[Cite as *State ex rel. Varnau v. Wenninger*, 2011-Ohio-3904.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO, ex rel. DENNIS J. VARNAU,	:	
	:	CASE NO. CA2009-02-010
Relator,	:	O P I N I O N
	:	8/8/2011
- vs -	:	
	:	
DWAYNE WENNINGER,	:	
Respondent.	:	

ORIGINAL ACTION IN QUO WARRANTO

Thomas G. Eagle, 3386 N. State Rt. 123, Lebanon, Ohio 45036, for relator

Gary A. Rosenhoffer, 302 E. Main Street, Batavia, Ohio 45103, for respondent

Patrick L. Gregory, 717 W. Plane, Bethel, Ohio 45106, for respondent

HENDRICKSON, P.J.

{¶1} This action in quo warranto is before the court upon remand by the Supreme Court for a determination of the merits of the parties' competing motions for summary judgment and motions to strike various exhibits submitted in support of their respective arguments.

{¶2} In February 2009, relator, Dennis J. Varnau, filed a complaint for a writ of quo warranto seeking to oust respondent, Dwayne Wenninger, from the office of Brown County Sheriff. Wenninger, a Republican candidate who has held the office of sheriff since January 2001, ran opposed in the 2008 general election by Varnau, an Independent candidate. Prior to the 2008 election Varnau had filed a protest against Wenninger's candidacy for sheriff. The Brown County Board of Elections denied the protest as it was not "filed by a member of the appropriate party." Varnau then sought a writ of mandamus to compel the board of elections to accept his protest as valid, but his action was dismissed by the Brown County Court of Common Pleas.[1] On appeal, this court affirmed the dismissal, holding that Varnau had other legal remedies he could pursue should Wenninger be elected sheriff. See *State ex rel. Varnau v. Brown Cty. Bd. of Elections* (Oct. 29, 2008), Brown App. No. CA2008-09-006 (accelerated calendar judgment entry).

{¶3} Wenninger won the 2008 election by receiving 62.92% of the vote. Varnau filed the present action, seeking to remove Wenninger from office and have himself appointed as sheriff. Varnau contends that Wenninger is not currently qualified to hold the office of sheriff because, upon initially taking office in 2001, Wenninger did not have the necessary educational credentials qualifying him to be an Ohio sheriff under R.C. 311.01(B)(9). Varnau argues this alleged deficiency, in turn, caused Wenninger to have a break in service which then invalidated his peace officer certificate. This would have resulted in Wenninger not meeting the qualifications for sheriff under R.C. 311.01(B)(8) beginning in January 2005.

1. "The Brown County Court of Common Pleas dismissed the mandamus action because, among other reasons, the extraordinary remedy of mandamus is not appropriate in that there is a legal remedy at law through a quo warranto action and Varnau's protest was not filed by a qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate whose declaration of candidacy the elector objects to pursuant to R.C. 3513.05." (Internal quotation marks omitted.) *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759, ¶5.

{¶4} Wenninger moved to dismiss the complaint and attached his affidavit to the motion. This court converted his motion to dismiss to a motion for summary judgment. Thereafter, Varnau filed a cross-motion for summary judgment.

{¶5} On August 16, 2010, this court granted Wenninger's motion for summary judgment and denied the writ of quo warranto "because the [Brown County Board of Elections] previously determined [that] Wenninger satisfied the necessary requirements to be elected Brown County Sheriff in 2000, 2004, and 2008 as statutorily required by R.C. 311.01(F)(2)." *State ex rel. Varnau v. Wenninger*, Brown App. No. CA2009-02-010, 2010-Ohio-3813, ¶10. On appeal, the Supreme Court found that the board of elections had not exercised its quasi-judicial authority in rendering its administrative determinations prior to the elections. "[T]he court of appeals erred in holding that the board's previous administrative determinations barred Varnau from challenging Wenninger's qualifications to remain sheriff in his quo warranto case. These determinations were not res judicata as to these issues, because the board did not exercise quasi-judicial authority in rendering them." *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759, ¶15. The matter was remanded for further proceedings based on the parties' competing motions for summary judgment.

