D. Ohio 2002); *Bell v. Marinko*, 367 F.3d 588, 592 (6th Cir. 2004).

⁸*In re Alicia Wolph Roshong*, Ohio Sec. of State Letter (July 8, 2011); *Higgins*, 170 Ohio St. 511, paragraph three of the syllabus; *Stine*, 101 Ohio St. 3d 252 at ¶ 13; *Markulin*, 65 Ohio St.3d at 184.

(D) The place where the family of a married person resides shall be considered to be the person's place of residence; except that when the spouses have separated and live apart, the place where such a spouse resides the length of time required to entitle a person to vote shall be considered to be the spouse's place of residence.

Stine, 101 Ohio St. 3d 252 at ¶ 15.

The Supreme Court has held that the "voting residence" requirements set forth in this statute "emphasizes the person's intent to make a place a fixed or permanent place of abode." *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 115 Ohio St. 3d 405, 2007-Ohio-5346, 875 N.E.2d 578, ¶ 11. Applying this principle, the Ohio Voter Registration and Information Update Form issued by this Honorable Secretary reads in part:

Residency Requirements:

Your voting residence is the location that you consider to be a permanent, not a temporary residence⁹

The evidence presented at the hearing demonstrated that, on April 27, 2015, when Bernabei began his efforts to run for Mayor of Canton, Bernabei lived with his wife in Jackson Township, a municipality adjoining Canton, at 2745 Dunkeith Drive NW. (Tr., p. 237). Both Bernabei and his wife were registered to vote at 2745 Dunkeith Drive NW at this time. (Prts.' Exhs. 25, 26).

The evidence also confirmed that, in addition to the Jackson Township home, Bernabei also owned a home located in Canton at 441 Lakecrest Street NW. (Tr., p. 237-40). In order to satisfy the residency requirements to enable Bernabei run for Canton Mayor, Bernabei intended to make the property located at 441 Lakecrest Street NW his permanent residence. (Tr., p. 237-43).

At the time Bernabei was preparing to run for Canton Mayor, the home at 441 Lakecrest Street NW was occupied by tenants that were renting from Bernabei. (Tr., p. 239). On April 28, 2015, Bernabei approached the tenants, informed them that he is "considering running for the office in the City of Canton," and asked them if he could "live in the house in the back bedroom" until they moved out. (Tr., p. 239-40). The tenants declined. (Tr., p. 240).

⁹ Ohio Secretary of State, Voter Registration and Information Update Form, SEC4010 (Rev. 6/14), <http://www.sos.state.oh.us/sos/upload/elections/forms/4010.pdf> (Prts." Exh. 8). See also, Ohio Secretary of State, Guide to Voting in Ohio, SOS 0513 (02/2015) ("your residence is a location you consider your permanent dwelling.") (Prts." Exh.120).

The next day, on April 29, Bernabei contacted a friend who owned an empty house for sale in Canton located at 2118 University Ave. NW. (Tr. 240). In an effort to satisfy the residency requirements to run for Canton Mayor, Bernabei then prepared and signed a one month lease for the property at 2118 University Ave. NW., with an effective date of May 1, 2015. (Tr., pp. 240-42). Bernabei signed the lease the following day, on April 30. (Tr., pp. 242).

The evidence showed that, the same day of April 30, Bernabei then completed a voter change of address form. Bernabei utilized the property at 2118 University Ave. NW as his voting residence on this form, **and forward-dated the document by using a May 3, 2015 date.** (Tr., pp. 251-54). Bernabei then “**conditionally**” provided this form to Jeannette Mullane, Deputy Director of the Stark County Board of Elections. (Tr., pp. 251-254). Bernabei instructed Mullane that she was to file the form with the Board of Elections on May 3, 2015 upon confirmation Bernabei’s final decision to run for Canton Mayor. (Tr., pp. 251-254). At the time Bernabei completed this form, he had not taken possession of the property at 2118 University Ave. NW nor moved in any belongings. Bernabei’s lease for this property was not effective until the following day, on May 1, 2015. (Tr., pp. 240-42).

Later that day, on April 30, 2015, Bernabei left for vacation in Florida. (Tr., pp. 97-98). On May 3, 2015, Bernabei contacted Mullane from Florida, confirmed that he had made the final decision to run for Canton Mayor, and instructed Mullane to file the forward-dated change of voter change of address form that he had previously provided to her. (Tr., pp. 287-88, 305). Mullane complied with Bernabei’s instructions and filed the form. (Tr., p. 255).

