

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.

JULIA R. BATES, *
Prosecutor of Lucas County, Ohio *
700 Adams Street *
Toledo, Ohio 43604 *
Relator *

CASE NO.

-vs-

DAVID HILARION SMITH, *
1029 N. Crissey Road *
Holland, Ohio 43528 *

ORIGINAL ACTION IN QUO
WARRANTO

Respondent. *

**MEMORANDUM IN SUPPORT OF COMPLAINT
FOR WRIT OF QUO WARRANTO**

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:
Evy M. Jarrett, #0062485 (Counsel of Record)
Elaine B. Szuch, #0080332
Assistant Prosecuting Attorneys
700 Adams Street, Suite 250
Toledo, Ohio 43604
Telephone: (419) 213-2001
Facsimile: (419) 213-2011
Email: ejarrett@co.lucas.oh.us

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.

JULIA R. BATES, *
Prosecutor of Lucas County, Ohio *
700 Adams Street *
Toledo, Ohio 43604 *
Relator *

CASE NO.

-vs-

DAVID HILARION SMITH, *
1029 N. Crissey Road *
Holland, Ohio 43528 *

ORIGINAL ACTION IN QUO
WARRANTO

Respondent. *

**MEMORANDUM IN SUPPORT OF COMPLAINT
FOR WRIT OF QUO WARRANTO**

D. Hilarion Smith, a former trustee of Spencer Township, was defeated in his campaign for re-election as a trustee in the 2015 general election. The day before his term expired, December 31, 2015, Respondent Smith and another township trustee, Michael Hood, voted to declare that the third trustee office was vacant. They then voted together to appoint Smith to fill that office beginning the next day.

The third trustee, Shawn Valentine, was absent from the meeting on December 31, 2015, because he was serving active military duty. As a result of his active military duty, Smith and Hood's declaration of vacancy violated the unambiguous provisions of R.C. 503.241. Moreover, the declaration of the vacancy and the appointment of Smith occurred at a meeting for which inadequate public notice was provided, and for which

there was no matter requiring immediate official action. The declaration of the vacancy and the appointment of Smith are therefore invalid acts pursuant to R.C. 121.22.

STATEMENT OF FACTS

In November, 2013, Shawn Valentine was elected trustee of Spencer Township, Lucas County, with a term beginning January 1, 2014 and ending December 31, 2017. (Valentine Affidavit, ¶1.¹)

Valentine also serves in the Ohio Army National Guard, and in the spring of 2015, he was notified that he would be deployed for active military service with the United States Army. In June, he gave verbal notice of his upcoming deployment to the other trustees, Michael Hood and Respondent D. Hilarion Smith. Valentine also informed Hood and Smith that he did not intend to resign from his position but expected to maintain the position pursuant to R.C. 503.241. (Valentine Affidavit, ¶2-4.)

Valentine attended a meeting of the trustees on September 3, 2015. (Valentine Affidavit, ¶5.) Hood acknowledged Valentine's upcoming deployment and requested that the Township pray over his safety and service to the country. (McDonald Affidavit, ¶2.) Four days later, Valentine was required to report for duty at Fort Bliss, Texas. (Valentine Affidavit, ¶5.)

The Spencer Township Trustees met on September 17, 2015 to discuss the effect of Valentine's deployment on various committees related to township business. Despite the discussion regarding Valentine's deployment at the meeting two weeks

¹The appendix to Relator's Complaint contains Valentine's affidavit, an affidavit authenticating minutes of the trustees' meetings, and a certified copy of the official results of the 2015 election for Spencer Township's trustee election.

earlier, Smith complained that Valentine never informed the board of his deployment. Hood again asked for prayers for Valentine during his deployment, and Smith commented that in Valentine's absence "disagreements will be made in private," and that he and Smith will "come to the meeting to conduct the business of the people." (McDonald Affidavit, ¶3, and attached minutes.)

At subsequent meetings of the trustees on October 1, 2015, November 5, 2015, November 19, 2015, December 16, and December 30, 2015, Valentine's absence was recorded as "military leave" on the minutes. (McDonald Affidavit, ¶4-7, and attached minutes.)

At the meeting on December 30, 2015, Hood presented a petition requesting Valentine's resignation. Trustee Smith read three resolutions seeking Valentine's resignation, suspension of Valentine's compensation pending an opinion from the Prosecutor's Office on the issue of "double dipping," and official information regarding Valentine's deployment. That meeting adjourned at 11:15 a.m. on December 30, 2015. (McDonald Affidavit, ¶8, and attached minutes.)

After the meeting on December 30, 2015, a notice of an emergency meeting was posted at the Spencer Township Hall. The notice was for a meeting the following day, December 31, 2015, at 11:00 a.m. (McDonald Affidavit, ¶9, and attached minutes.)

The "emergency meeting" began at 11:03 a.m. on that day, less than 24 hours after the December 30 meeting. Smith moved that Valentine's absences from the township in September, October, November and December be deemed to exceed the time permitted for absences under R.C. 503.241. Both Hood and Smith voted yes. Hood declared the office vacant and moved to have Smith fill the vacancy on January

1, 2016. Both Hood and Smith voted yes. Smith then asked the fiscal officer "to inform former Trustee Valentine to surrender all Township equipment and keys." (McDonald Affidavit, ¶9, and attached minutes.)