Motions to Strike Inadmissible Evidence

{¶6} Before we discuss the merits of the parties' motions for summary judgment, we must first address the parties' competing motions to strike various affidavits and exhibits offered in support of their respective motions for summary judgment.[2] Wenninger seeks to strike "any materials" that Varnau has submitted that are not certified or properly authenticated by the Rules of Evidence or are improper under Civ.R. 56(E). Varnau seeks to

2. Varnau filed his original motion to strike on August 21, 2009. He later renewed his motion to strike on March 9, 2011. On March 17, 2011, Wenninger filed a reply to Varnau's motion to strike, and within this reply, Wenninger sought to strike various documents from Varnau's motion for summary judgment on the ground that such documents did not comply with Civ.R. 56 or the Rules of Evidence.

strike the affidavits of Jamie Callender, a former member of the House of Representatives and Ohio Board of Regents, and Lee Spievack, the former owner of Technichron Technical Institute, Inc. (hereafter "TTI"), on the grounds that the affidavits are not based on personal knowledge, contain inadmissible hearsay, and seek to improperly provide legal opinions. Varnau further seeks to strike any "material[s] to and from attorneys for various parties * * * documents prepared for apparent use in [Wenninger's] criminal case, and also 'sworn' and unsworn legal opinions from third parties."[3]

{¶7} Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment. *Spier v. American Univ. of the Caribbean* (1981), 3 Ohio App.3d 28, 29. Those materials are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." Civ.R. 56(C). "[A] party may properly introduce evidence not specifically authorized by Civ.R. 56(C) by incorporating it by reference through a properly framed affidavit pursuant to Civ.R. 56(E)." *Wilson v. AIG*, Butler App. No. CA2007-11-278, 2008-Ohio-5211, ¶29; *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562, 569.

{¶8} Pursuant to Civ.R. 56(E), "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." Personal knowledge is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay." *Re v. Kessinger*, Butler App. No. CA2007-02-044, 2008-Ohio-167, ¶32, quoting

3. In December 2002, criminal charges for election falsification were brought against Wenninger. He was later acquitted of falsifying election records relating to his qualifications to run for and hold the office of sheriff of Brown County, Ohio. See *State v. Wenninger*, 125 Ohio Misc.2d 55, 2003-Ohio-5521.

Carlton v. Davisson (1995), 104 Ohio App.3d 636, 646. "Hearsay statements, i.e. statements other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted, are not admissible evidence in a summary judgment context unless an exception to the hearsay rule applies. Evid.R. 801(C)." *Koop v. Speedway SuperAmerica, LLC*, Warren App. No. CA2008-09-110, 2009-Ohio-1734, ¶11.

{¶9} In the present case, Varnau seeks to exclude both Callender's and Spievack's affidavits on the ground that these documents attempt to present legal opinions in the guise of sworn testimony. "Where an affidavit containing opinions is made part of a motion for summary judgment, it is properly considered by a trial or reviewing court when it meets the requirements set forth in Civ.R. 56(E) and Evid.R. 701." *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 335, quoting *Tomlinson v. Cincinnati* (1983), 4 Ohio St.3d 66, paragraph one of the syllabus. "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Evid.R. 701.

{¶10} Applying the requirements of Civ.R. 56(E) and Evid.R. 701 to Callender's affidavit, we find portions of the affidavit to be inadmissible. Portions of paragraph four and all of paragraph six refer to various documents that were reviewed and relied on by Callender in drafting his affidavit, but were not attached to the affidavit or served therewith as required by Civ.R. 56(E).[4] Accordingly, with respect to paragraph four, all but the final sentence is hereby stricken, and the entirety of paragraph six is hereby stricken. The remaining portions of Callender's affidavit are admissible as the statements contained therein are either based on personal knowledge or are opinions provided in accordance with Evid.R. 701.

4. Such documents include the indictment and bill of particulars filed in the criminal case against Wenninger and a letter dated October 4, 2002, from the Ohio Board of Regents.