Later that day, on May 3, 2015, Bernabei returned from Florida at approximately 1:00 PM. (Tr., p. 256). Bernabei testified that the “first thing that [he] did” upon his return “was to prepare the, petition the nominating petition.” (Tr., p. 265). He made 40 copies and then signed each petition affirming 2118 University Ave. NW as his “voting residence.” (Tr., p. 256-57; Prts.’ Exh. 1). Bernabei then began the process of gathering the needed signatures for his independent nominating petition to run for Canton Mayor. (Tr., p. 257).

Bernabei testified that his efforts to gather signatures on the afternoon of May 3, 2015 “took a significant amount of time.” (Tr., p. 257). As a consequence, Bernabei did not move any of his belongings into the property at 2118 University Ave. NW until the evening of May 3, 2015. (Tr., p. 257-58).

Bernabei Did Not Have a Fixed Habitation at the Address Stated in his Nominating Petition On the Date it Was Petition Signed.

As mentioned above, a candidate’s affirmation of their “voting residence” “relates to the time the declaration of candidacy is signed and sworn to.” *Higgins*, 170 Ohio St. 511, paragraph three of the syllabus. Similarly, “a qualified elector” “is qualified to vote then and there, not at some future time, or some other place.” *Barrett*, 6 Ohio Supp. 345.

The evidence confirmed that when Bernabei "signed and sworn to" 2118 University Ave. NW as his "voting residence" on the afternoon of May 3, 2015, he had not moved in any of his belongings, and the property was vacant. (Tr., p. 257-58). This process did not begin until later the evening of May 5, 2015, after Bernabei signed and began to obtain signatures on his nominating petition. (Tr., p. 257-58).

As a consequence, Bernabei failed to establish that his "habitation was fixed" at 2118 University Ave. NW pursuant to R.C. § 3503.02(A) when he signed his nominating petition. Future intention, without actual habitation, is not enough. *Jolly v. Deeds*, 135 Ohio St. 369, 372, 21 N.E.2d 108. Bernabei therefore failed to establish a valid "voting residence" at the address stated in his petition at the time it was signed. Bernabei was therefore neither "a qualified elector" at that address nor "an elector qualified to vote for the office [the person] seek[s]." Bernabei therefore failed to comply with R.C. § 3513.261, and it is the position of Members Ferruccio and Sherer that Bernabei's candidacy requires disqualification on this basis .

Bernabei Intended the Address Stated in his Nominating Petition to be Temporary Only.

As explained above, the "voting residence" requirements set forth in R.C. § 3503.02(A) "emphasizes the person's intent to make a place a *fixed or permanent* place of abode." *Duncan*, 115 Ohio St. 3d 405 at ¶ 11. This Honorable Secretary has stated in plain terms, "Your voting residence is the location that you consider to be a permanent, not a temporary, residence."

Bernabei consistently acknowledged that he intended the property at 2118 University Ave. NW be a temporary residence only, and that his permanent residence would be at 441 Lakecrest St. NW when it became available. In an interview on May 6, 2015, Bernabei explained:

MR. BERNABEI: I do own a house then at 441 Lakecrest which has been my permanent home before. Um, that house has been rented. That house has now become vacant. Ah, in fact, as of today [May 6, 2015], I will get the keys back and I will personally be moving back into the house probably immediately, or within the next day or two days. Ah, and subject to putting some additional new carpeting in and a couple of other things that my wife has demanded as condition to continue to live with me ... she will be moving in and that will become our permanent residence.

(Tr., p. 95, Prts.' Exh. 50, p. 11). In another interview, he continued:

MR. OLSON: So you haven't physically relocated yet?

MR. BERNABEI: To that house. My, my permanent house in Canton-

MR. OLSON: Okay.

MR. BERNABEI: -is, is now available.

MR. OLSON: Okay.

MR. BERNABEI: Ya know, and I will be moving back to that house. My wife will then be moving back to that house also.

* * *

Ya know, and maybe do some, ya know, new carpet in a couple of the rooms and then we'll move all of our furniture from our house in Jackson Township in Hills and Dales to, to that house. And we will live there as we used to.

(Tr., pp. 94, 96, Prts.' Exh. 49, pp. 3-4).

The evidence produced at the hearing further confirmed Bernabei's description of the temporary nature of his residency is at 2118 University Ave. NW.