Valentine has not resigned his position as a Trustee of Spencer Township and has no intention of doing so. Since reporting for duty in September 2015, Mr. Valentine continues to serve on active duty with the United States Army and is currently stationed in Guantanamo Bay, Cuba. (Valentine Affidavit, ¶¶6-8 and attached orders.) Valentine has requested to remain informed of township business and to participate in meetings by electronic means, although he understands that he cannot cast votes when he is not physically present. However, Valentine's requests to participate electronically in meetings have been refused. (Valentine Affidavit, ¶7.)

LAW AND ARGUMENT

Ohio law is clear that Relator has standing to bring an action in quo warranto. R.C. 2733.05. And this Court has original jurisdiction over an action in quo warranto pursuant to the Ohio Constitution, Article IV, Section 2. *See also* R.C. 2733.03.

An action in quo warranto is the exclusive means of litigating an individual's right to hold a public office. *State ex rel. Battin v. Bush*, 40 Ohio St.3d 236, 238-239, 533 N.E.2d 301 (1988). *See also State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759, 944 N.E.2d 663, ¶9. A writ of quo warranto should issue when the relator establishes that the office is being unlawfully held and exercised by respondent and that another individual is entitled to hold the office. *See State ex rel. Zeigler v. Zumber*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶23.

In this case, Respondent should be ousted from his claimed position as trustee of Spencer Township for either of two independent reasons: (1) Valentine's military service cannot be deemed to create a vacancy in a township office pursuant to R.C. 503.241; or (2) the declaration of the vacancy and the appointment of Smith occurred at a meeting which violated Ohio's Open Meetings Act.

I. Active military service does not create a vacancy in a township office.

R.C. 503.241 provides that when a township officer is absent from the township for 90 consecutive days, his office shall be deemed vacant. However, the statute explicitly exempts active United States military service from that provision:

Whenever any township officer ceases to reside in the township, or is absent from the township for ninety consecutive days, except in case of sickness or injury as provided in this section, his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office.

Such vacancy shall be filled in the manner provided by section 503.24 of the Revised Code. Whenever any township officer is absent from the township because of sickness or injury, he shall cause to be filed with the board of township trustees a physician's certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of the ninety consecutive days of absence from the township, his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office.

This section shall not apply to a township officer while in the active military service of the United States.

R.C. 503.241 (emphasis added).

R.C. 503.241 does not require any notice whatsoever of military service, much less that notice be provided in any particular form. Of course, in this case, there were repeated references to military service in the official minutes of the board meetings, so the trustees were indisputably on notice of the upcoming deployment.

Under the plain language of R.C. 503.241, Valentine is still entitled to hold the office of trustee of Spencer Township, but Smith has usurped and unlawfully exercises the authority of that office. However, the declaration of the vacancy and the appointment of Smith to fill the vacancy also occurred at a meeting for which inadequate public notice was provided, so that the actions taken at the meeting are invalid for that reason as well.

II. The December 31, 2015 meeting was held in violation of the Open Meetings Act. Resolutions adopted and actions taken at that meeting are therefore invalid.

Ohio's Open Meetings Act, R.C. 121.22 requires that public bodies "establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings." R.C. 121.22(F). The statute likewise provides, "A public body shall not hold a special meeting unless it gives at least twenty four hours advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action." *Id.*

The phrase "immediate official action" is not defined, and a public body has discretion to determine what is an emergency. *Wolf v. E. Liverpool School Dist. Bd. of Ed.*, 7th Dist. Columbiana No. 03 CO 5, 2004-Ohio-2479, ¶146. Nevertheless, a public body is subject to judicial inquiry when "a public body calls an emergency session as a pretext for avoiding public scrutiny of their actions." *Id.* See also *Hoops v. Jerusalem Township Bd of Trustees*, 6th Dist. Lucas App. No. L-97-1240, 1998 Ohio App. LEXIS 1496 (summary judgment was improperly granted in favor of board when the minutes of

a meeting failed to indicate any matters requiring immediate official action).

On December 30, 2015, the trustees' meeting ended at 11:15 a.m. with no indication that a meeting would be held the following day. A notice was then posted that a meeting would occur the following day at 11:00 a.m. "[t]o declare a vacancy on The Board of Spencer Township Trustees." The notice was for an "emergency meeting," but no immediate official action was in fact necessitated. As a practical matter, Smith's term was about to end, after which his replacement, Teresa Bettinger, would take office. But a change of officials at the end of a political term should be held, as a matter of law, not to constitute an "emergency" as the phrase is used in R.C. 121.22(F).

R.C. 121.22 does not create an empty requirement that public bodies conduct business at public meetings. The statute prescribes unambiguous consequences for failure to comply with its requirements:

A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. * * * A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

R.C. 121.22(H) (emphasis added).

By providing inadequate notice of a meeting and by improperly designating the meeting as an "emergency," the board of trustees of Spencer Township violated the provisions of R.C. 121.22. Actions taken at the meeting--declaration of the vacancy on the board of trustees and the appointment of Smith to fill that vacancy--were therefore invalid acts by the board.

CONCLUSION

Because Respondent unlawfully claims to hold the office of trustee of Spencer Township, Relator seeks Respondent's ouster and a declaration that Valentine remains trustee of Spencer Township, along with an award of attorney's fees to Relator pursuant to R.C. 2733.14.

Respectfully submitted,

JULIA R. BATES,
LUCAS COUNTY PROSECUTING ATTORNEY

By: 
Evy M. Jarrett
Elaine B. Szuch
Assistant Prosecuting Attorneys
Counsel for Relator