{¶11} Portions of Spievack's affidavit are also inadmissible pursuant to Civ.R. 56(E) and Evid.R. 701. The last sentence of paragraph two refers to TTI's school catalogue which was not attached to the affidavit; likewise, a copy of a certificate of accreditation by the National Association of Trade and Technical Schools, which Spievack refers to and relies on in paragraph three of his affidavit, was not attached to the affidavit. Because these documents were not presented in accordance with Civ.R. 56(E), the last sentence of paragraph two and the entirety of paragraph three are hereby stricken from Spievack's affidavit. The remaining portions of the affidavit are based on personal knowledge and are therefore admissible.

{¶12} Both Varnau and Wenninger seek to admit various documents under the business records, Evid.R. 803(6), and public records, Evid.R. 803(8), exceptions to the hearsay rule. Varnau attempts to introduce such documents into evidence by attaching them to a personal affidavit wherein he attests that "[t]he documents attached hereto * * * were all obtained either from [Wenninger] or pursuant to subpoena or public records requests from the custodian of the documents and records, and are believed to be true, accurate, and authentic copies of the actual records maintained by each said agency or custodian." Wenninger attempts to introduce documents into evidence under Evid.R. 106,[5] claiming that the documents represent the entirety of the records produced by various state agencies in response to Varnau's subpoena requests.

{¶13} "To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act,

5. Evid.R. 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it."

event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness.'" *State v. Glenn*, Butler App. No. CA2009-01-008, 2009-Ohio-6549, ¶17, quoting *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶171. "[P]rior to admission of a business record, the record must be properly identified or authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims." (Internal quotation marks omitted.) Id. at ¶18.

{¶14} Similarly, documents purporting to be public records must also be authenticated as such. Evid.R.902 states, in relevant part:

{¶15} "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

{¶16} "* * *

{¶17} "(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, *certified as correct by the custodian or other person authorized to make the certification*, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio." (Emphasis added.)

{¶18} In the present case, there were instances where both Varnau and Wenninger failed to comply with Evid.R. 803, Evid.R. 902, and Civ.R.56(E). Documents attached to a motion for summary judgment must be sworn and certified, and the individual certifying the document as correct must be the custodian of the document or another individual with personal knowledge that the document is what its proponent purports it to be. Because Varnau failed to comply with the Rules of Evidence and with Civ.R.56(E), we find the following documents he submitted to be inadmissible: an unsworn and uncertified copy of

TTI's school catalogue (exhibit 8); purported business records and uncertified public records from the State Board of Career Colleges and Schools and the State Board of Proprietary School Registration (exhibits 8B and 8C); purported business records, including a letter and an email, from the Ohio Board of Regents (exhibit 9A); and uncertified public records from the Ohio Secretary of State (exhibit 18).

{¶19} We also find the following documents submitted by Wenninger to be inadmissible as they were not introduced through an affidavit, as required by 56(E), and were not properly certified as business records or public records pursuant to Evid.R. 803: an unsworn and uncertified May 9, 2008 letter from the Brown County Board of Elections; an unsworn memoranda on behalf of Wenninger filed by Wenninger's attorneys before the Brown County Board of elections; an unsworn and uncertified copy of Wenninger's 1989 Ohio peace officer basic training program certificate; an unsworn and uncertified copy of a September 30, 2002 letter from the Brown County Prosecuting Attorney to the Ohio Board of Regents; an unsworn and uncertified copy of an October 4, 2002 letter from the Ohio Board of Regents to the Brown County Prosecuting Attorney; and an unsworn and uncertified copy of a March 19, 2003 email from Shane DeGarmo, an employee of the Ohio Board of Regents, to Kris Frost, an employee of the Ohio Attorney General.

{¶20} The remaining evidence submitted by the parties, having conformed to the requirements of Civ.R. 56(E) and the Rules of Evidence, are deemed admissible.