When Bernabei did move in his belongings into 2118 University Ave. NW on the evening of May 3, 2015, the property Bernabei brought consisted of a "relatively minimal kit." (Tr., p. 258). Bernabei previously described it as "a [single] bed, clothes, ... a card table and a computer ... and not much else." (Tr., pp. 96, Prts.' Exh. 50, p. 10). To illustrate, Bernabei testified that he only brought enough clothing to 2118 University Ave. NW to last a few days. (Tr. 258-59). If more were needed, he would have to retrieve it from his property at 2745 Dunkeith Drive NW. (Tr., pp. 258-59).

While Bernabei was living at 2118 University Ave. NW, which was owned by a friend, the property was unfurnished, vacant, and listed for sale. (Tr., p. 97). Bernabei was not under contract to purchase it.

There was no evidence presented at the hearing that Bernabei placed any utilities in his name, instituted a forwarding mailing address, or even received any mail of any type at 2118 University Ave. NW. Nor did he ever update his Attorney Registry with the Ohio Supreme Court to reflect his address at 2118 University Ave. NW. (Tr., p. 103-04, Prts.' Exh. 123).

While the 2118 University Ave. NW was subject to a one-month lease, Bernabei only stayed at the property a total of four nights, whereupon he moved to his "permanent" address at 441 Lakecrest NW. (Tr., pp. 259-60).

Finally, and perhaps most importantly, Bernabei's wife did not join him at the temporary residence at 2118 University Ave. NW. (Tr., pp. 263, 292). She stayed at the their home owned at 2745 Dunkeith Drive NW. (Tr., pp. 263, 292). And while Bernabei cast an in-person provisional ballot at the Board of Elections in the May election while he was taking steps to finalize the filing of his independent nominating petitions on May 4 (Tr., p. 264), **Bernabei's wife cast an in-person ballot on election day at the precinct for their family residence.** (Tr., p. 293, Prts.' Exh. 127). R.C. § 3503.02(D) reads, "the place where the family of a married person resides shall be considered to be the person's place of residence."

A subpoena sent by the Protestors Attorney for Thomas Bernabei was returned and accepted by Mrs. Bernabei at the 2745 Dunkieth family residence. As part of the packet you are receiving from our office, you will note a return of service with respect to the subpoena the Protestors had served on the Candidate. The return shows on July 3, 2015, Mrs. Bernabei accepted service, on behalf of her husband at the marital residence of 2745 Dunkeith.

When the evidence presented at the hearing is applied pursuant to Ohio Law and directives which state that a "voting residence" is "a permanent, not a temporary, residence," and the requirement that "the place where the family of a married person resides shall be considered to be the person's place of residence," The undersigned Members Ferruccio and Sherer respectfully submit that Bernabei's candidacy requires disqualification. 2118 University Ave. NW was not Bernabei's valid "voting residence" at the time he signed his nominating petitions. Bernabei failed to comply with R.C. § 3513.261.

At the hearing, Bernabei attempted to claim that he had two "permanent residences" when he signed his petition – one at 2118 University Ave. NW, the other at 441 Lakecrest St. NW. (Tr., pp. 92-94). **In reality he had three if you take the permanent residence his wife was still living in at 2745 Dunkeith Drive NW.** But based on the evidence, any effort to characterize Bernabei's four-day stay at "2118 University Ave. NW" as "permanent" belies any definition of the word "permanency." To hold otherwise would automatically transform hotel rooms, campgrounds, and vacation spots into valid "voting residences." This is not the law. *In re Protest of Brooks*, 3rd Dist. No. 17-03-17, 2003-Ohio-6990, ¶¶ 23-27 (holding "Red Roof Inn where person stayed for five nights" was not a permanent "voting residence" for purposes of Ohio Election law); *In re Protest of Brooks*, 155 Ohio App. 3d 370, 2003-Ohio-6348, 801 N.E.2d 503, ¶¶ 42-49 (3rd Dist.) (accord). Further, a sworn declaration of "voting residence" is made under penalty of perjury. For that reason, it must be accurate at the time the declaration is made.

For these reasons, it is the position of the undersigned that evidence produced at the hearing proves, by clear and convincing evidence, that Bernabei failed to satisfy the residency requirements of R.C. § 3513.261. Bernabei's independent candidacy should not proceed.

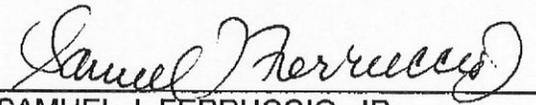
CONCLUSION

It is the position of Board Members Samuel J. Ferruccio, Jr. and William V. Sherer, II, based upon the testimony and evidence provided during the protest hearing, that Bernabei failed to satisfy both the "independent candidate" requirements of R.C. §§ 3501.01(i) and 3513.257 and the "voting residency" requirements of R.C. § 3513.261.