Motions for Summary Judgment

{¶21} Summary judgment is appropriate when there are no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Williams v. McFarland Properties*, *L.L.C.*, 117 Ohio App.3d 490, 2008-Ohio-3594, ¶7. To prevail on a motion for summary judgment, the moving party must be able

to point to evidentiary materials that show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The nonmoving party must then present evidence that some issue of material fact remains to be resolved. Id. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First Natl. Bank & Trust Co.* (1970), 21 Ohio St.2d 25, 28.

{¶22} Wenninger argues that he is entitled to summary judgment because no genuine issues of material fact exist with respect to his right to hold the office of sheriff. He contends that he was qualified to run and hold the office of sheriff as of January 4, 2008, the qualification date for the 2008 election.[6] Varnau contends, however, that as a matter of law, Wenninger was not qualified on January 4, 2008, to run or hold the office of Brown County sheriff. The premise of Varnau's argument is that Wenninger was not qualified for the position in 2000 when Wenninger first ran and was elected sheriff, and subsequent to the 2000 and 2004 elections, Wenninger's peace officer training certificate was invalidated due to a break in service. Varnau further argues that he was the *only* qualified and eligible

6. **{¶a}** As it is defined in R.C. 311.01(H)(1), "qualification date" means "the last day on which a candidate for the office of sheriff can file a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate, as applicable, in the case of a primary election for the office of sheriff; the last day on which a person may be appointed to fill a vacancy in a party nomination for the office of sheriff under Chapter 3513 of the Revised Code, in the case of a vacancy in the office of sheriff; or a date thirty days after the day on which a vacancy in the office of sheriff occurs, in the case of an appointment to such a vacancy under section 305.02 of the Revised Code."

{¶b} In the present case, neither Wenninger or Varnau presented evidence to establish the qualification date for the 2008 election. On June 30, 2011, the court notified the parties of its intent, pursuant to Evid.R. 201, to take judicial notice of the Ohio Secretary of State's January 29, 2008 Directive No. 2008-19, which established that the qualification date for the office of Brown County sheriff for the 2008 election was January 4, 2008. On July 15, 2011, Varnau filed a response to the court's notice of intent to take judicial notice, questioning the purpose behind taking notice of the qualification date and the relevancy of such date. Varnau did not, however, object to or dispute the accuracy of the date. In fact, within his August 10, 2009 motion for summary judgment and memorandum in opposition to Wenninger's motion for summary judgment, and in his May 19, 2011 reply to Wenninger's argument and objections, Varnau states that "[t]he filing deadline for sheriff candidates in the 2008 election, was January 4, 2008." Accordingly, Varnau has conceded that January 4, 2008, was the qualification date for the 2008 election.

candidate for sheriff and that the votes cast for him in the 2008 election are the only ones that should be counted.[7] Varnau maintains that the writ of quo warranto should therefore be granted as Wenninger is unlawfully holding the office of sheriff when Varnau is lawfully entitled to the office.

{¶23} A writ of quo warranto is a high prerogative writ of an extraordinary nature. *State ex rel. Cain v. Kay* (1974), 38 Ohio St.2d 15, 16. "[Q]uo warranto is the exclusive remedy by which one's right to hold a public office may be litigated." *State ex rel. Battin v. Busch* (1988), 40 Ohio St.3d 236, 238-239. "For a writ of quo warranto to issue, a relator must establish (1) that the office is being unlawfully held and exercised by respondent, and (2) that relator is entitled to the office." (Internal quotation marks omitted.) *State ex rel. Newell v. Jackson*, 118 Ohio St.3d 138, 2008-Ohio-1965, ¶6. Because "[t]he law does not favor the removal of a duly elected official"; *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 419, 2005-Ohio-2373, ¶85; "[a]n elective public official should not be removed except for clearly substantial reasons and conclusions that his further presence in office would be harmful to the public welfare." *State ex rel. Corrigan v. Hensel* (1965), 2 Ohio St.2d 96, 100.

{¶24} "A person other than the attorney general or a prosecuting attorney can bring a quo warranto action, as a private citizen, only when the person is personally claiming title to a public office." *Jackson*, 2008-Ohio-1965 at ¶6. Further, the individual must be claiming title to a *current* public office as a quo warranto action is rendered moot by the expiration of a term of office. *State ex rel. Zeigler v. Zumbar*, __ Ohio St.3d __, 2011-Ohio-2939, ¶14; *State ex rel. Paluf v. Feneli* (1995), 100 Ohio App.3d 461, 464-465; *State ex rel. Devine v. Baxter* (1959), 168 Ohio St. 559, 559. Wenninger is currently holding a four-year term of office as a result of winning the sheriff's race in the 2008 election. Accordingly, the court can only

7. Varnau listed his qualifications for the office of sheriff in a personal affidavit, dated October 9, 2009, which has not been challenged by Wenninger within these proceedings.

examine his qualifications and right to hold office pursuant to the 2008 election. Wenninger's qualifications, or alleged lack thereof, for the 2000 election and the 2004 election are moot as Wenninger's 2000 and 2004 terms as sheriff have long since expired. See *Feneli* at 464-465.

{¶25} R.C. 311.01(B) sets forth the specific qualifications a candidate for sheriff must possess in order to be elected sheriff. "[N]o person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

{¶26} "(1) The person is a citizen of the United States.

{¶27} "(2) The person has been a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date.

{¶28} "(3) The person has the qualifications of an elector as specified in section 3503.01 of the Revised Code and has complied with all applicable election laws.

{¶29} "(4) The person has been awarded a high school diploma or a certificate of high school equivalence issued for achievement of specified minimum scores on the general educational development test of the American council on education.

{¶30} "(5) The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state.

{¶31} "(6) The person has been fingerprinted and has been the subject of a search of local, state, and national fingerprint files to disclose any criminal record. Such fingerprints

shall be taken under the direction of the administrative judge of the court of common pleas who, prior to the applicable qualification date, shall notify the board of elections, board of county commissioners, or county central committee of the proper political party, as applicable, of the judge's findings.

{¶32} "(7) The person has prepared a complete history of the person's places of residence for a period of six years immediately preceding the qualification date and a complete history of the person's places of employment for a period of six years immediately preceding the qualification date, indicating the name and address of each employer and the period of time employed by that employer. The residence and employment histories shall be filed with the administrative judge of the court of common pleas of the county, who shall forward them with the findings under division (B)(6) of this section to the appropriate board of elections, board of county commissioners, or county central committee of the proper political party prior to the applicable qualification date.

{¶33} "(8) The person meets at least one of the following conditions: (a) [h]as obtained or held, within the four-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission or has been issued a certificate of training pursuant to section 5503.05 of the Revised Code, and, within the four-year period ending immediately prior to the qualification date, has been employed as an appointee pursuant to section 5503.01 of the Revised Code or as a full-time peace officer as defined in section 109.71 of the Revised Code performing duties related to the enforcement of statutes, ordinances, or codes; [or] (b) [h]as obtained or held, within the three-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission and has been employed for at least the last three years prior to the qualification date as a full-time law enforcement officer, as defined in division (A)(11) of section 2901.01 of the

Revised Code, performing duties related to the enforcement of statutes, ordinances, or codes.

{¶34} "(9) The person meets at least one of the following conditions: (a) [h]as at least two years of supervisory experience as a peace officer at the rank of corporal or above, or has been appointed pursuant to section 5503.01 of the Revised Code and served at the rank of sergeant or above, in the five-year period ending immediately prior to the qualification date; [or] (b) [h]as completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located or in a school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code." R.C. 311.01(B).