It is the position of Members Ferruccio and Sherer that evidence produced at the hearing proves, by clear and convincing evidence, that Bernabei's efforts to disaffiliate with the Democratic Party were singularly driven by Bernabei's desire to gain access to the ballot via the independent route as a consequence of the ability to gain access through the primary process having been foreclosed. *Jolivette* confirms that an attempt to politically disaffiliate for this singular reason is not in "good faith" as required by the Advisory. Bernabei's independent candidacy should not proceed.

It is also the position of the undersigned that evidence produced at the hearing proved, by clear and convincing evidence, that the "voting residence" that Bernabei affirmed in his independent nominating petition was invalid when he signed his petition on May 3, 2015. This is because at the time Bernabei signed his petition the property identified as his "voting residence" was vacant, and Bernabei had yet to occupy or move his belongings into the property. Even when Bernabei did occupy this property, this residence was only intended by Bernabei to be a temporary, and not a permanent residence. His permanent residence was at 2745 Dunkeith wherein the majority of his possessions and his wife resided. This was outside the City of Canton. Bernabei was therefore neither "a qualified elector" at that address and "an elector qualified to vote for the office" of Canton Mayor when he signed his petition. Consequently, Bernabei failed to satisfy the residency requirement of R.C. § 3513.261, and Bernabei's candidacy should be rejected.

Based upon the foregoing, Board Members Ferruccio and Sherer respectfully urge this Honorable Secretary of State to break the tie vote in favor of upholding the protest and refusing the certification of Thomas M. Bernabei as an independent candidate for the office of Mayor of Canton, Ohio.



SAMUEL J. FERRUCCIO, JR.

7-20-15

DATE



WILLIAM V. SHERER, II

7-20-15

DATE

**POSITION OF BOARD MEMBERS FRANK C. BRADEN AND WILLIAM S.
CLINE OPPOSING MOTION TO DENY THOMAS M. BERNABEI'S
INDEPENDENT CANDIDACY FOR MAYOR OF THE CITY OF CANTON
JULY 6, 2015 BOARD MEETING**

INTRODUCTION:

On July 6, 2015 a motion was made to uphold the protest made against the validity of the petition of Thomas M. Bernabei as an independent candidate for Mayor of the City of Canton. Members Braden and Cline voted against the motion and members Ferruccio and Scherer voted for it.

The following is respectfully submitted in support of our request that Secretary of State Husted break the tie vote by supporting our position on this matter and allowing the Candidate to be on the ballot in the November General Election.

FACTUAL BACKGROUND

On May 29, 2015 a timely protest against the candidacy of Thomas M. Bernabei, a candidate for the office of Mayor in the City of Canton, Ohio ("the Candidate") was filed by seven (7) qualified electors eligible to vote for the candidate whose petition is the subject of the protest. These electors were joined by the Stark County Democratic Party, which later withdrew its claim for party status, and by the Ohio Democratic Party.

The Stark County Board of Elections met on June 9, 2015 and set Monday, July 6, 2015 at 9:00 a.m. at the Board's offices in Canton, Ohio as the hearing date for the protest. The Board also found at that time that the petition of candidacy in question was otherwise valid and would have been certified but for the protest. The hearing was held and a transcript produced.

The Protestors asserted at the hearing that the Candidate was not a resident of the City of Canton when he submitted his candidacy petitions and that his declaration that he was an independent was made in "bad faith".

The subject tie vote occurred when Member Scherer moved to uphold the protest and not certify the nominating petitions and candidacy of Thomas M. Bernabei for Mayor for the City of Canton.

Roll Call Vote:

Chairman Ferruccio	Yes
Member Braden	No
Member Cline	No
Member Scherer	Yes

Second Roll Call Vote:

Chairman Ferruccio	Yes
Member Braden	No
Member Cline	No
Member Scherer	Yes

A tie vote was then declared.

DISCUSSION

I. The Candidate Was A Resident of the City of Canton when he filed his candidacy petitions.

The Candidate testified that when he filed his petitions he resided in a house that he leased, pursuant to a written lease agreement, in the City of Canton (Exhibit A). He signed that lease on 30 April 2015 and moved in on 3 May 2015. This address on University Avenue in the City of Canton was declared by the Candidate to be his residence. He also testified, without contradiction, that at that time he intended to return to that residence when he was away and regarded it as his residence for the indeterminate future.