{¶35} Wenninger submitted a personal affidavit stating that he met all nine of the statutory requirements set forth in R.C. 311.01(B). Wenninger specifically states that he meets the requirements set forth in (B)(1) and (B)(2) as he is a U.S. citizen who has resided in Brown County, Ohio since 1971. He further states that he meets the requirements (B)(3) as he has all the qualifications of an elector as set forth in R.C. 3503.01, and he has complied with the applicable election laws. Wenninger attests that he received a high school diploma in 1986, and he has not been convicted of a felony or offense involving moral turpitude, has not been convicted or pleaded guilty to an offense that is a misdemeanor of the first degree, and has not been convicted or pleaded guilty of an offense that carries a penalty that is substantially equivalent to the penalty of a misdemeanor of the first degree, thereby complying with requirements set forth in (B)(4) and (B)(5). He further attests that he has been fingerprinted as required by (B)(6) and has filed all necessary documents with the administrative judge of Brown County, Ohio as required by (B)(7). Wenninger states that he

meets the requirements of (B)(8)(b) as he has obtained or held within the three-year period ending immediately prior to the qualification date for the 2008 election a valid peace officer certificate of training issued by the Ohio Peace Officer Training Commission (OPOTC), and he has been employed as sheriff for Brown County on a full-time basis since January 2001. Finally, Wenninger attests that he has been acting and performing as Brown County sheriff since 2001, and therefore has complied with the supervisory experience requirement set forth in (B)(9)(a).

{¶36} Varnau only contends that Wenninger has not met the requirements set forth in R.C. 311.01(B)(8) and (9). With respect to R.C. 311.01(B)(9), Varnau alleges that as of 2000, Wenninger did not possess the necessary supervisory experience to be elected sheriff. In support of this argument, Varnau relies upon Wenninger's response to a request for admission wherein Wenninger admits that prior to January 7, 2000, he had not attained the rank of corporal or higher in any municipal police department or sheriff department. Varnau further contends that any supervisory experience Wenninger obtained after taking office as sheriff on January 1, 2001, cannot count towards the requirement set forth in R.C. 311.01(B)(9)(a), as such experience was illegally obtained because Wenninger was never lawfully qualified to hold the office.

{¶37} Varnau also argues that Wenninger has not met the post-secondary education requirements of R.C. 311.01(B)(9)(b), as Wenninger did not complete two years of schooling and did not obtain a degree from a college or university authorized to confer degrees by the Ohio Board of Regents.[8] In support of this argument, Varnau relies on three pieces of

8. At the time of the 2000 election, a former version of R.C. 311.01 was in effect. Under the prior version of the statute, a sheriff candidate either had to have two years of supervisory experience or the candidate must have "completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located." R.C. 311.01(B)(9)(b) (West 2000). The current version of the statute, which was in effect at the time of the 2008 election, states that post-secondary

evidence, namely Wenninger's October 23, 1987 diploma from TTI, Wenninger's deposition testimony wherein Wenninger states that he attended TTI from August 1986 to October 23, 1987, and TTI's certificate of registration for the period of August 22, 1986 through August 22, 1988, which was issued by the Ohio State Board of School and College Registration rather than the Ohio Board of Regents. Varnau contends because Wenninger was not qualified to hold the office of sheriff as of the 2000 election since he could not meet the requirements of R.C. 311.01(B)(9)(a) or (b), Wenninger illegally held the office of sheriff beginning in January 2001. Varnau further contends Wenninger failed to remove his disqualification immediately upon assuming office in 2001, and that this disqualification persisted to the 2008 election, thereby making Wenninger ineligible to run for and hold the office of sheriff.

{¶38} The specific language of R.C. 311.01(B)(9)(a) requires that a sheriff candidate's supervisory experience occur "in the five-year period ending immediately prior to the qualification date." As discussed above, any challenge to Wenninger's qualifications to run for or hold the office of sheriff for the 2000 and 2004 election terms has been rendered moot as those office terms have already expired. *See Zumbar*, 2011-Ohio-2939 at ¶14; *Feneli*, 100 Ohio App.3d at 464-465; *Baxter*, 168 Ohio St. at 559. The qualification date for the 2008 election was January 4, 2008. The relevant question for our analysis then becomes, within the time period of January 4, 2003, to January 4, 2008, did Wenninger have at least two years of supervisory experience as a peace officer at the rank of corporal or above or as an officer for the state highway patrol, pursuant to R.C. 5503.01, at the rank of sergeant or above. Wenninger's affidavit and the SF400adm Appointment/Termination form attached to

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education may be obtained from a "school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the revised code." R.C. 311.01(B)(9)(b).

the affidavit of Robert Fintal, the executive director of OPOTC,[9] establish that Wenninger has held the rank of sheriff since January 1, 2001. Accordingly, at the time of the qualification date for the 2008 election, Wenninger had seven years of supervisory experience at the rank of sheriff, and five of those years occurred "in the five-year period ending immediately prior to the qualification date." R.C. 311.01(B)(9)(a). Varnau has failed to present evidence contradicting this requirement. Varnau's reliance on Wenninger's admission that he had not held the rank of corporal or above prior to January 7, 2000, is irrelevant in determining Wenninger's qualifications for sheriff for the 2008 election.

{¶39} Furthermore, Varnau's argument that Wenninger's supervisory experience as sheriff cannot count towards the requirement set forth in R.C. 311.01(B)(9)(a) is without merit as Wenninger was lawfully holding the office. Wenninger was duly elected as sheriff in 2000 and 2004, and he lawfully took office pursuant to those elections. There were no successful protests or challenges to his candidacy or his right to hold office during either of these two prior terms. Varnau cannot now seek to challenge or void Wenninger's right to hold office for past terms which have already expired. Wenninger's status as elected sheriff of Brown County for the period of 2001 to 2008 remains, and his time in office can and does count as supervisory experience under R.C. 311.01(B)(9)(a).

{¶40} R.C. 311.01(B)(9) explicitly states that a candidate for sheriff need only meet one of the conditions set forth in that subsection. Because Wenninger obtained the necessary supervisory experience set forth in R.C. 311.01(B)(9)(a), the court need not discuss Wenninger's educational qualifications under R.C.311.01(B)(9)(b).

{¶41} Varnau also challenges Wenninger's ability to hold the office of sheriff under

9. This form states that Wenninger was appointed on January 1, 2001, to the rank and position of sheriff with the Brown County Sheriff's Office. The form was sworn to and subscribed before a notary public on December 18, 2003.

R.C. 311.01(B)(8), claiming that Wenninger's peace officer training certificate expired on January 1, 2005. Varnau contends that because Wenninger was not originally qualified to be sheriff in 2001, his appointment to the office was invalid. According to Varnau's argument this invalid appointment started a break in service on January 1, 2001, and four years later, on January 1, 2005, Wenninger's peace officer training certificate expired.[10] Without a valid peace officer certificate, Varnau contends Wenninger was ineligible to run for sheriff in the 2008 election. Wenninger, on the other hand, contends that he has always held a valid peace officer training certificate and that he has never had a break in service.

{¶42} R.C. 311.01(B)(8)(b) requires that within the three years immediately prior to an election qualification date, a candidate for sheriff must have obtained or held a valid peace officer training certificate issued by OPOTC and must have been employed as a full-time law enforcement officer performing duties related to the enforcement of statutes, ordinances and codes. Ohio Adm.Code Chapter 109:2-1 governs peace officer basic training programs and provides that individuals are awarded a peace officer certificate of training after they have completed a basic training course. See Ohio Adm.Code 109:2-1-07(A). A peace officer training certificate remains valid so long as it has "legal force." See *State ex re. Hayburn v. Kiefer* (1993), 68 Ohio St.3d 132, 133. Further, "[a]ny person who has been appointed as a peace officer and has been awarded a certificate of completion of basic training by the executive director and *has been elected or appointed to the office of sheriff shall be considered a peace officer during the term of office for the purpose of maintaining a current and valid basic training certificate*." (Emphasis added.) Ohio Adm.Code 109:2-1-12(E).

10. Varnau relies on Ohio Adm.Code 109:2-1-12(D)(3) as the basis for his argument that Wenninger's peace officer training certificate expired on January 1, 2005. This regulation provides the following with respect to peace officers' breaks in service: "All persons who have previously been appointed as a peace officer and have been awarded a certificate of completion of basic training by the executive director or those peace officers described in paragraph (A)(3) of this rule who have not been appointed as either a peace officer or a trooper *for more than four years* shall, upon re-appointment as a peace officer, complete the basic training course prior to performing the functions of a peace officer. (Emphasis added).