There was no testimony presented that the University Avenue was not a fixed place of habitation to which he intended to return.

There was also testimony from a Common Pleas Judge, who is a Democrat and a long-time friend of the Candidate, that he visited the University Avenue residence and observed the personal belongings of the Candidate throughout the residence and that it was apparent to him that the house was where the Candidate lived.

The Candidate also owned a another single family house in the City of Canton and he testified that it was his plan to eventually move into that property after his tenants left and after some work was done which his wife wanted before they moved in (referred to as the Lakecrest Street residence). When he moved into the University Avenue property there was no date certain as to when he would have the opportunity to move into the other Canton residence.

The essence of the argument of the Protestors was that the University residence was a "sham" and that he did not intend to reside there. This allegation, however, was not supported by any evidence other than the Candidate had not

yet sold his former residence and that he later moved into the Lakecrest Street when his tenants vacated that residence.

Whether that move occurred in a few days, weeks, or months is not material. What is material and dispositive is that he resided in Canton Ohio when he filed his petitions.

The Candidate thus satisfied Ohio Revised Code section 3503.02 (A) by his testimony and the uncontroverted fact that he moved into the Canton residence.

The Protestors attempted to in effect re-write this code section by arguing that it requires that the subject residence must be intended to be “permanent” in order to satisfy the code section. This is not the law in Ohio as we know it, or as it is written.

Accepting that argument would lead to the conclusion that anyone who leases an apartment, or a house, has no ‘residence’ since those housing situations are not “permanent”. Clearly that is not the intent of the law, nor does it make any sense.

Previous judicial decisions on the issue of candidate residency are supportive of the position of Board Members Braden and Cline.

R.C. 3503.02 “provides that the person’s intent is of great import,” *State ex rel. Stine v. Brown Cty. Bd. of Elections*, 101 Ohio St.3d 252, 2004-Ohio-771, 804 N.E.2d 415, and thus “emphasizes the person’s intent to make a place a fixed or permanent place of abode.” *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 115 Ohio St.3d 405, 2007-Ohio-5346, 875 N.E.2d 578.

In *State ex rel Husted v. Brunner*, 123 Ohio St.3d 288, 295 (2009), the Court taught that when a candidate has two homes, but repeatedly emphasized his intention to make his permanent residence in one jurisdiction, and not the other, the Board of Elections was bound to afford great weight and deference to his profession of intent.

In the instant case the Candidate had two residences in the same jurisdiction. Thus the holding in *Husted* is even more compelling and should be regarded as dispositive of the issue in this case.

II: The Candidate's Status as an Independent was not refuted by clear and convincing evidence that his claim of independence was made in "bad faith".

The Protestors attempted to prove that the Candidate's claim of independence was made in "bad faith" by almost exclusively relying on his admittedly extensive pre-petition activities as a member of the Democrat Party. It was uncontroverted, however, that he resigned from that Party and its Executive Committee before he filed his petition. He also withdrew as the treasurer on several past campaigns. And he submitted letters of resignation to a few small Democrat clubs in Stark County by giving those letters to a member of that Party's Executive Committee who is also the deputy director of the Stark County Board of Elections.

There was no evidence of any post-petition activity or conduct, which would be regarded, as inconsistent with his claim of independence.

Revised Code 3501.01(I) defines an Independent candidate, "Independent candidate" means any candidate who claims not to be affiliated with a political party, and whose name has been certified on the office-type ballot at a general or special election through the filing of a statement of candidacy and nominating petition, as prescribed in section 3513.257 of the Revised Code.

Citing *Morrison v. Colley*, 467 F.3d 503 (6th Cir. 2006), Ohio Secretary of State Advisory 2007-05 advises that R.C. 3513.257 requires that:

- an independent candidate actually be unaffiliated, or disaffiliated from any political party; and
- the required claim of unaffiliation by an independent candidate must be made in good faith.

Further guidance was provided in the Advisory;

- If an independent candidate votes in a party primary election after filing as an independent, the candidate is not actually unaffiliated, and the candidate's claim of independence was either not made in good faith or is no longer current; and
- If an independent candidate was on a political party's central or executive committee at the time he or she filed as an independent candidate, or becomes such a committee member at any time during his or her independent candidacy, the candidate is not actually unaffiliated, and the

candidate's claim of independence was either not made in good faith or is no longer current.