{¶43} In the present case, the evidence submitted by the parties demonstrates that from the period of January 4, 2005 to January 4, 2008, Wenninger held a valid peace officer training certificate issued by OPOTC and had been employed full-time as a law enforcement officer for the Brown County Sheriff's Office. In his affidavit, Wenninger attests that he held a valid peace officer certificate of training issued by OPOTC within the three-year period ending immediately prior to the qualification date of the 2008 election. Further, OPOTC documents establish that Wenninger had been employed since he received his OPOTC peace officer training certificate on May 24, 1989. Wenninger was first employed with the Brown County Sheriff's Office, and then with the Ripley Police Department before he returned to the Brown County Sheriff's Office in 2001.[11] Wenninger further attests that he has been employed as the Brown County sheriff on a full-time basis since taking office in January 2001. Because Wenninger's employment as sheriff has been continuous since January 2001, pursuant to Ohio Adm.Code 109:2-1-12(E), he has maintained a current and valid peace officer training certificate. Accordingly, there is no credible material fact disputing that Wenninger was qualified to run for and hold office pursuant to the 2008 election as he met the requirements set forth in R.C. 311.01(B)(8)(b).

{¶44} Varnau has failed to present factual evidence that demonstrates that Wenninger had a break in service that encompassed more than four years or that he otherwise had an invalid or expired peace officer certificate of training. Varnau's argument that Wenninger started a break in service on January 1, 2001, because he failed to meet the

11. There is a dispute as to the exact dates Wenninger was employed with each law enforcement entity. In his deposition testimony, Wenninger provided employment dates that contradicted the dates set forth on the OPOTC's SF400adm Appointment/Termination form and the Update Training Evaluation Information form. The dispute as to the exact date on which Wenninger ended his employment with one entity before joining another is irrelevant and immaterial for purposes of deciding the present motions. Regardless of whether Wenninger was employed with the Brown County Sheriff's Office and Ripley Police Department on the dates attested to at his deposition or on the dates set forth on the OPOTC forms, any break in service Wenninger may have had was for less than one year. As such, his peace officer certificate of training remained valid and he was "not * * * required to complete, additional, specialized training to remain eligible for re-appointment as a peace officer." Ohio Adm.Code 109:2-1-12(D)(1).

qualifications set forth in R.C. 311.01(B) is without merit. Varnau cannot seek to invalidate Wenninger's present term of office based on an alleged prior disqualification from an expired term of office. The focus must remain on Wenninger's eligibility to run for and hold the office of sheriff for the *present term*, not for previous terms that have already expired. "'His office' means his present office under his present commission, and not an old expired term in the same office under a former election or appointment. He could not be ousted from such former term of office, because the term has expired, and he is not now in office under that term, and is not now an officer under that term." *State ex rel. Wilmot v. Buckley* (1899), 60 Ohio St. 273, 299-300. Wenninger lawfully took office in 2001, and he has been employed full-time as Brown County sheriff since his original appointment. Wenninger has not had a break in service which would invalidate his peace officer training certificate.

Conclusion

{¶45} Varnau has failed to present any evidence that would establish or create a genuine issue of material fact as to Wenninger's qualification to run for or hold the office of sheriff pursuant to R.C. 311.01 for the 2008 election. Varnau has not demonstrated that Wenninger is presently holding and exercising the office of Brown County sheriff unlawfully. Accordingly, he is not entitled to a writ of quo warranto ousting Wenninger from office. The court, therefore, does not need to determine Varnau's alleged entitlement to the office. Varnau's motion for summary judgment is hereby denied.

{¶46} Conversely, Wenninger has demonstrated that there are no genuine issues of material fact that would preclude the court from entering judgment in his favor as to his motion for summary judgment. The evidentiary material presented establishes that as a matter of law, Wenninger is lawfully holding and exercising the office of Brown County sheriff. Wenninger's motion for summary judgment is therefore granted.

{¶47} Judgment accordingly.

PIPER and HUTZEL, JJ., concur