None of disqualifying factors above were proven and the protestors called to testify could not point to a single example of the Candidate acting in bad faith with regard to his declaration of independence. In fact, other witnesses, public officials and two judges testified to having had discussions with the Candidate about his disillusionment with the Democratic Party and his motives for becoming an independent.

The lone and unpersuasive 'fact' on which the Protestors have relied to prove that the Candidate was not dis-affiliated with the Democrat Party was that his name was still carried on the rosters of those small political clubs, the clubs to which he directed correspondence with his resignation which was handed to a member of the Democrat Executive Committee to be delivered. Perhaps he should have mailed them rather than entrusting them to a Party official, but that is what he did. For that Party or the Protestors to now claim he was not dis-affiliated because of actions they did or did not take is at best disingenuous. At worse it was a deliberate attempt to create a false record of the Candidate's status.

CONCLUSION

The burden of proof is on the Protesters. They did not prove by clear and convincing evidence that Thomas M. Bernabei was not a legal resident of the City of Canton, Ohio when he filed his petitions, nor did they prove that on the day of filing of his petition that he had not disaffiliated from the Democratic Party. They further failed to present any evidence of actions or conduct after his independence was declared that he was not an independent or his conduct was in bad faith.

It is the strongly held position of Members Cline and Braden that an individual in this state has the Constitutional right to disaffiliate or disassociate from a political party. Only the most compelling, clear, and convincing evidence that such a declaration was made in bad faith should prevent access to the ballot as an independent.

For the reasons set forth above, we respectfully request that Secretary Husted vote with Board members Braden and Cline against the motion of the July 6, 2015

meeting and allow certification of the petition of candidacy of Thomas M. Bernabei.

3503.02 Residence determination rules.

All registrars and precinct election officials, in determining the residence of a person offering to register or vote, shall be governed by the following rules:

(A) That place shall be considered the residence of a person in which the person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.

(B) A person shall not be considered to have lost the person's residence who leaves the person's home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.

(C) A person shall not be considered to have gained a residence in any county of this state into which the person comes for temporary purposes only, without the intention of making such county the permanent place of abode.

(D) The place where the family of a married person resides shall be considered to be the person's place of residence; except that when the spouses have separated and live apart, the place where such a spouse resides the length of time required to entitle a person to vote shall be considered to be the spouse's place of residence.

(E) If a person removes to another state with the intention of making such state the person's residence, the person shall be considered to have lost the person's residence in this state.

(F) Except as otherwise provided in division (G) of this section, if a person removes from this state and continuously resides outside this state for a period of four years or more, the person shall be considered to have lost the person's residence in this state, notwithstanding the fact that the person may entertain an intention to return at some future period.

(G)

(1) If a person removes from this state to engage in the services of the United States government, the person shall not be considered to have lost the person's residence in this state, and likewise should the person enter the employment of the state, the place where such person resided at the time of the person's removal shall be considered to be the person's place of residence.

(2) If a person removes from this state to a location outside of the United States and the person does not become a resident of another state, the person shall not be considered to have lost the person's residence in this state. The place where

the person resided at the time of the person's removal shall be considered to be the person's place of residence.

(3) If a person is eligible to vote in this state under division (D)(2) of section 3511.011 of the Revised Code, the place where the person's parent or legal guardian resided in this state prior to that parent or legal guardian's removal to a location outside of the United States shall be considered to be the person's place of residence.

(4) If an address that is considered to be a person's place of residence under division (G) of this section ceases to be a recognized residential address, the board of elections shall assign an address to the applicable person for voting purposes.

(H) If a person goes into another state and while there exercises the right of a citizen by voting, the person shall be considered to have lost the person's residence in this state.

(I) If a person does not have a fixed place of habitation, but has a shelter or other location at which the person has been a consistent or regular inhabitant and to which the person has the intention of returning, that shelter or other location shall be deemed the person's residence for the purpose of registering to vote.

Amended by 130th General Assembly File No. 47, SB 109, §1, eff. 2/25/2014.

Amended by 129th General Assembly File No.105, SB 295, §1, eff. 8/15/2012.

Amended by 129th General Assembly File No.46, HB 224, §1, eff. 10/27/2011.

Amended by 129th General Assembly File No.40, HB 194, §1 Made subject to referendum in the Nov. 6, 2012 election. The version of this section thus amended was repealed by 129th General Assembly File No.105, SB 295, §1, eff. 8/15/2012.

Effective Date: 08-22-1995; 05-02-2006